[2013] UKUT 0596 (TCC)

Appeal number: FTC/27/2012

VALUE ADDED TAX — claim for repayment of VAT — failure of UK to implement Article 4.5 of Sixth VAT Directive — erroneous guidance issued by HMRC — curtailment of limitation period for claims — section 80 VAT Act 1994 — whether compatible with EU legal principles —appeal dismissed

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

LEEDS CITY COUNCIL **Appellant**

- and –

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

Tribunal: Judge Colin Bishopp
Judge Nicholas Aleksander

Sitting in public in London on 7 and 8 February 2013

Julian Ghosh QC, Jonathan Bremner and Zizhen Yang, counsel, instructed by Shepherd & Wedderburn LLP, for the Appellant

Andrew Macnab, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Defendants and Respondents

DECISION

Introduction

1. This is yet another instalment in the prolonged litigation following the ill-fated reduction in 1996 of the time limit for reclaiming repayment of VAT paid by mistake to the Commissioners of HM Revenue and Customs ("HMRC"), as they now are. The appellants, Leeds City Council ("Leeds"), have sought to recover various amounts of VAT paid to HMRC in periods falling both before and after the reduction of the time limit. HMRC agree that the sums paid did not represent VAT due to them, but they have refused to repay amounts for which Leeds accounted after 4 December 1996 on the grounds that, they say, the time limit which applies to the claims, commonly known as the "three-year cap", took effect from that date and is offended. Leeds' case, in short, is that the time limit does not apply to the claims it has made.

2. On 11 May 2007 Leeds made claims in accordance with s 80 of the Value Added Tax Act 1994 ("VATA") for repayment of VAT over-declared on:

(a) charges for memorial items placed in cemeteries, for the VAT periods from April 1977 to July 2001;

(b) library charges, for the VAT periods from April 1990 to December 2000; and

(c) excess parking charges, for the VAT periods from January 1984 to August 1999.

3. On 27 March 2009 Leeds made a further claim, also in accordance with s 80, for repayment of VAT over-declared on:

(a) trade waste collection charges, for the VAT periods from March 1974 to March 2008; and

(b) administration charges in respect of housing improvement loans, for the VAT periods from October 1999 to March 2009.

4. HMRC have met all of those claims so far as they relate to periods ending on or before 4 December 1996. They have also met so much of the claims in respect of trade waste collection charges as relate to periods ended within the three years before the claims were made. They have refused to meet the remainder of the claims and in doing so have relied only on the three-year cap. There is a separate dispute about the administration charges, to which we refer at para 26 below, which is not before us and which does not affect the outcome of this appeal.

5. Leeds appealed to the VAT and Duties Tribunal against the decision rejecting part of the first claim, and to the Tax Chamber of the First-tier Tribunal against the partial rejection of the second claim. The first appeal was transferred automatically to the First-tier Tribunal by virtue of the Transfer of Tribunal Functions and Revenue

and Customs Appeals Order 2009. The appeals were then categorised as Complex and were transferred to the Upper Tribunal following a joint application of the parties, and with the agreement of the Presidents of the Tax Chamber and of this Chamber.

6. Before us, Leeds was represented by Mr Julian Ghosh QC, Mr Jonathan Bremner and Ms Zizhen Yang and HMRC by Mr Andrew Macnab. We were provided with copies of the relevant documentary evidence, and had the witness statement and oral evidence of Mrs Sarah Bagley, who has been employed by Leeds as its senior taxation officer from 2006 to 2011, and as its taxation manager from 2011, by way of explanation of the background. There was no material dispute about the facts.

7. In this decision, references to HMRC include their predecessors HM Customs and Excise, by "EU" we mean both the European Union and the European Community, and by "CJEU" we refer to both the Court of Justice of the European Union and its predecessor the European Court of Justice.

The three-year cap

8. Section 80 of VATA deals with claims for repayment of overpaid VAT and, as sub-s (7) makes clear, is intended to provide a complete and exclusive code. The wording of that subsection has changed from time to time but its sense has not. In its current form it reads:

> "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."

9. As Leeds accepts, there is no other means by which an overpayment of VAT to HMRC may be recovered than a claim in accordance with s 80. As originally enacted, sub-s (1) provided that:

> "Where a person has (whether before or after the commencement of this Act) paid an amount to the Commissioners by way of VAT which was not VAT due to them, they shall be liable to repay that amount to him."

10. Subsections (4) and (5), again as originally enacted, applied a limitation period to claims:

> "(4) No amount may be claimed under this section after the expiry of 6 years from the date on which it was paid, except where subsection (5) below applies.
>
> (5) Where an amount has been paid to the Commissioners by reason of a mistake, a claim for the repayment of the amount under this section may be made at any time before the expiry of 6 years from the date on which the claimant discovered the mistake or could with reasonable diligence have discovered it."

11. On 18 July 1996 the Paymaster General announced in Parliament the Government's intention to reduce the limitation period governing claims for the

recovery of overpaid output tax to three years with immediate effect. On 3 December 1996 the House of Commons resolved in accordance with the Provisional Collection of Taxes Act 1968 that the new time limit should take effect from the following day. The requisite amendment of s 80 to implement the three-year cap was effected by s 47(1) of the Finance Act 1997. This amended s 80 by removing sub-s (5) and substituting the following for sub-s (4):

> "The Commissioners shall not be liable, on a claim made under this section, to repay any amount paid to them more than three years before the making of the claim."

12. Section 47(2) of the 1997 Act provided that the amendment had effect from 18 July 1996 (the date of the Paymaster General's announcement rather than 4 December 1996, the effective date of the House of Commons resolution) in relation to all claims brought under s 80, including claims made before that date which had not already been paid, and claims relating to payments made before that date.

13. It is well known that the introduction of the three-year cap, with retrospective effect and with no provision for transitional relief, led to a good deal of litigation, which in turn led to changes in HMRC's policy and to further legislation.

14. The first change followed the decision of the CJEU on 11 July 2002 in *Marks and Spencer v Customs and Excise Commissioners* (Case C-62/00) [2003] QB 866 ("*Marks and Spencer*") to the effect that, while the reduction in the time limit was compatible with EU law, retrospectively depriving taxpayers of hitherto valid claims, without any transitional period to enable such claims to be made, was not. In consequence, and with the intention of introducing an extra-statutory practice which complied with the *Marks and Spencer* judgment, HMRC published Business Briefs 22/02 and 27/02, inviting claims under s 80 for output tax overpaid before the 3 year cap was introduced. The Business Briefs did not invite input tax claims for the same periods, nor did they invite claims for output tax over-declared in accounting periods for which repayment returns had been made, omissions which led to further litigation. Legislative change followed in the Finance (No 2) Act 2005, but the amendment of s 80 effected by that Act is immaterial for present purposes.

15. There was an announcement by HMRC in 2006 about repayment claims with which we deal at para 24 below. On 23 January 2008, the House of Lords released its decision in *Fleming (trading as Bodycraft) v Revenue and Customs Commissioners* [2008] STC 324 ("*Fleming*"). The House had been required to consider not only the amendment to s 80(4), but also corresponding changes to the input tax recovery provisions in reg 29 of the Value Added Tax Regulations 1995, made with (intended) effect from 1 May 1997. In February 2008 HMRC published Revenue & Customs Brief 07/08, inviting claims for input tax where the entitlement to claim deduction of that input tax arose in an accounting period ended before 1 May 1997. It also invited claims for output tax overpaid or over-declared in pre-implementation periods, that is periods ending before 4 December 1996, the date from which the House of Commons resolution took effect.

16. On 18 March 2008, the House of Commons passed a further resolution under the Provisional Collection of Taxes Act 1968, giving effect to s 121 of the Finance Act 2008 from 19 March 2008. That section provided as follows:

> "The requirement in section 80(4) of VATA 1994 that a claim under that section be made within 3 years of the relevant date does not apply to a claim in respect of an amount brought into account, or paid, for a prescribed accounting period ending before 4 December 1996 if the claim is made before 1 April 2009."

17. Various other amendments to s 80 have been made, but those amendments are not relevant to the issues before us and we shall not deal with them. We add for completeness, although it does not affect the outcome of this appeal, that the Finance Act 2008 increased the time limit from three to four years.

18. Those developments explain why HMRC have paid Leeds' claims for periods ending before 4 December 1996 and for periods ended within the three years before the claims were made, but have refused to meet the claims for other periods.

Article 4.5

19. Leeds' case rests, in part, on the application to some of the relevant supplies of article 4.5 of the Sixth VAT Directive (77/388/EEC), which provided as follows:

> "States, regional and local government authorities and other bodies governed by public law shall not be considered taxable persons in respect of the activities or transactions in which they engage as public authorities, even where they collect dues, fees, contributions or payments in connection with these activities or transactions.
>
> However, when they engage in such activities or transactions, they shall be considered taxable persons in respect of these activities or transactions where treatment as non-taxable persons would lead to significant distortions of competition.
>
> In any case, these bodies shall be considered taxable persons in relation to the activities listed in Annex D, provided they are not carried out on such a small scale as to be negligible.
>
> Member States may consider activities of these bodies which are exempt under Article 13 or 28 as activities which they engage in as public authorities."

20. Article 4.5 has been replaced by article 13 of the Principal VAT Directive (2006/112/EC) in materially the same terms, but as the supplies in issue in this appeal were made at a time when the Sixth VAT Directive was in force, we shall refer hereafter to article 4.5. It required member States to treat a public body as a non-taxable person for the purposes of VAT if the supplies were made by the public body "acting as such", that is, the public body was acting under a "special legal regime" in making those supplies (see, for example, *Fazenda Pública v Camara Municipal do Porto* (Case C-446/98) [2001] STC 560 at para 17). However, the requirement that a public body be treated as a non-taxable person under article 4.5 is overridden by the proviso in the second paragraph if such treatment would cause a significant distortion

of competition. How that proviso is to be properly applied, and the location of the burden of proof (which is on HMRC), were established only after long and complex litigation culminating, in judicial hierarchy terms, in *Revenue and Customs Commissioners v Isle of Wight Council* (Case C-288/07) [2008] STC 2964 and [2009] STC 1096. The litigation in that case is continuing, at present before this tribunal.

21. It is agreed that neither article 4.5 nor article 13 has ever been implemented by United Kingdom legislation. Nevertheless, it is common ground (subject to the substantive dispute described at para 26 below in relation to housing improvement loan administration charges) that:

(a) all of the supplies with which we are concerned, save for the excess parking charges, were within the scope of article 4.5 by reason of Leeds having made those supplies ("the article 4.5 supplies") in the capacity of a public body "acting as such";

(b) the proviso relating to significant distortion of competition is not engaged in respect of any of those supplies; and therefore

(c) Leeds is to be treated as a non-taxable person in respect of all of the article 4.5 supplies that are the subject of this appeal; but

(d) until dates after 4 December 1996 HMRC's publicly stated position was that the supplies were standard-rated.

Background facts

22. We extract the following, which may be taken as our findings of fact so far as it is necessary to make any, from Mrs Bagley's witness statement, her oral evidence and the documents provided to us.

23. The Chartered Institute of Public Finance and Accountancy ("CIPFA") is the professional body for finance professionals working in the public sector. CIPFA's VAT committee was established in the 1990s. It meets regularly with HMRC in order to discuss issues relating to the operation of VAT as they affect local government, and various exchanges of information take place. Leeds was, it seems, reliant on that information although it had contacts of its own with HMRC.

24. On 24 August 2006 HMRC published Business Brief 13/2006, which set out HMRC's position on retrospective refund claims following the second of two decisions of the Court of Appeal which led to the *Fleming* appeal which was later to reach the House of Lords (see para 15 above). The Court of Appeal's decisions are reported as *Fleming (trading as Bodycraft) v Customs and Excise Commissioners* [2006] STC 864 and *Condé Nast Publications Ltd v Customs and Excise Commissioners* [2006] STC 1721. The effect of those decisions, upheld albeit on different grounds by the House of Lords, was that claims for repayment in respect of amounts paid before the enactment of the three-year cap were not subject to any effective time limit. HMRC announced that they would meet such claims, subject to recovery if the House of Lords should reverse the Court of Appeal's decision. On 13

September 2006 Leeds wrote to HMRC announcing its intention to make, or more accurately renew, claims for over-declared VAT. The claim in respect of excess parking fees had originally been submitted in 2002, and claims in respect of library charges and cemetery memorial items had been made in 2004. They were rejected at the time because HMRC believed they could rely on the three-year cap.

25. The renewed claims were submitted, as we have said, on 11 May 2007. The further claims made in March 2009, which were not renewals of earlier claims, related to the trade waste collection charges and housing improvement loan administration fees, and included also claims in respect of cultural admission fees and sport and recreational admission charges. The claims for repayment of the VAT accounted for on admission fees related entirely to periods before 4 December 1996 and they have been met. All the other claims except that in respect of the administration fees related to periods both before and after 4 December 1996, and they have been met so far as they relate to periods ended before 4 December 1996 or within the three years before the claim was made, but otherwise rejected.

26. The whole of the claim in respect of the housing improvement loan administration fees relates to periods after 4 December 1996. HMRC accept that recent periods are not capped, but contend that the cap applies to earlier periods. There is a substantive dispute between Leeds and HMRC about whether the supplies made in return for the fees would, but for article 4.5, be taxable supplies, or are exempt supplies of finance. That dispute is not before us in this appeal.

27. It is not suggested that excess parking charges (that is, charges levied when a motorist has stayed in a parking space for longer than the time for which he has paid, or in excess of the maximum permitted time) fall within article 4.5 but Leeds' argument is that its position in respect of these supplies is similar. HMRC's published position in relation to such charges was, until 2002, that they were the consideration for the continued use of the parking space and, pursuant to VATA ss 4 and 5, were chargeable to VAT at the standard rate. On 15 May 2002 the VAT and Duties Tribunal released its decision in *Bristol City Council v Customs and Excise Commissioners* (2002) VAT Decision 17665, holding that "the excess parking charges, whatever may be their precise nature, as damages for trespass or as a penalty for infringement, are not consideration for a supply of parking". HMRC changed their published position following that decision, and accept that their earlier stance that the excess parking charges were taxable was wrong. (See also the recent judgment of the Court of Appeal in *Vehicle Control Services Ltd v Revenue and Customs Commissioners* [2013] STC 892.)

28. Leeds contends that it accounted for VAT in respect of the relevant supplies because it relied on incorrect guidance issued by HMRC. Some guidance was provided by Public Notices, but some was contained in correspondence or given during the course of meetings between HMRC and Leeds, or between HMRC and the various representative bodies of local authorities, in particular CIPFA.

29. *Memorial Items*: The 1990 edition of Public Notice 749 stated that only supplies directly connected with burials and cremations and the placing of headstones were exempt, while fees for the placing of memorial items such as plaques were standard-rated. In January 1998 Leeds wrote to HMRC setting out its view that the operation of cemeteries and crematoria was not a business activity. HMRC disagreed, and contended that only the operation of "closed" burial sites constituted a non-business activity—everything else constituted a business activity. In February 2000 the VAT and Duties Tribunal held in *Rhondda Cynon Taff County Borough Council v Customs and Excise Commissioners* (2000) VAT Decision 16496 that a local authority was not to be considered a taxable person when providing and maintaining cemeteries. In Business Brief 04/00 (issued following the *Rhonda Cynon Taff* decision), HMRC stated that services offered by a local authority in addition to the operation of the cemetery remained outside the special statutory regime underpinning its non-business status, and therefore continued to be business activities of the local authority. However, in September 2004, prompted by an article in a tax newsletter, Leeds submitted a claim for repayment of VAT on memorial items. The claim was for the period of three years from August 2001, and we understand that (despite HMRC's earlier position) it has been paid. It is only the May 2007 claim which is the subject of this appeal.

30. *Libraries*: The guidance in the 1990 edition of HMRC's Public Notice 749 was that loans of pictures, cassettes and records constituted a standard-rated business activity. In the early 1990s, the VAT Committee of CIPFA raised the liability to VAT of these activities with HMRC. At that time, HMRC considered that treating these as supplies falling within article 4.5 would distort competition, as there were a number of commercial video rental businesses in operation. In 1999 HMRC agreed that the loan of spoken word cassettes by public libraries was a non-business activity, but made no greater concession. The issue was raised again by CIPFA in 2003, prompting HMRC to write to CIPFA in December 2003 to the effect that HMRC now accepted that such loans constituted non-business activities, because of the statutory obligation of local authorities to lend, and that the competition proviso was not engaged. In January 2004, Leeds submitted a claim for repayment of VAT on library charges for the period from January 2001 to December 2003; that claim, we understand, has also been paid. It is, again, only the May 2007 claim which is the subject of this appeal.

31. *Excess parking charges*: HMRC's published position, from at least 1997, was that such charges in respect of on-street parking were for non-business activities, because they were levied in accordance with a statutory regime, while similar charges made in respect of off-street car parks, which were not subject to that regime, were standard-rated. When the decision in the *Bristol City Council* case (see para 27 above) was released, Leeds submitted a claim for repayment of VAT on excess parking charges levied at off-street car parks for the period from September 1999 to August 2002, and that claim has been met. Here, too, it is the May 2007 claim which is the subject of this appeal.

32. *Trade waste collection charges*: The guidance in HMRC's Public Notice 749 (1990 edition) was that the collection, treatment and tipping of refuse was a non-business activity when no specific charge was made, but was otherwise standard-rated. The guidance was amended in the 1996 edition of the Notice to provide that the collection of domestic refuse under the relevant statute was a non-business activity, and it no longer differentiated between collections when a charge was or was not levied. It went on to say that the collection of commercial and industrial refuse was a non-business activity when no charge was made, but was a standard-rated business supply when a charge was made. In June 2001 Leeds submitted a repayment claim for VAT charged on the collection of bulky domestic refuse for the period from May 1998 to April 2001, and that claim has been paid. In 2001 a submission was made to HMRC by a regional local authority VAT liaison group that, as the same legal provisions govern the removal of trade waste as govern the removal of domestic waste, the VAT treatment should also be the same. Thus trade waste collection services, whether or not a charge is made, should be treated as a non-business activity. In a letter to CIPFA of 31 March 2003 HMRC maintained their position that charges for the collection of commercial waste were the consideration for a standard-rated business activity, apparently (though the letter is not entirely clear) relying on the possibility that as private companies also collected commercial waste for a fee the competition proviso in article 4.5 might be offended. Despite continuing debate there had been no change in HMRC's position when, for unconnected reasons, Leeds ceased collecting commercial waste in 2002. On 27 March 2009, mindful of the 31 March 2009 deadline for submitting retrospective claims for periods prior to 4 December 1996 (see para 16 above), Leeds lodged a protective claim for repayment of VAT accounted for on trade waste charges, with a view to resolving the outstanding question whether such activities were business activities or not. The claim was for the period from March 1974 to March 2008. On 13 December 2010, HMRC wrote to Leeds to the effect that they were now of the view that the collection of trade waste was a non-business activity when conducted by a local authority and that the levels of competition within the market were insufficient to invoke the second paragraph of what was by then article 13. HMRC have rejected the part of the claim relating to periods beginning in and after December 1996, relying on the three-year cap, and that rejection is the subject of this appeal.

33. *Housing improvement loan fees*: Local authorities have powers to assist private home owners to improve their dwellings. From mid-1995 to 2000 there was confusion over the VAT liability of administration charges levied at the time of assessing eligibility for home improvement grants. During this period, HMRC's position was that the administration fee was integral to the main supply and took the same VAT liability. However there was also confusion about the VAT liability of the main supply of housing grants, and it was considered at different times to be either outside the scope of VAT, or standard-rated. In 1999 HMRC decided that the administration of that part of the grant which was funded by the local authority was a non-business activity, but that the administration of that part of the grant that was funded by central government constituted a business activity. If that view was correct,

40% of the administration fee charged was attributable to a non-business activity, while the balance was standard-rated. In 2002, following the decision of the High Court in *Ashfield District Council v Customs and Excise Commissioners* [2001] STC 1706, HMRC changed their minds: they now considered that the whole of the administration fee related to funds that were not the local authority's own resources, consequently the whole of the administration fee was liable to VAT at the standard rate. Again mindful of the 31 March 2009 deadline for submitting retrospective claims for periods prior to 4 December 1996, Leeds lodged a protective claim for repayment of the VAT for which it had accounted on the administration fees, asserting that HMRC's revised position was incorrect. The claim submitted on 27 March 2009 related to the period from October 1999 to March 2009. In May 2009 a further repayment claim was lodged for the period from April 2009 to March 2010. All of these claims have been rejected by HMRC, and as we have mentioned there is an underlying substantive dispute between Leeds and HMRC as to whether the administration fees are in fact taxable. But HMRC have in any event rejected the claims in respect of periods on or after December 1996 and more than three years before the making of the claims on the grounds that they are capped, and that is the only issue before us.

Leeds' submissions

34. It is common ground that Leeds has the right (as a matter of EU law, since VAT is a tax governed primarily by EU law) to recover overpaid VAT from HMRC, and that is so whether or not the supplies in respect of which it accounted for that VAT are or are not within the scope of article 4.5. The CJEU put it succinctly in *Amministrazione delle Finanze dello Stato v SpA San Giorgio* (Case 199/82) [1983] ECR 3595 ("*San Giorgio*") at para 12:

> "… [the] entitlement to the repayment of charges levied by a member state contrary to the rules of Community law is a consequence of, and adjunct to the rights conferred on individuals … Whilst it is true that repayment may be sought only within the framework of the conditions as to both substance and form, laid down by the various national laws applicable thereto, the fact nevertheless remains, as the court has consistently held, that those conditions may not be less favourable than those relating to similar claims regarding national charges and they may not be so framed as to render virtually impossible the exercise of rights conferred by Community law."

35. The essence of Mr Ghosh's argument for Leeds is that HMRC's reliance on the expiry of the three-year cap offends various EU principles. It denies Leeds an effective remedy; it does not respect the requirement of legal certainty; it is disproportionate; it does not meet Leeds' legitimate expectations; and it breaches the principle of equivalence.

Effective remedy

36. The general principle of fiscal neutrality requires that the supplier who has wrongly accounted for VAT has a *San Giorgio* claim for recovery of the overpayment, and should be able to enforce that claim. In *Danfoss A/S Sauer-Danfoss ApS v Skatteministeriet* (Case C-94/10) [2011] ECR I-09963 at para 25 the CJEU said:

> "observance of the principle of effectiveness requires that the conditions under which an action may be brought for recovery of sums unduly paid be fixed by the Member States, pursuant to the principle of procedural autonomy, in such a way that the economic burden of the duty unduly paid can be neutralised."

37. It is for the Member State, in this case the UK, to give effect to that right. That proposition follows from what was said by the CJEU in *Salgoil SpA v Italian Ministry of Foreign Trade* (Case 13/68) [1969] CMLR 181 at 196:

> "The provisions of Articles 31 and 32 [of the EEC Treaty] require the authorities and especially the competent judicial authorities in member-States to safeguard the interests of their nationals who may be affected by any violation of the said provisions, by ensuring the direct and immediate protection of their interests, and this is so whatever the relationship in internal law between these interests and the public interests raised by the question."

38. The remedy must be effective, as the Court said in *Bozzetti v Invernizzi SpA and Ministero del Tesoro* (Case C-179/84) [1985] ECR 2301 at para 17:

> "… the member-States are responsible for ensuring that … rights [derived from EU law] are effectively protected in each case…."

39. Effective protection of the right to recover wrongly paid taxes must be available whether or not the domestic law of the relevant member state provides an adequate remedy. The CJEU observed, in *Reemtsma Cigarettenfabriken GmbH v Ministero delle Finanze* (Case C-35/05) [2008] STC 3448, at para 42, that:

> "… where reimbursement of the VAT would become impossible or excessively difficult, the member states must provide for the instruments necessary to enable [the person entitled to reimbursement] to recover the unduly invoiced tax in order to respect the principle of effectiveness."

40. It is well-established too, said Mr Ghosh, that national rules are subordinate to EU law, and that in consequence national rules which represent an obstacle to the enforcement of EU rights must be set aside. In *Mangold v Helm* (Case C-144/04) [2005] ECR I-9981, a case in which age discrimination was in issue, the CJEU said at para 77 of its judgment:

> "… it is the responsibility of the national court, hearing a dispute involving the principle of non-discrimination in respect of age, to provide, in a case within its jurisdiction, the legal protection which individuals derive from the rules of Community law and to ensure that those rules are fully effective, setting aside any provision of national law which may conflict with that law (see, to that

effect, Case 106/77 *Simmenthal* [1978] ECR 629, paragraph 21, and Case C-347/96 *Solred* [1998] ECR I-937, paragraph 30)."

41. Similarly, in *Kücükdeveci v Swedex GmbH & Co KG* (Case C-555/07) [2010] All ER (EC) 867 the Court said:

> "50 … the principle of non-discrimination on grounds of age is a general principle of European law …
>
> 51 In those circumstances, it [is] for the national court, hearing a dispute involving the principle of non-discrimination … to provide, within the limits of its jurisdiction, the legal protection which individuals derive from European Union law and to ensure the full effectiveness of that law, disapplying if need be any provision of national legislation contrary to that principle (see, to that effect, *Mangold*'s case, para 77)."

42. Mr Ghosh also argued that to compel a taxpayer first to make a payment of VAT under protest, and then to invoke EU law to seek a refund, offends the principle of effectiveness. The basic rule in s 84 of VATA (as it is currently in force) is that (absent hardship) a taxpayer is required to pay HMRC the VAT in dispute before it can lodge any appeal, and it is not disputed that the basic rule would be applicable to the circumstances of this case, and that Leeds would not be able to establish hardship.

43. In support of this contention, he referred us to the decision of the CJEU in *Danske Slagterier v Germany* (Case C-445/06) [2009] ECR I-2119 [2010] All ER (EC) 74 where the court said

> "In Joined Cases C-397/98 and C-410/98 *Metallgesellschaft and Others* [2001] ECR I-1727, paragraph 106, the Court indeed held that the exercise of rights conferred on private persons by directly applicable provisions of Community law would be rendered impossible or excessively difficult if their claims for compensation based on Community law were rejected or reduced solely because the persons concerned did not apply for grant of the right which was conferred by Community provisions, and which national law denied them, with a view to challenging the refusal of the Member State by means of the legal remedies provided for that purpose, invoking the primacy and direct effect of Community law. In a case of that kind, it would not have been reasonable to require the injured parties to utilise the legal remedies available to them, since they would in any event have had to make the payment at issue in advance, and even if the national court had held the fact that payment had to be made in advance incompatible with Community law, the persons in question would not have been able to obtain interest on that sum and they would have laid themselves open to the possibility of penalties (see, to this effect, *Metallgesellschaft and Others*, paragraph 104)."

44. The *Metallgesellschaft* case (*Metallgesellschaft Ltd v Commissioners of Inland Revenue* (Case C-397/98 and C-410/98) [2001] Ch 620) related to the then provisions of UK law requiring the payment of advance corporation tax ("ACT") on dividends, and the consequences of the inability of EU parent companies, unlike UK parent companies, to enter into group income elections with their UK subsidiaries to avoid the need for the subsidiary to account for ACT on dividends paid to the EU parent.

Though the taxpayer's position in that case is not directly comparable to Leeds' position here, it nevertheless establishes the relevant principle.

45. A helpful summary of the jurisprudence was given by Lord Sumption JSC in his judgment in *Test Claimants in the FII Group Litigation v Revenue and Customs Commissioners* [2012] 2 AC 337. He cited the passage from *San Giorgio* quoted above, and then added, at [147]:

> "These principles were restated in the judgments of the European Court of Justice in *Metallgesellschaft* [2001] Ch 620, paras 84-86 and in the first reference in this litigation: *FII Group Litigation v Inland Revenue Comrs* (Case C-446/04) [2007] STC 404, paras 201-208. It follows that a member state is 'in principle required to repay charges levied in breach of Community law': *Société Comateb v Directeur Général des Douanes et Droits Indirects* (Joined Cases C-192/95 to 218/95) [1997] ECR I-165, para 20. Subsequent case law has emphasized the absolute character of this obligation. The only exception which has been recognized to date is the case where the charge has been passed on by the party who paid it, with the result that he would be unjustly enriched were he to recover it for his own benefit: see *Weber's Wine World Handels GmbH v Abgabenberufenskommission Wien* (Case C-147/01) [2003] ECR I-11365, para 94. So, although national courts and legislatures are the masters of their own law and procedure, in so far as the legal system of a member state fails to give adequate effect to directly effective EU law rights, it is incumbent on national courts to give effect to those rights by filling the gap between existing causes of action or if necessary to create a new one: see *Unibet (London) Ltd v Justitiekanslern* (Case C-432/05) [2008] All ER (EC) 453, paras 40-1."

46. Mr Ghosh accepted that limitation periods are not, in themselves, contrary to EU law, but they must be reasonable and must be implemented in a manner which does not offend EU law, for example by summarily depriving an EU national of existing but unenforced rights: see *Marks and Spencer*. Where limitation periods are not EU law compliant, he said, the case-law shows that they must be disapplied, so that the general right to a remedy is not frustrated. It is for Parliament to enact EU compliant limitation provisions and it is not for the courts or this tribunal to give the offending provisions an EU compliant effect where a conforming construction is not possible: see *Fleming*. The court must instead set it aside.

47. This is particularly the case where the frustration of EU rights arises because of the conduct of the member state (in this case, the failure of the UK to implement article 4.5 and HMRC's incorrect published position). Mr Ghosh accepted that a minor or inadvertent breach of a directive would not justify the setting aside of a limitation period, but, he said, the failure in this case is serious since it has resulted in economic loss: see *Dillenkofer and others v Bundesrepublik Deutschland* (Case C-178/94) [1996] ECR I-04845.

48. Thus although limitation periods are, in principle, compatible with the requirements of EU law, Mr Ghosh said, there are some qualifications which must be added. A limitation period (and any reduction in the applicable period) must strike a proper balance between the right of EU nationals to obtain a remedy for breach of

their EU rights, and the need of member states for certainty that they are not exposed to perpetual open-ended claims. In the *Test Claimants in the FII Group Litigation* case Lord Walker of Gestingthorpe JSC said:

> "93. It is well established that EU law has no general objection to limitation periods being provided for in the legal systems of member states. On the contrary, limitation periods are one manifestation of the principle of legal certainty. As long ago as *Rewe I* (*Rewe-Zentralfinanz eG v Landwirtschaftskammer für das Saarland* (Case C-33/76) [1976] ECR 1989, para 5), the Court of Justice (after referring to the general principle of national courts acting in accordance with national rules) observed:
>
> > 'The position would be different only if the conditions and time-limits made it impossible in practice to exercise the rights which the national courts are obliged to protect. This is not the case where reasonable periods of limitation of actions are fixed. The laying down of such time-limits with regard to actions of a fiscal nature is an application of the fundamental principle of legal certainty protecting both the taxpayer and the administration concerned.'
>
> There is a similar statement, again expressly linked to fiscal proceedings, in *Comet BV v Produktschap voor Siergewassen* (Case C-45/76) [1967] ECR 2043, para 18.
>
> 94. Limitation periods must be reasonable, but the Court of Justice recognises that national systems vary a good deal, and accepts different approaches so long as there is no infringement of the principles of effectiveness and equivalence, and no disappointment of legitimate expectations. This is made clear in *Amministrazione delle Finanze dello Stato v Sas MIRECO* (Case C-826/79) [1980] ECR 2559, paras 11 to 13, and other cases of the same vintage involving the Italian tax authorities, including *Amministrazione delle Finanze dello Stato v Denkavit Italiana Srl* (Case C-61/79) [1980] ECR 1205, paras 23 and 24, and *Amministrazione delle Finanze dello Stato v Ariete SpA* (Case C-811/79) [1980] ECR 2545, paras 10 and 11."

49. The essence of Leeds's case on this point is that manner in which the three-year cap was implemented and its application to the amounts in dispute offend the criteria identified by Lord Walker and, as a result, it does not strike a proper balance between the right of the state to achieve finality and the right of the taxpayer to assert and enforce his rights. It should therefore be set aside to allow Leeds to recover the disputed amounts.

50. Both before and after 18 July 1996 (and, following the passing of s 121 of the Finance Act 2008, 4 December 1996), Leeds had directly enforceable EU rights under article 4.5 to be treated as a non-taxable person in relation to each of the article 4.5 supplies. The reason why it made the payments it now seeks to recover was the combined effect of the United Kingdom's failure to implement article 4.5 into the domestic VAT Code and HMRC's published guidance which wrongly required Leeds to be treated as a taxable person in relation to those supplies. HMRC also adopted an incorrect published position in relation to the excess parking charges, which breached

Leeds' EU rights, albeit not in relation to unimplemented directive provisions. It was because of HMRC's insistence that it must do so that Leeds paid the disputed amounts.

51. Prior to 18 July 1996, s 80(4) and (5) imposed a proportionate limitation period for the enforcement of EU rights. In particular, by virtue of sub-s 80(5) the pre-18 July 1996 limitation period ran from the discovery of a mistake, rather than the date of a mistaken payment of VAT. The three-year cap curtailed that proportionate limitation period by both reducing the period from six years to three, and repealing sub-s (5). The position on and before 18 July 1996 (or 4 December 1996) was that Leeds could not with reasonable diligence have discovered its right to be treated as a non-taxable person in relation to the article 4.5 supplies. The absence of any transitional provision which might have given Leeds a reasonable period of time to discover that it had paid VAT which was not due led to the consequence that it was deprived of any opportunity to make a claim. HMRC's long-standing public position was that VAT was due in respect of all the relevant supplies, and that public position was maintained until well after the expiry of the three year limitation period imposed by the amended s 80. What might in other circumstances be a "good" limitation period becomes "bad" and unenforceable when it is HMRC's persistent maintenance of an incorrect but unequivocal public position that VAT is payable, until after the period has expired, which has led to the wrongful payment of that VAT. As a matter of fact, Leeds did not discover that it was not liable to account for that VAT until after the expiry of the limitation period. In the meantime it had no choice but to account for VAT as HMRC insisted, as it would otherwise have been liable to be assessed for VAT, and would have risked default surcharges or other penalties.

52. Limitation periods represent an exception to the general right under EU law to a remedy, and it was for that reason that they (and any measure by which they are curtailed) must respect and safeguard the general EU law principles of legal certainty, of effectiveness, and of proportionality and must respect legitimate expectations. A limitation period which failed to do any of those things would not meet Lord Walker's test of reasonableness. The reduced limitation period, implemented as it was without a transitional period, fails the test because of the combined effect of the fact that time runs from the date of payment rather than from the date of the discovery of the mistake, the absence of an adequate transitional provision giving taxpayers a reasonable time to discover whether they have made any mistake, the UK's failure to implement article 4.5 and HMRC's public position. In addition, the three-year cap offends the principle of equivalence, as the limitation periods applicable to UK domestic direct taxes are (or at the relevant time were) more generous than the limitation periods that apply to VAT.

53. Although the excess parking charges do not fall within article 4.5, Leeds' argument is that the same principles apply, *mutatis mutandis*, to them.

Legal certainty

54. Mr Ghosh argued that HMRC's public position that Leeds must be treated as a taxable person when making the article 4.5 supplies amounted to concealment by the UK of Leeds' EU rights. Leeds could not, in a practical sense, become aware of its rights until the UK implemented article 4.5, or litigation established the EU right to rely on its direct effect. Against the additional background of the uncertainty about the application of the three-year cap, the correct starting date for the running of time and the presence or absence of transitional provisions Leeds was faced with very uncertain provisions governing its assessment of the legal and financial consequences of its decisions (in this case the decision to pay the disputed amounts to HMRC). The position in which Leeds found itself at 18 July 1996, (or 4 December 1996), Mr Ghosh submitted, was not merely uncertain but incoherent.

55. Where there is a lack of certainty about the date on which a limitation period begins to run, as was the case here, the effectiveness of EU rights is undermined and the limitation period should be disapplied, or at least suspended in order that EU rights can be effectively enforced: see *Raffaello Visciano v Istituto nazionale della previdenza sociale* (Case C-69/08) [2009] ECR I-6741 at para 46:

> "… it is also apparent from Case C-62/00 *Marks & Spencer* [2002] ECR I-6325, paragraph 39, that in order to serve their purpose of ensuring legal certainty, limitation periods must be fixed in advance. A situation marked by significant legal uncertainty may involve a breach of the principle of effectiveness, because reparation of the loss or damage caused to individuals by breaches of Community law for which a Member State can be held responsible could be rendered excessively difficult in practice if the individuals were unable to determine the applicable limitation period with a reasonable degree of certainty…."

56. The "normally attentive taxable person" or "prudent and alert economic operator" to whom the CJEU referred in *Banca Antoniana Popolare Veneta SpA v Ministero dell'Economia e delle Finanze* (Case C-427/10) [2012] STC 526 ("*BAPV*") at paras 25 and 37 respectively could not reasonably be expected to have known that the disputed amounts were not due to HMRC until well after 18 July 1996 (or 4 December 1996). This is a case in which the UK has not merely failed to implement a directive, but has adopted and persistently maintained a public position contrary to the purpose of the relevant part of the directive. The reason why the limitation period should be set aside is obvious: enforcing it would permit the UK to benefit from its own wrong. That was in essence the reasoning in *Theresa Emmott v Minister for Social Welfare* (Case C-208/90) [1991] ECR I-4269 ("*Emmott*"), in which the CJEU said:

> "21 So long as a directive has not been properly transposed into national law, individuals are unable to ascertain the full extent of their rights …
>
> 22 Only the proper transposition of the directive will bring that state of uncertainty to an end and it is only upon that transposition that the legal certainty which must exist if individuals are to be required to assert their rights is created.

> 23 It follows that, until such time as a directive has been properly transposed, a defaulting Member State may not rely on an individual's delay in initiating proceedings against it in order to protect rights conferred upon him by the provisions of the directive and that a period laid down by national law within which proceedings must be initiated cannot begin to run before that time."

57. It is true that that passage refers to individuals rather than organisations such as a local authority, and that some doubts have been expressed about it. Nevertheless, the CJEU and Advocates General have said much the same in other cases. In *Fantask A/S and others v Industriministeriet (Erhvervministeriet)* (Case C-188/95) [1996] All ER (EC) 917 ("*Fantask*") Advocate General Jacobs referred to various criticisms of the judgment in *Emmott* at paras 57 to 63 of his opinion but, at paras 85 to 88, explained it as an example of the court upholding "the principle that the exercise of Community rights must not be rendered excessively or unduly difficult".

58. In *BP Supergas Anonimos Etairia Geniki Emporiki-Viomichaniki kai Antiprossopeion v Greek State* (Case C-62/93) [1995] STC 805 the questions referred to the ECJ were, in summary, whether Greece could lawfully introduce a special system for the imposition of VAT on petroleum products which precluded the recovery of input tax and, if not, whether BP Supergas could recover the input tax for which it should have received credit. The Court held that the Greek system was unlawful and that in principle the input tax was recoverable. The question which remained was whether the claim could be defeated by domestic procedural provisions. In his opinion (which was accepted by the Court) Advocate General Jacobs said this:

> "58. The question then is whether the plaintiff can rely on the failure of Greece to implement the directive. In my view it follows from the principle that claims based on Community law must not be treated less favourably than claims based on national law that, wherever taxable persons are entitled to a refund of tax in respect of a particular tax year on grounds recognised by national law, that possibility must extend to claims based on Community law; that is so regardless of the nature of the grounds recognised by national law. It is not, in my view, necessary to engage in the difficult and somewhat artificial exercise of seeking a comparable claim under national law. Indeed such an approach does not follow from the court's case law on this matter. That case law is based on the principle that, subject to the requirement of ensuring the effectiveness of Community law, it is for the member states, in the absence of harmonised rules, to decide upon the appropriate balance between the requirements of legal certainty and sound administration and the need to ensure the correct application of the tax in a particular tax year. Where a member state allows a tax year to be re-opened at the instance of the taxable person within a certain period on any ground, it accepts by implication that for the period for which the claim is permitted it is the need to ensure correct application of the tax which takes precedence. The member state cannot therefore object that a claim based on Community law must be refused on grounds of legal certainty or sound administration.
>
> 59. That conclusion is particularly appropriate in the case of a member state's failure to implement a directive, where the state itself is at fault and has led the

> taxable person to make the error in question. A taxpayer must be entitled to assume, when preparing his tax returns, that the national legislation has correctly implemented all relevant Community directives, and is therefore entitled to rely exclusively on the national legislation for that purpose. If subsequently he discovers that the national legislation is defective, then it must be open to him to seek a revision of his assessment within the time limit laid down by national law for revision on any other ground."

59. Mr Ghosh particularly emphasised paragraph 59. The UK's failure to implement article 4.5 must be sufficient, he said, to suspend the three-year cap, when taken with HMRC's adoption of a public position in contravention of Leeds' EU rights, and the absence from section 80 of any transitional provisions which would have given Leeds a reasonable period of time within which to discover its rights. That proposition was supported, he said, by the more recent judgment of the CJEU in *BAPV*.

60. From 1984 to 1999, BAPV supplied certain services which were regarded by it and the Italian tax authorities as taxable, and it accounted for VAT on them. In 1999 the tax authorities announced by administrative circular that the supplies were fiscal in nature and, consequently, exempt from VAT. BAPV's customers sought a refund, by civil action, of the VAT they had paid, and BAPV was found liable to repay it; the limitation period for such an action was ten years. BAPV sought an equivalent refund from the tax authorities. The court found that BAPV's right to a refund had lapsed as the two-year limit for such a claim had expired: time ran from the date of payment, and not from the date of the announcement. BAPV appealed to the Corte Suprema di Cassazione, which referred to the CJEU the question whether there were any principles of EU law which precluded national rules importing different time limits which had the effect that a supplier such as BAPV, obliged to reimburse its customers, could not recover the overpayment from the tax authority. The CJEU said this:

> "31. … the Court has held that a national authority may not rely on the expiry of a reasonable time-limit if the conduct of the national authorities, combined with the existence of a time-limit, means that a person is totally deprived of any possibility of enforcing his rights before the national courts ….
>
> 32. In the case before the referring court, it should be noted, first of all, that—as the European Commission pointed out at the hearing—it would have been impossible or, at the very least, excessively difficult for BAPV to obtain, by means of an action brought within the two-year time limit, a refund of the VAT paid in the years from 1984 to 1994, particularly in view of the position adopted by the tax authority—and confirmed, according to the information provided by the referring court, by the case law of the national courts—which dismissed the possibility that the services supplied by BAPV fell within the exemption ….
>
> 33. Also, by attributing retroactive effect to the circular of 26 February 1999, the interpretation provided by the referring court … has the result of moving the starting point of actions for recovery back to the date on which the VAT was paid, which—given that the service provider had no more than two years in

> which to bring an action against the tax authority for the recovery of sums paid but not due—totally deprived the provider of any possibility of recovering the tax paid but not due."

61. That, said Mr Ghosh, was the position in which Leeds found itself: required by the taxing authority to account for VAT on all the relevant supplies, but deprived of a remedy when the authority changed its mind. In this respect, there was no reason to differentiate between the article 4.5 supplies and the excess parking charges. HMRC's adoption of an incorrect published position made it equally difficult for Leeds to ascertain its position in respect of all the supplies.

Proportionality

62. Mr Ghosh's argument to the effect that the three-year cap offends the principle of proportionality depends upon the proposition that EU law requires legislation to go only so far as is necessary to achieve legitimate objectives. For example, in *Futura Participations SA and another v Administrations des Contributions* (Case C-250/95) [1997] STC 1301 the CJEU considered whether it was a proportionate requirement of Luxembourg law to require a French company with a place of business in Luxembourg wishing to take advantage of a provision of Luxembourgeois tax law to keep accounts within Luxembourg and in a particular form. It concluded that this requirement was not "necessary" and, since it discriminated against non-resident taxpayers, and was prohibited by article 52 of the EEC Treaty (which regulates the right of establishment).

63. The principle of proportionality is particularly important when one considers limitation periods precisely because they are an exception to the general rule of effectiveness. Thus although it is, in many circumstances, permissible to set a limitation period which runs from the date of payment (see *Edilizia Industriale Siderurgica Srl v Ministero delle Finanze* (Case C-231/96) [1998] ECR I-04951 at para 35) that cannot be so where the limitation period in question replaces one (*ie* the extended period for which sub-s 80(5) provided) which would have enabled Leeds to discover its rights pursuant to the non-implemented article 4.5. The three-year cap goes beyond what is necessary to achieve legitimate objectives, by expiring before the payer in the position of Leeds was or could reasonably become aware of its EU right to recover the payments, thus making it impossible for such a payer to recover the payments. Save that the incorrect payment of VAT on the excess parking charges did not result from a failure to implement the directive, the same principles apply here, said Mr Ghosh, as elsewhere.

Legitimate Expectation

64. Mr Ghosh submitted that the introduction of the three-year cap breached Leeds' legitimate expectation, as at 18 July 1996, that it would have a reasonable time to make a claim for over-paid VAT once it had discovered its error in making the payment. That proposition was clearly shown to be correct by the judgment in *Marks*

and Spencer, at para 38. Although it is permissible to reduce a limitation period, any new limitation period must be reasonable, and the new legislation must include

> "… transitional arrangements allowing an adequate period after the enactment of the legislation for lodging the claims for repayment which persons were entitled to submit under the original legislation. Such transitional arrangements are necessary where the immediate application to those claims of a limitation period shorter than that which was previously in force would have the effect of retroactively depriving some individuals of their right to repayment, or of allowing them too short a period for asserting that right."

65. Leeds' position, as Mr Ghosh put it, was that on 18 July 1996, the date on which the three-year cap took effect, and on 4 December 1996, the date from which HMRC seek to apply the three-year cap in this case, Leeds had a legitimate expectation, were it to make a payment on the following day of VAT not in fact due, under a mistake arising because of a directly effective but unimplemented directive provision, such as article 4.5, that either it would be given a reasonable period of time to discover its rights, or, alternatively, the limitation period would not start running until the date on which it discovered the mistake or could with reasonable diligence have discovered it.

66. But that expectation was summarily removed, with the consequence that Leeds had only three years from payment in which to claim a refund. Critically, said Mr Ghosh, Leeds was not given any transitional period in which to discover whether or not it had a right to recover the VAT, whether by application of article 4.5 or otherwise. The summary removal of its rights could be regarded only as a breach of its legitimate expectations.

Equivalence

67. The EU principle of equivalence was succinctly described by the CJEU, in a similar context, at para 12 of its judgment in *San Giorgio*, set out at para 34 above, as one which requires a member State to prescribe conditions for the enforcement of EU rights which may "not be less favourable than those relating to similar claims regulating national charges". Similarly in *Fantask* the court said, at para 49 of its judgment, "The five-year limitation period under Danish law must be considered to be reasonable … Furthermore, it is apparent that that period applies without distinction to actions based on Community law and those based on national law."

68. The same point has been made in the United Kingdom. In the *Test Claimants in the FII Group Litigation* case the question was whether, if domestic law provided two possible remedies, it was open to a taxpayer attempting to recover money from HMRC to choose the remedy which was most advantageous to him. That is not the question here; but the requirement of an equivalent remedy fell for consideration. At [218] Lord Reed JSC referred to the restatement by the Grand Chamber of the CJEU in a reference in the same case, *Test Claimants in the FII Group Litigation v Inland Revenue Comrs* (Case C-446/04) (Note) [2012] 2 AC 436 at para 203 of the *San Giorgio* principle:

> "… it is for the domestic legal system of each member state to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from Community law, provided … that such rules are not less favourable than those governing similar domestic actions (principle of equivalence) …."

69. Then, at [220], Lord Reed said:

> "Where both these grounds of action are available for the recovery of taxes which have been levied in breach of domestic law, and a person seeking to recover such taxes can choose to base his claim upon whichever ground of action best suits his interests, it follows from the principle of equivalence that the same grounds of action, and the same freedom of choice, must equally be available in analogous circumstances to a person seeking to recover taxes which have been levied in breach of EU law: otherwise, claims based on EU law would be less favourably treated than similar claims based on domestic law … it must be possible for any type of action provided for by national law to be available for the purpose of ensuring the observance of Community provisions having direct effect."

70. At [225] he added:

> "… The two grounds of action are not identical: in particular, subject to the legislation at issue in the present case, they are subject to different limitation periods. The mistake ground of action admittedly includes an additional element, namely that the taxes were paid under a mistake; but it is the presence of that additional element which enables the claimant to benefit from an extended limitation period which begins when the mistake is discovered or could with reasonable diligence have been discovered, rather than beginning when the payment was made. The mistake ground of action is therefore a valuable remedy for the recovery of taxes levied contrary to EU law. If it were not available for that purpose, then the person who had paid taxes levied contrary to EU law would be in a less favourable position than the person who had a similar claim under domestic law."

71. The object of scrutiny for the purposes of the test of equivalence is not the subject matter, but the nature and purpose of the provisions which are being compared. The limitation period set by the three-year cap must therefore be no less favourable than the limitation period for recovery of overpaid domestic taxes imposed in the UK at the material time. Section 80, as it has been applied by HMRC to these claims is more restrictive than comparable time limits as they applied at that time to domestic taxes: the time limit for claiming relief for overpaid UK direct taxes (for example tax charged under an assessment that was excessive by reason of some error or mistake in a return) was longer. For income tax and capital gains tax, a claim could be made up to five years after the 31st January next following the year of assessment to which the return related, and for corporation tax, a claim could be made up to six years after the end of the accounting period to which the return related: see s 33 of the Taxes Management Act 1970 as it was then in force. A disparity of that kind, Mr Ghosh said, is contrary to the principle of equivalence and for that reason too we should refuse to apply the three-year cap in this case.

Result

72. For all those reasons, Mr Ghosh submitted, the three-year cap, as it purportedly applied to Leeds' claims, should be set aside until Parliament enacts a limitation provision which fully satisfies general EU law principles. As it has not yet done so, we should conclude that there is no effective limitation period and that Leeds should be entitled to recover the disputed amounts.

73. Alternatively, he said, we should refer a number of questions to the CJEU. He produced a draft of the questions he wished us to refer which, in summary, address the issue whether, against the background of a member State having taken an incorrect position about a directly enforceable right, it is open to that member State to enforce a limitation period such as the three-year cap.

HMRC's submissions

74. Mr Macnab's starting point was the essentially simple fact, as he put it, that Leeds' claims all relate to accounting periods ending on or after the date of enactment of the three-year cap. They are not claims in respect of which the time limit was once longer, or non-existent, or where time formerly ran from discovery of the error but no longer does. Once a period of three years from the relevant payment expired, the claims became barred by s 80(4), and remain barred. Thus although there was some uncertainty about the time limit, if any, which applied to claims for repayment of sums paid before 4 December 1996, that was not a consideration in this case. As the court said in *Revenue and Customs Commissioners v Scottish Equitable plc* (Court of Session, 25 June 2009) (unreported) "[t]he need to disapply [the three-year cap] arose only respecting accrued rights at the time of the legislative amendment. It could not be argued that the disapplication extended to rights to repayment accruing in the future."

75. It has been clear for a very long time that limitation periods are permitted by EU law: see *Rewe-Zentralfinanz eG and Rewe-Zentral AG v Landwirtschaftskammer für das Saarland* (Case 33/76) [1976] ECR 1989 and *Comet BV v Produktschap voor Siergewassen* (Case 45/76) [1976] ECR 2043, in which the court made the observation, at para 18, that:

> "The fixing, as regards fiscal proceedings, of [a limitation] period is in fact an application of a fundamental principle of legal certainty which protects both the authority concerned and the party from whom payment is claimed."

76. It is clear from the judgments, said Mr Macnab, that by the time the *Test Claimants in the FII Group Litigation* case reached the Supreme Court it was considered trite law that reasonable limitation periods are acceptable in the context of the enforcement of rights conferred by EU law. In addition, a limitation period that runs from the time of payment is consistent with EU law, even if its effect is to prevent repayment of incorrectly overpaid VAT, and as Lord Sumption JSC said in *Test Claimants in the FII Group Litigation* at [151], "[n]or is there any rule of EU law requiring the running of a limitation period to be deferred until the existence of a

right to recover the payment has been judicially established." Thus Leeds' only legitimate expectation in respect of the claims in dispute was that it had 3 years from the date of payment in which to make a claim for repayment should it be able to show that the payment was made in error. It had, and could have, no legitimate expectation that the three-year cap might be disapplied in respect of claims accruing after its implementation.

77. That is so even where the claim is derived from a member state's failure to implement a directive into national law, as long as a claimant is not deprived altogether of his opportunity to enforce his directly effective EU law rights before the national courts. In *Fantask*, as we have said, the CJEU considered the earlier decision in *Emmott*, observing at para 51 that "the solution adopted in *Emmott* was justified by the particular circumstances of that case", and then stating, at para 52:

> "… Community law, as it now stands, does not prevent a member state which has not properly transposed the directive from resisting actions for the repayment of charges levied in breach thereof by relying on a limitation period under national law which runs from the date on which the charges in question became payable, provided that such a period is not less favourable for actions based on Community law than for actions based on national law and does not render virtually impossible or excessively difficult the exercise of rights conferred by Community law."

78. Similar statements were made in *Edilizia Industriale Siderurgica Srl* at para 47 and in several other judgments to which we were referred but which we do not think it necessary to list.

79. The criticisms made in *Marks and Spencer* and elsewhere of the reduction of the time limit in respect of existing claims are of no relevance to a time limit so far as it affects prospective claims, which all of those in issue in this appeal are. The CJEU made that clear in the context of VAT in *Enel Maritsa Iztok 3 AD v Direktor "Obzhalvane i upravlenie na izpalnenieto" NAP* (Case C-107/10) [2011] ECR I-03873 at para 39:

> "…according to the Court's settled case-law, it is perfectly permissible and, as a general rule, consistent with the principle of the protection of legitimate expectations for new rules to apply to the future consequences of situations which arose under the earlier rules …."

80. In *Commission of the European Communities v Freistaat Sachsen* (Case C-334/07P) [2009] 1 CMLR 42 at para 43 the CJEU stated, in the context of EU legislation, that

> "According to settled case-law, new rules apply, as a matter of principle, immediately to the future effects of a situation which arose under the old rule … The Court has also held that the principle of legitimate expectations cannot be extended to the point of generally preventing a new rule from applying to the future effects of situations which arose under the earlier rule …."

81. It is plain from the authorities, said Mr Macnab, that s 80 is compliant with EU law so far as it affects claims for repayment of sums paid after 4 December 1996,

whether they were paid in breach of EU law provisions (the article 4.5 supplies) or in breach of domestic law provisions (the excess parking charges), and there is accordingly nothing in Leeds' argument about the reduction in the time limit. The passages in the Advocate General's opinion in *BP Supergas* and in the judgment in *BAPV* on which Mr Ghosh relied and which we have set out at paras 58 and 60 above respectively simply do not support the proposition that there is a different rule for recovery of sums paid in breach of EU law. All that is required is that the period allowed is no less favourable than that applied to domestic law claims, and that the exercise of the relevant right is not rendered impossible or excessively difficult. The limitation period imposed by s 80 applies indiscriminately to EU and domestic rights (see, if authority is needed, *F J Chalke Ltd v Revenue and Customs Commissioners* [2009] STC 2027 at [169] and *Local Authorities Mutual Investment Trust v CCE* [2004] STC 246 at [68]), and Leeds has at all times been free to assert its directly effective EU law rights, as well as its domestic law rights.

82. It is irrelevant, Mr Macnab said, that Leeds did not know that it had the right to recover the payments. That is a common feature of s 80 claims for repayment. It is equally irrelevant, even if it is true, that HMRC contributed to or caused Leeds' ignorance of its rights. Leeds knew that it was accounting for VAT on the relevant supplies; if it considered HMRC's view of the law to be wrong there was no impediment to its challenging that view by appeal to the First-tier Tribunal or its predecessor.

83. There is no support in the jurisprudence of the CJEU that a taxing authority's incorrect public position operates to extend the limitation period. The *San Giorgio* right to recovery, on which the claims are based, is dependent solely on the fact that the tax was not due; fault is not a relevant consideration. Error by a member State, if sufficiently serious, might sound in damages (see *Francovich v Italy* (Joined Cases C-6/90 and C-9/90) [1991] ECR I-5357, as explained in *Brasserie du Pêcheur SA v Bundesrepublik Deutschland and R v Secretary of State for Transport, ex parte Factortame Ltd and others* (Joined Cases C-46/93 and C-48/93) [1996] QB 404) but this tribunal has no jurisdiction to adjudicate on such a claim if it is made.

84. The argument that Leeds' rights are infringed by its being compelled to pay the disputed tax as a precondition for making a reclaim is not open to it, since it was not compelled to pay any tax on that basis. It paid the tax it now wishes to reclaim for the quite different reason that it believed, at the time, that it was required to do so as a matter of law. There is also nothing in *Metallgesellschaft* to support the argument; that was a case about freedom of establishment and it concerned, not the recovery of money incorrectly paid, but the recovery of interest on money the taxpayer was required to pay too soon.

85. There is no necessity for a reference; the CJEU has made it perfectly clear that a limitation period of three years from payment is reasonable and that the adoption by the member State of an incorrect position is immaterial. That is enough to dispose of the appeal.

Discussion

86. We agree with Mr Macnab that the circumstances in which the three-year cap was introduced are irrelevant. It is in our view clear beyond any doubt from what the CJEU has said, and in particular in the extracts from its judgments in *Enel Maritsa Iztok 3 AD* and *Commission v Freistaat Sachsen* which we have set out above, that there is no EU law impediment to the introduction of a new and shorter time limit for the making of future claims for the repayment of sums paid in error after its introduction, provided only that the new time limit respects the various principles to which we come next. It was made abundantly clear by the Court of Session in *Scottish Equitable* that the fact that the manner in which the new time limit was introduced may have been offensive in respect of accrued rights has no bearing on its application to future rights. We start therefore from the position that, unless it can be defeated by reason of its offending one of those principles, the three-year cap, as it applies to the rejected claims, is valid.

87. The principle of effectiveness requires that a person whose rights have been infringed has available to him a remedy by which he may assert those rights, and it is for member States to provide that remedy: see *Danfoss*, *Salgoil* and *Bozzetti*. We consider that what was said on this topic in those cases, in the extracts we have set out above, is uncontroversial, and Mr Macnab did not suggest otherwise. The principle also requires member States to refrain from imposing any obstacle which makes it impossible or excessively difficult for the citizen to exercise that remedy; and it is for the courts and tribunals to disapply any such obstacle: see *Reemtsma Cigarettenfabriken*. Again, that proposition is uncontroversial, and it is what led to the judgments in *Marks and Spencer* and *Fleming*, and the disapplication in respect of accrued claims of the three-year cap.

88. Mr Ghosh did not suggest, as we understand his arguments, that (leaving aside the three-year cap) the United Kingdom has omitted to provide an effective remedy. He did not, in particular, contend that s 80 failed to offer an adequate means of recovering overpaid VAT. His argument, rather, was that the combined effect of the absence of implementation by the UK of article 4.5 coupled with HMRC's public position made it impossible for Leeds to discover that it had any right of recovery, until after the claims were barred. Save that article 4.5 does not assist him, his argument in respect of the excess parking charges was essentially the same. In our view that proposition cannot succeed.

89. Although (as HMRC accept) article 4.5 has not been implemented, it is not a provision which has no effect until implemented; as Mr Ghosh recognised, indeed argued, it is a provision which, so long as it is sufficiently precise, has direct effect: see *Becker v Finanzamt Münster-Innenstadt* (Case 8/81) [1982] ECR 53. Leeds could, therefore, have relied on it irrespective of the absence of implementation. It did not do so because it was (it says) misled by HMRC's public pronouncements.

90. Had article 4.5 been incorrectly implemented by UK legislation, that is in a manner contrary to the purpose of the article, there might perhaps be some substance

in the argument, though in our view even that is doubtful. None of the authorities to which Mr Ghosh referred us, with the possible exception of *Emmott*, supports the proposition that a failure to implement a directive (rather than incorrect implementation) must lead to the conclusion that a taxpayer is unable to discover his EU rights. It is true that in *Emmott* the court said that "So long as a directive has not been properly transposed into national law, individuals are unable to ascertain the full extent of their rights", but as we have already mentioned, *Emmott* has been said several times to have been decided on its own particular facts, and Advocate General Jacobs explained it in *Fantask* as an example of the court upholding the principle that the exercise of Community rights must not be rendered excessively difficult, rather than as a case establishing a principle of its own.

91. In our judgment the weight of authority is against Mr Ghosh's argument. In para 59 of his opinion in *BP Supergas*, set out at para 58 above, Advocate General Jacobs referred to the citizen who has discovered that national legislation is defective (and without apparently discriminating between defects due to incorrect implementation and those due to an absence of implementation). Such a citizen must be permitted to assert his rights by seeking an adjustment of his liability; but only "within the time limit laid down by national law". It is only when, as the court said in *BAPV*, the time limit renders it impossible or excessively difficult to enforce the rights that time limits must be disapplied.

92. It is in our view, and with respect to Mr Ghosh, not even arguable that HMRC's public position rendered it impossible or excessively difficult for Leeds to assert its rights within a period of three years from payment of the disputed amounts. As Mrs Bagley's evidence indicated, there were regular discussions between CIPFA and HMRC, in addition to which Leeds had its own meetings with HMRC. Her evidence also shows that there was, throughout the relevant period, uncertainty about the proper VAT treatment of supplies within, or potentially within, article 4.5, and that HMRC changed their position in some respects. Had Leeds considered that HMRC were wrong about any one or more of the relevant supplies, it could have sought a ruling and then appealed against it to (depending on timing) the VAT and Duties Tribunal or the First-tier Tribunal. Leeds did in fact make some claims but did not pursue them to a conclusion.

93. We also reject Mr Ghosh's argument about payment of the disputed tax in advance as a condition of appealing. Leeds is not disputing an assessment (in which case advance payment of the disputed tax would be the norm), but seeking to recover payments it has already made, in some cases long before the claims were submitted. It is also, in our judgment, artificial to suggest that fear of penalties precluded Leeds from challenging HMRC's position; again, the dispute is not about the tax treatment of supplies Leeds is continuing to make, but about supplies it has already made. It has accounted for the tax and is (and was) at no risk of penalties. There is moreover simply no evidence before us that Leeds was deflected from an earlier challenge by either of these factors.

94. We reject, therefore, the argument that Leeds was deprived of an effective remedy.

95. We also reject the argument that there is, or has been, a lack of legal certainty. It is perfectly true that the impact of the three-year cap on claims which had accrued at the date of its introduction, whether one takes that date as 18 July 1996 or 4 December 1996, was unclear, and for a number of years. But we agree with Mr Macnab that there was little room for doubt that the three-year cap was effective so far as it affected payments made after 4 December 1996, the tribunal's decision in *Scottish Equitable* notwithstanding. The CJEU's judgment in *Fantask*¸ in which it explained (see para 77 above) that EU law does not prevent a member state relying on a national limitation period even when it has not properly transposed the directive, was itself given in 1996 and from then on it should have been clear that there was, at the very least, a strong possibility that claims for repayment of sums incorrectly paid would be affected by the three-year cap. The reality, as the evidence and the chronology we have set out above show, was that Leeds' failure to make an earlier claim or to pursue the claims it did make to a conclusion had nothing to do with uncertainty about the limitation period but was attributable to uncertainty about the correct tax treatment of the supplies.

96. The argument that there is anything disproportionate about a time limit of three years from payment is also not supported by any of the authorities on which Mr Ghosh relied, and we reject it. On the contrary, there is nothing in *Marks and Spencer* or any other of the numerous cases to which we were referred which suggests that a period of three years is too short—in *BAPV* the CJEU found nothing objectionable in principle in a two-year limit—and it is equally clear that a time limit which runs from payment rather than discovery of the error is unobjectionable: see, for example, *Edilizia Industriale Siderurgica Srl*. The authorities show, indeed, that it is only in an extreme case, such as *Emmott*, when a time limit which is ordinarily of a reasonable duration has expired before the person affected could have taken action to assert his rights, that judicial intervention might be appropriate.

97. We do not think there is a true parallel between this case and *BAPV*, beyond the fact that the tax authority in each case changed its position. The distinguishing features of *BAPV* were, first, that (as para 32 of the judgment shows) there had been judicial scrutiny of the tax liability of the supplies, and thus a challenge to the tax authority's position, which is not the case here; and, second, that BAPV had been forced to make a refund to its customers but was left with no corresponding remedy. It would, at least in a practical sense, have been impossible for BAPV to challenge the tax authority's view of the correct tax treatment of the supplies in view of the fact that there was already domestic case law on the subject, but that is not the position in which Leeds found itself. Leeds could have asked for a ruling, as we have said, and appealed against it, but it did not do so. Leeds has not made a refund and, as we understand the matter, will not be at any risk of having to do so.

98. We are satisfied that Mr Macnab's argument in respect of legitimate expectation is correct. It must have been clear to Leeds on 18 July 1996 (and if it was

not, should have been) that the then government intended to implement a three-year limitation period for s 80 claims. From that day on, Leeds could have had no more than a hope that Parliament might not enact the necessary legislation; it could certainly not assume that it would not. In fact, on 3 December 1996 Parliament passed a resolution, as we have said, which brought the three-year cap into effect; and from the passing of that resolution the only possible expectation which Leeds could have held, in respect of claims arising thereafter, was that they would be affected by a three-year time limit, and that Parliament would in due course pass (as it did) the legislation which provided for it. Leeds' claims were in fact so affected; and there has correspondingly been no infringement of its expectations. We cannot see any basis on which it could be said to be a legitimate expectation that the extension of the period for which the former sub-s 80(5) provided would continue indefinitely, when Parliament had made a resolution which removed it.

99. In addressing the question whether the principle of equivalence has been breached we begin by saying, in case there should be any doubt about it, that we reject the proposition implicit in Mr Ghosh's arguments that the fact that the overpayments in respect of the article 4.5 supplies were made because of the UK's failure to implement that part of the directive gives them some kind of special status such that the three-year cap should be disapplied. We find nothing in the authorities which supports the argument; indeed there is no reason to be derived from the jurisprudence relating to the principle of equivalence (or indeed any of the other principles of EU law discussed in this decision), whether of the CJEU or of the UK courts, which would justify distinguishing, for the purpose of applying a limitation period, between rights derived from a directive which has not been implemented at all, from a directive which has been incorrectly implemented, from a directive which has been correctly implemented but incorrectly applied, or from purely domestic legislation. The principle of equivalence requires that EU rights should be treated not less favourably than those derived from national legislation; it does not require that they be accorded a privileged status. The three-year cap does not discriminate between rights derived from different provisions (and Mr Ghosh did not argue that it did) and there is in our judgment no basis upon which we could disapply the three-year cap in respect of the article 4.5 supplies, merely because that part of the directive had not been implemented. It follows that there is no ground for treating the excess parking charges differently from the article 4.5 supplies.

100. The essence of Mr Ghosh's argument in respect of the principle of equivalence was that the period laid down for the recovery of overpayments of VAT was shorter than the period prescribed for the recovery of overpayments of some other taxes. Mr Macnab did not dispute the factual basis of the argument; his contention was that different periods for different types of claim were permissible and that the fact that more generous limits were set for other types of taxes was irrelevant. We agree. There may be perfectly valid reasons for different treatment of different taxes, for example because the manner in which a taxable person is required to account for VAT (normally quarterly, with payment to be made a month after the end of each quarter) differs from the manner in which a taxpayer is required to submit his self-

assessment for income tax, namely by 31 January following the end of the preceding tax year (which ends on 5 April). The real question, as the authorities to which Mr Macnab referred us on this point show, is not whether national law discriminates between one tax and another, but whether it discriminates between rights derived from EU law and similar rights derived from domestic law. Before 18 July 1996 the time limit for the making of claims for VAT refunds was, as it happens, more generous than the period applicable to other taxes. When it was reduced the new period applied to all output tax recovery claims, regardless of the basis of the claim. We do not detect any breach of the principle of equivalence in those circumstances, and in our judgment this argument too must be rejected.

101. We do not agree with Mr Ghosh that there is any need in this case for a reference to the CJEU. In our view the Court has already answered all the questions which arise in connection with this appeal, and we entertain no doubt about its outcome which could warrant a reference.

Disposition

102. For the reasons given, we dismiss the appeal.

Colin Bishopp
Upper Tribunal Judge

Nicholas Aleksander
Upper Tribunal Judge

Release Date: 3 December 2013