[2014] UKUT 0396 (TCC)

Upper Tribunal
(Tax and Chancery Chamber) **Appeal Number: FTC/34/2013**

Heard at The Tribunal Centre George House Edinburgh	Determination Promulgated
On 1 – 3 April 2014	08 September 2014
	……

Before

LORD DOHERTY
(Sitting as a Judge of the Upper Tribunal)

Between

TAYLOR CLARK LEISURE PLC

Appellants

and

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Philippa Whipple QC and Philip Simpson, Advocate instructed by KPMG Manchester

For the Respondent: Andrew Young QC, instructed by the Office of the Advocate General for Scotland

DETERMINATION AND REASONS

VAT – Fleming claims - Preliminary Issues – Time-bar: construction of VATA 1994, s. 80 – Entitlement: whether right to repayment assigned; whether right capable of assignation; VATA 1994, s. 43.

DECISION

The appeal is dismissed.

REASONS

Introduction

1. This is an appeal from a decision of the First-tier Tribunal ("the FTT") dated 19 December 2012 ([2013] UKFTT 792 (TC)).

2. From at least 1973 the appellant owned and operated a number of business and leisure facilities in England and Scotland including, in particular, bingo halls, cinemas and multi-use complexes. Turnover from this part of the appellant's business was largely generated from a variety of bingo games and from various types of gaming machines. As from 1 April 1990 the appellant undertook a group reorganisation. Leisurebrite Limited ("Carlton") was incorporated on 28 March 1990 as a wholly owned subsidiary of the appellant. (It changed its name to CAC Leisure PLC in 1991, to Carlton Clubs PLC in 1997, and to Carlton Clubs Ltd in December 2010). With effect from 1 April 1990 the appellant transferred to Carlton its bingo halls, cinemas and multi-use complexes and assets and liabilities related thereto ("the 1990 Agreement"). From that date Carlton generated the turnover from those activities.

3. Between 1973 and 2009 the appellant was the representative member of a VAT group. Carlton was a member of the VAT group between 1990 and 1998. During the period 1973 to 1998 the appellant overdeclared output tax (on the erroneous understanding that income from certain gaming machines, bingo machines and main stage bingo for cash prizes was not exempt). The decision in *Fleming t/a Bodycraft v Revenue and Customs Commissioners* [2012] UKHL 2, [2008} STC 324 led to the enactment of the Finance Act 2008, s. 121. In terms thereof claims for output tax overpaid (known as "*Fleming*" claims) in any prescribed accounting period ending before 4 December 2006 could be made until 31 March 2009.

4. Carlton made four *Fleming* claims to the respondents before 31 March 2009. The claims are fully described in the FTT's decision.

5. The first claim was made in November 2007. The respondents processed it for repayment to Carlton but by mistake repaid the monies to the appellant. On 7 July 2009 the respondents issued assessments to the appellant for recovery of the sums paid. The appellant requested a review. The review confirmed the assessments. On 28 February 2011 the appellant appealed to the FTT (TC/2011/01731).

6. The remaining *Fleming* claims were also based upon letters submitted by Carlton in November 2007. HMRC rejected these claims and Carlton appealed to the FTT (EDN/08/79, EDN/08/79, and EDN/08/162). After the expiry of the time-bar period the appellant requested that the claims in these appeals should be repaid to it. By a decision

dated 4 May 2011 the respondents intimated that those claims would not be paid to the appellant. The appellant appealed to the FTT (TC/2011/04303). Carlton withdrew appeals EDN/08/79 and EDN/08/162 on or about 26 January 2012. Appeal EDN/08/79 was sisted on 6 February 2012.

7. By directions dated 6 February 2012, issued following a case management hearing on 31 January 2012, the FTT directed that the following preliminary issues be determined in each of the appellant's appeals:

> "1. Whether the claims made by the appellant in this appeal, or any of those claims, are time-barred?
>
> 2. Whether the appellant is entitled to receive repayment of VAT overpaid between 1973 and 1998?"

8. The FTT held that the appellant's claims were time-barred. It also held that, in any event, the right to claim repayment for the period 1973-1990 had been assigned by the appellant to Carlton by the 1990 Agreement (and that the Agreement had been intimated to the Commissioners in January 2009). Alternatively, if the 1990 Agreement had not assigned the right to repayment for 1973-1990, entitlement had remained with the appellant until 31 March 2009 but then became time-barred because the appellant had not made a timeous claim. In respect of VAT overpaid between 1 April 1990 and 3 December 1996 Carlton had been the person entitled to claim repayment. Once it left the VAT group in 1998 it, rather than the appellant as representative member, had been invested with the claim and entitlement. If Carlton had not become so entitled on leaving the VAT group, it had become the entitled person on dissolution of the VAT group in 2009.

The present appeal

9. The respondents defended the FTT's decision on the time-bar issue. They did not fully support the decision on the entitlement issue. On the third day of the hearing they indicated that they wished to consider their position on it having regard to two decisions of differently constituted FTTs which had just been released (*MG Rover Group Ltd v HMRC; BMW (UK) Holdings Ltd v The Commissioners for Her Majesty's Revenue and Customs* [2014] UKFTT 327 (TC) and *Standard Chartered plc v HMRC; Lloyds Banking Group Plc v The Commissioners for Her Majesty's Revenue and Customs* [2014] UKFTT 316 (TC)). Thereafter the parties made further written submissions.

10. Both parties supported the reasoning of the FTT in *Standard Chartered plc v The Commissioners for Her Majesty's Revenue and Customs*. Neither sought to support the observations and reasoning of the FTT in *MG Rover Group Ltd v The Commissioners for Her Majesty's Revenue and Customs* insofar as they differed from the approach of the FTT in *Standard Chartered.* Contrary to the view expressed by the FTT in the present case, the

respondents accepted that in relation to overpayment between 1 April 1990 and 3 December 1996, the appellant, as the VAT group representative member (and following disbandment of the VAT group, as the last representative member), had been the person entitled to claim and receive repayment. However since the appellant made no claim by 31 March 2009 its claims were time-barred. The respondents' position in relation to the period 1973-1990 was that the appellant would have been the person entitled to claim repayment had it not been for the 1990 Agreement. They maintained that the effect of intimation of the 1990 Agreement was that as from January 2009 Carlton acquired from the appellant the right to receive repayment of the 1973-1990 overpaid VAT. The appellant submitted that the 1990 Agreement had not assigned that right to receive overpaid VAT; and that, even if it had, the appellant (as the VAT group representative member at all material times) had remained the person entitled to claim and receive the VAT overpaid in that period.

11. In the result the only contentious matters concerning the entitlement issue were (i) whether on a proper construction of the 1990 Agreement the appellant had assigned to Carlton the right to claim overpaid VAT for the period 1973-1990; (ii) whether, notwithstanding such an assignation, the appellant (as the VAT group representative member) had remained the person entitled to claim and receive overpaid VAT.

The legislation relating to overpayment and claims for repayment

12. The Value Added Tax Act 1994 ("VATA 1994"), s. 80 provided (at the times material to these appeals):

> "(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 under subsection (1B) above,

if the claim is made more than three 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, unless paragraph (b) below applies:

(b) in the case of a claim by virtue of subsection (1) above in respect of an erroneous voluntary disclosure, the end of the prescribed accounting period in which the disclosure was made; …

(6) A claim under this section shall be made in such form and manner and shall be supported by such documentary evidence as the Commissioners prescribe by regulations …

(7) Except as provided for 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."

There is no definition of "claim" in VATA 1994.

13. Part VA of the Value Added Tax Regulations 1995 deals with Reimbursement Arrangements. Regulations 37 and 43A provide:

"**37 Claims for credit for, or repayment of, overstated or overpaid VAT**

Any claim under section 80 of the Act shall be made in writing to the Commissioners and shall, by reference to such documentary evidence as is in the possession of the claimant, state the amount of the claim and the method by which that amount was calculated."

43A Interpretation of Part VA

"In this Part –'claim' means a claim made … under section 80 of the Act for credit of an amount accounted for to the Commissioners or assessed by them as output tax which was not output tax due to them, and 'claimed' and 'claimant' shall be construed accordingly; …"

14. Section 121 of the Finance Act 2008 provided (at the material times):

"121 Old VAT claim: extended time limits

(1) 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…"

The relevant VAT Directives and UK statutory provisions relating to VAT groups

15. Part 4.4 of the Sixth VAT Directive 77/388/EEC provided:

> "Subject to the consultations provided for in Article 29, each Member State may treat as a single taxable person persons established in the territory of the country who, while legally independent, are closely bound to one another by financial, economic and organizational links."

Virtually identical wording was contained in article 11 of the Principal VAT Directive 2006/112/EC.

16. The UK elected to allow VAT Groups. The original legislation was the Value Added Tax Act 1983 ("VATA 1983"), s. 29. The current legislation is the VATA 1994, s. 43 and s. 43B:

> "43(1) Where ….any bodies corporate are treated as members of a group, any business carried on by a member of the group shall be treated as carried on by the representative member, and -
>
> ….
>
> (b) any supply which is a supply …. of goods or services by or to a member of a group shall be treated as a supply by or to the representative member….
>
> 43B (1) This section applies where an application is made to the Commissioners for two or more bodies corporate, which are eligible….. to be treated as members of a group.
>
> (2) This section also applies where two or more bodies corporate are treated as
>
> members of a group and an application is made to the Commissioners –
>
> ….
>
> (b) for a body corporate to cease to be treated as a member of the group,
>
> ….
>
> (d) for the bodies corporate no longer to be treated as members of a group.
>
> ….
>
> (4) Where this section applies in relation to an application it shall ……..be taken to
>
> be granted with effect from-
>
> (a) the day on which the application is received by the Commissioners, or
>
> (b) such earlier or later time as the Commissioners may allow…"

Cases referred to

The principal cases referred to in the course of submissions were:

Amministrazione delle Finanze dello Stato v Meridionale Industria Salumi Srl (Joined cases C-66, 127 and 128/79) [1980] ECR 1237

Amministrazione delle Finanze dello Stato v San Giorgio SpA (Case 199/82) [1983] ECR 3595

Ampliscientifica Srl v Ministero dell'Economia e delle Finanze (Case C-162/07) [2011] STC 566

Carter v McIntosh (1862) 24D 925

Chubb Ltd v Revenue and Customs Commissioners [2013] UKFTT 579 (TC)

Commissioners of Customs and Excise v Cresta Holidays Ltd [2001] EWCA Civ 215, [2001] STC 386

Customs & Excise Commissioners v Thorn Materials Supply Ltd [1998] STC 725

Danfoss A/S v Skatteministeriet (Case C-94/10) [2013] STC 1651

Dilexport Srl v Amministrazione delle Finanze dello Stato (C-343/96) [1999] ECR-I 579

Deutsche Morgan Grenfell Group v Inland Revenue Commissioners [2007] 1 AC 558

Edilizia Industriale Siderurgica Srl v Ministero delle Finanze (Case C-231/96) [1998] ECR I-4951

European Commission v Ireland (C-85/11) [2013] STC 2336

FJ Chalke Ltd v Revenue and Customs Commissioners [2010] EWCA Civ 313, [2010] S.T.C. 1640

Fleming t/a Bodycraft v Revenue and Customs Commissioners [2008] UKHL 2, [2008] 1 W.L.R. 195

Gray Aitken Partnership Limited v Link Housing Association Limited [2007] SC 294

Investment Trust Companies v Revenue and Customs Commissioners [2012] EWHC (Ch) 458, [2012] STC 1150

Investment Trust Companies No 2 v Revenue and Customs Commissioners [2013] STC 1129

Link Housing Association Ltd v PBL Construction Ltd [2009] S.C. 653

Littlewoods Retail Ltd v Revenue and Customs Commissioners (Case C-591/10) [2012] STC 1714

Marks and Spencer plc v Customs and Excise Commissioners (C-62/00) [2002] STC 1036

Marks and Spencer plc v Revenue and Customs Commissioners (No 5) [2009] UKHL 8, [2009] STC 452

MG Rover Group Ltd v The Commissioners for Her Majesty's Revenue and Customs; BMW (UK) Holdings Ltd v The Commissioners for Her Majesty's Revenue and Customs [2014] UKFTT 327 (TC)

Midland Cooperative Society Ltd v HMRC [2008] EWCA Civ 305, [2008] STC 1803

Parkinson Engineering Services Plc (In Liquidation) v Swan [2009] EWCA Civ 1366, [2010] P.N.L.R. 17

Proto-Glazing VTD 13410

Rainy Sky SA v Kookmin Bank [2011] UKSC 50

*Rank Group Plc v Revenue and Customs Commissioners (*Joined cases C-259/10 and C-260/10) [2012] STC 23

Revenue and Customs Commissioners v Rank Group plc [2014] STC 470

Reed Employment Ltd v Revenue and Customs Commissioners [2013] STC 1286; 2014 EWCA Civ 32

Roberts v Gill & Co. [2011] 1 A.C. 240

Shop Direct Group v Revenue and Customs Commissioners [2013] EWHC 942; [2014] EWCA Civ 255

Test Claimants in the FII Group Litigation v Revenue and Customs Commissioners [2012] 2 A.C. 337, [2012] STC 1362

Triad Timber Components Limited v Inland Revenue Commissioners [1993] VATTR 384

Woolwich Equitable Building Society v Inland Revenue Commissioners [1993] AC 70

The time-bar issue

Submissions for the appellant

17. Ms Whipple acknowledged that the appellant had not submitted claims before 1 April 2009. She accepted that the claims made by Carlton had been submitted on Carlton's behalf, and not on behalf of the appellant. She recognised that if, on a proper construction of VATA 1994, s.80, claims had required to be made by the appellant before 1 April 2009 its claims would be time-barred. She maintained that on a proper construction of s. 80 all that was necessary was that some person had made such claims timeously.

18. On an ordinary reading of s. 80 "a person" (the appellant) had accounted to the respondents for VAT and had brought into account as output tax amounts that were not output tax due (s. 80(1)). S. 80(2) required "a claim being made for the purpose". The "purpose" referred to was the purpose of obtaining credit or repayment of the amount overpaid. S. 80(2) did not require that the claim be made by or on behalf of the person who had made the overpayment. The absence of express linkage between s. 80(1) and s. 80(2) had been deliberate. The same formulation had been used in statutory provisions relating to the recovery of other indirect taxes which had been overpaid. By contrast statutory provisions for recovery of direct taxes expressly required that the person who made the overpayment, or was assessed to the tax be the person who made the repayment claim. S. 80(2) claims need not be made by the person referred to in s. 80(1). Where, as here, claims for repayment had been made timeously by someone else (Carlton) the requirements of s.80 were satisfied. Carlton's claims were the relevant claims for the purposes of determining whether the cap in s. 80(4) (read with the Finance Act 2008, s.121) prevented

enforcement. No assistance was to be had from the terms of the 1995 Regulations. It was not legitimate to construe s. 80 by reference to subsequent secondary legislation. The question ought properly to be viewed as one of substitution rather than time-bar. The real issue was whether the appellant was permitted to take over Carlton's claims by asserting its rival entitlement to payment.

19. A purposive approach also pointed to the appellant's construction being correct. The general purpose of s. 80 was to set out the domestic rules enabling a taxpayer to assert his EU law right to repayment of overpaid VAT. The specific purpose of s. 80(2) was to put the Commissioners on notice of a claim under s. 80(1), not to restrict the categories of persons who were permitted to make claims. S. 80 ought to be construed so as to permit the substitution of one claimant for another in appropriate circumstances, *e.g.* where through mistake a claim has been made by the wrong person; or where a claim has been made by a representative member of a VAT group but both the VAT group and the representative member have been dissolved. The fact that there was some scope for amendment of claims (*Reed Employment Ltd v Revenue and Customs Commissioners* [2013] STC 1286*),* and the fact that rules of procedure applicable to civil litigation (e.g *CPR 19,* and *Rules of the Court of Session, chapter 24*) permitted the substitution of one party for another even after the expiry of a limitation period, were prayed in aid as tending to support, by analogy, the appellant's construction. In this connection reference was made to *Gray Aitken Partnership Limited v Link Housing Association Limited* 2007 S.C. 294; *Link Housing Association Ltd v PBL Construction Ltd* 2009 S.C. 653 *; Roberts v Gill & Co.* [2011] 1 A.C. 240; and *Parkinson Engineering Services Plc (In Liquidation) v Swan* [2009] EWCA Civ 1366, [2010] P.N.L.R. 17.

20. Finally, Ms Whipple submitted that the respondents' construction of s.80 breached EU law, and in particular the principles of equivalence and effectiveness. The appellant was entitled under EU law to a refund of overpaid VAT: *Marks and Spencer plc v CEC* [2002] STC 1036 at para 30. It was for member states to lay down the detailed procedural rules governing actions for safeguarding rights which derive from EU law, but such rules must comply with the principles of equivalence and effectiveness. The principle of equivalence required that the rules were not less favourable than those governing similar domestic actions. The principle of effectiveness required that the rules did not render virtually impossible or excessively difficult the exercise of the rights conferred by EU law.

21. The relevant comparator claims for the purposes of the equivalence principle were claims for repayment of taxes, both direct and indirect. In relation to direct taxes at the material time the statutory right to claim repayment (Taxes Management Act 1970, s.33) had not excluded restitutionary claims (*Test Claimants in the FII Group Litigation v Revenue and Customs Commissioners* [2012] 2 A.C. 337). Since such restitutionary claims could have been pursued by raising an action they could have benefited from the flexibility inherent the court rules of procedure (*CPR 19,* or *Rules of the Court of Session, chapter 24*) - flexibility which, on the respondents' construction, was unavailable in relation to a s. 80 claim. That construction would result in a breach of the principle of equivalence.

22. Further, the proper conclusion here was that the respondents' construction would make it impossible, or excessively difficult, for taxpayers to recover overpaid VAT (*Danfoss A/S v*

Skatteministeriet (Case C-94/10) [2013] STC 1651). That was contrary to the principle of effectiveness.

Submissions for the respondents

23. Mr Young submitted that there was no ambiguity as to the meaning and effect of s.80. S. 80(2) imposed a procedural step requiring a claim to be made for the purpose of obtaining credit or repayment of overpaid VAT. In the ordinary case s. 80(4) had provided a three year limitation period for the making of that claim, but claims for the relevant tax years claims had had to be submitted by 31 March 2009. The matter was one of construction: but it was not without interest to note the observations by Simon Brown LJ concerning the construction of analogous provisions dealing with insurance premium tax (*Commissioners of Customs and Excise* v *Cresta Holidays Ltd* [2001] EWCA Civ 215, [2001] STC 386, at para 16).

24. On an ordinary reading of section 80 it was plain that a claim made by or on behalf of the claimant had to be made before the expiry of the limitation period. As no such claims had been made by or on behalf of the appellant its claims were time-barred.

25. In the event that a purposive construction of s. 80 was appropriate the result was the same. The purpose of the section was to enable claims for repayment of overpaid VAT to be made within the limitation period.

26. The respondents' construction did not breach EU law principles of equivalence or effectiveness. The relevant comparators for the purpose of the principle of equivalence were claims for repayment of other indirect taxes. The right conferred by s. 80 was not less favourable than the rights under domestic law to recover other indirect taxes. Even if, contrary to the respondents' submission, the relevant comparator claims included restitutionary claims for the recovery of direct taxes, the principle of equivalence had not been breached. The authorities relied upon did not support the contention that a rival claimant could found upon a claim made by another party in order to defeat a plea of time-bar in respect of its own claim. Further, the principle of equivalence did not oblige a member state to extend its most favourable rules governing reimbursement to all actions for repayment of charges or dues levied in breach of EU law (*Dilexport Srl v Amministrazione delle Finanze dello Stato* (Case 343/96) [1999] ECR-I 579, para 27).

27. The respondents' construction did not contravene the EU law principle of effectiveness. Time-bar provisions such as those in s. 80 were compliant with EU law (*Investment Trust Companies v Revenue and Customs Commissioners* [2012] EWHC 458, [2012] STC 1150, per Henderson J at para 142). It was not suggested that the limitation period applicable here had made it impossible or excessively difficult for a timeous claim to be made. Nor could it be said that any other aspect of s. 80 made it impossible, or excessively difficult, for taxpayers to recover overpaid VAT. On the contrary, the simple fact was that the appellant had failed to claim in time. Its claims had become time-barred through the normal application of an EU law compliant limitation provision.

Decision and reasons

28. The meaning of the relevant provisions of s.80 appear to me to be readily ascertainable employing ordinary canons of statutory construction. I do not consider it necessary, or useful, to embark upon an examination of rules of procedure which apply in court proceedings as an analogical aid to statutory interpretation.

29. In my opinion the FTT were correct to decide that the appellant's claims are time-barred. I am in very substantial agreement with their reasoning on this issue. (However, I disagree with the observations in para 67 anent the position on disbandment and the suggested agency relationship: see para 36 *infra).*

30. On an ordinary reading of s. 80 a claim made by or on behalf of any claimant for credit or repayment to him requires to have been made prior to the expiry of the relevant limitation period.

31. S. 80(2) qualifies s. 80(1), s. 80(1A) and s. 80(1B). It provides that the Commissioners "shall only be liable to credit or repay an amount under this section *on a claim being made for the purpose*"(the emphasis is mine). A "claim … made for the purpose" of s. 80(1) is an assertion by a person (the claimant) (a) that *he* has accounted for VAT for a prescribed accounting period; (b) that *he* has brought into account an amount of output tax not due; and that, accordingly, the Commissioners are liable to credit *him* with that amount: "him" in this context means the person who accounted for VAT or his agent, assignee or certain successors (*Midland Co-operative Society Ltd v Revenue and Customs Commissioners,* [2008] EWCA Civ 305*,* per Arden LJ at para 14). A "claim … made for the purpose" of s. 80(1A) is the assertion by a person (the claimant) that the Commissioners have assessed him to VAT and brought into account as output tax an amount that was not output tax due, and that they are liable to repay him. A "claim … made for the purpose" of s. 80(1B) is an assertion by a person that he has paid to the Commissioners VAT which was not due and that the Commissioners are liable to repay him. In each case the "claim… made for the purpose" is a claim by the claimant that he satisfies the requirements of the subsection and that the Commissioners have a liability to credit (or repay) him the amount claimed. In its turn s. 80(4) qualifies s. 80(1), (1A), (1B) and s. 80(2). A claim by a claimant that he satisfies the requirements of s. 80(1), or 80(1A) or s. 80(1B) and that the Commissioners have a liability to credit (or repay) him the amount claimed must be made before the expiry of the limitation period. That is the natural and ordinary meaning of the relevant provisions. It is a construction which is sensible and which sits comfortably with the rest of s. 80.

32. By contrast, on the appellant's construction, as long as a person claims within the limitation period that the Commissioners are liable to credit or repay him, any other person (or persons) may make a "rival" claim (or claims) after the expiry of the limitation period. The only qualification which Ms Whipple suggested was that the window for making a rival claim was only open until the original claim was resolved.

33. In my opinion there is nothing in the language of the provisions which supports the appellant's construction. Nor does a purposive construction favour Ms Whipple's approach. A clear purpose of s.80 was to impose a limitation period within which any claimant may make a claim for credit or repayment to him of output tax accounted for or paid by him. The appellant's construction would have the result that a claimant could make a "rival" claim to the Commissioners for credit or repayment to him after the expiry of the limitation period. That would be inimical to the purpose of the limitation provision. In my opinion it would be an absurd result.

34. The respondents' construction does not breach the EU law principle of equivalence. The appropriate comparison is with recovery of other overpaid indirect taxes. The distinction between direct and indirect taxes is clear and well established. Different tax regimes apply to them. A feature of the respective regimes is that different provision exists for the recovery of overpaid taxes. Section 80(7) of VATA 1994, and corresponding provisions for repayment of other indirect taxes which have been overpaid, put in place an exclusive statutory basis of liability for repayment (see *e.g.* Finance Act 1994, para 8(7) of Sch 7 (insurance premium tax); Finance Act 1996, para 14(6) of Sch 5 (landfill tax); Landfill Tax (Scotland) Act 2014, s. 29(6) (Scottish landfill tax); Finance Act 2001, s. 31(5) (aggregates levy); Finance Act 2000, Para 63(6) of Sch 6 (climate change levy)). By contrast, at the material time the statutory rights which were conferred for recovery of direct taxes (*e.g.* TMA 1970, s. 33) did not exclude common law rights of redress (*Test Claimants in the FII Group Litigation v Revenue and Customs Commissioners*, *supra*, per Lord Walker at para. 119)). Once the correct comparator is identified it is evident that equivalent provision is made for the repayment of overpaid VAT and other indirect taxes. Those seeking to claim repayment of VAT are not treated less favourably than those exercising (domestic) rights to reclaim other indirect taxes. Given the view I have reached as to the relevant comparator it is not necessary to decide what the position would have been had restitutionary claims for the recovery of direct taxes been an appropriate comparator: I prefer to reserve my opinion on that question.

35. Further, I reject the contention that the respondents' construction contravenes the EU law principle of effectiveness. Time-bar provisions such as those in s. 80 are compliant with EU law (*Investment Trust Companies v Revenue and Customs Commissioners*, *supra,* per Henderson J at para 142). The limitation period applicable here did not make it impossible or excessively difficult for a timeous claim to be made; indeed, nothing in s. 80 made it impossible, or excessively difficult, for taxpayers to recover overpaid VAT. Very many taxpayers made timeous claims and recovered the relevant amounts. The fact that the appellant did not provides no justification for concluding that the respondents' construction contravenes the principle of effectiveness.

36. The appellant made no claims prior to the expiry of the limitation period. The claims made by Carlton were not claims made by or on behalf of the appellant. Carlton's claims have not been assigned to the appellant, nor has the appellant otherwise succeeded to them. The appellant does not stand in Carlton's shoes. The appellant's claims are time-barred as a result of the normal application of an EU law compliant limitation provision.

37. It follows that the FTT was correct to hold that the appellant's claims are time-barred, and that the appeal against the FTT's decision should be dismissed. That is determinative of the appeal. However, in deference to the arguments which I heard on the second preliminary issue - entitlement - I shall provide a brief outline of my views.

The entitlement issue

Introduction

38. Neither party sought to support the FTT's analysis of the relationship between the representative member and group members as being one of agency. Nor did either support its view as to the consequences for the appellant of Carlton's departure from the VAT group in 1998; or its view as to the consequences for the appellant of disbandment of the group. I agree with the parties that the FTT fell into error in relation to those matters, and I find the analysis and reasoning of the FTT in *Standard Chartered* persuasive in relation to them (and preferable to the approach taken by the FTT in *MG Rover*). It follows that in respect of overpayment between 1990 and 3 December 1996, the appellant was, as the VAT group representative member (and following disbandment of the VAT group, as the last representative member), the person entitled to claim and receive repayment; and that the FTT was wrong to hold that the appellant was not the entitled person. That being so, the question whether the effective date of disbandment of the VAT group was 28 February 2009 or 12 May 2009 is of no moment. I turn then to what, ultimately, were the two contentious matters concerning entitlement.

Whether on a proper construction of the 1990 Agreement the appellant assigned to Carlton the right to claim overpaid VAT for the period 1973-1990?

39. The FTT held that on a proper construction of the Agreement the appellant's right to repayment of overpaid output tax was assigned to Carlton. I disagree, for the following reasons.

40. The Agreement begins with a recital that the appellant agrees to transfer to Carlton "the whole business, undertakings and assets" of the operating units listed in the Appendix. The operative part of the agreement begins "The assets transferred consist of:-" and it proceeds to list them. The words "consist of" suggest that the list which follows is an exhaustive statement of the assets transferred. The only provision which might arguably be wide enough to include the right to recover overpaid VAT is "All trade debtors and *all other sums owed*" (emphasis added).

41. Prior to the Agreement the appellant and a number of subsidiary companies carried on a variety of businesses. Cinema, multi-use complex and bingo businesses were carried on by the appellant. Night club and restaurant businesses were also operated within the group. The appellant and its subsidiaries were the members of a VAT group and the appellant was the representative member. At the time of the Agreement the Commissioners owed no sum to the bingo, multi-use complex and cinema businesses operated by the appellants. The appellant, as representative member, was the person entitled to claim repayment of output tax overpaid by the VAT group. Any sum owed by the Commissioners was a debt to the

single taxable unit which comprised the VAT group - in relation to which the appellant, *qua* representative member, was the legal emanation. There was no debt due by the Commissioners to any member of the group *qua* constituent member or *qua* VAT generating member. *A fortiori,* there was no sum owed by the Commissioners to any particular business or businesses carried on by a member of the group. Accordingly, the debts owed to the businesses which were assigned to Carlton did not include any sum owed by the Commissioners to those businesses.

42. Moreover, in my opinion at the time of execution of the Agreement a reasonable person, reading its terms and being informed of the relevant surrounding facts and circumstances, would have concluded that no right to reclaim output tax overpaid by the group in the past was being assigned. He would not have understood the subject matter of the Agreement to extend to rights which were vested in the appellant as representative member of the VAT group. He would have noted the absence of any reference at all to VAT in the Agreement. The relevant surrounding facts and circumstances included the history of the businesses, the commercial and administrative purposes of the reorganisation to be brought about by means of the Agreement, and the fact that Carlton was a wholly owned subsidiary of the appellant; the fact that the appellant had been the company which had generated the output tax and had paid it prior to the Agreement; and the fact that following the Agreement the appellant was to remain as representative member of the VAT group, with the right to reclaim VAT which was overpaid in the future.

43. It follows in my view that the right to recover output tax wrongly accounted for prior to the Agreement was not assigned by the appellant to Carlton. Thus until the expiry of the time-bar period on 31 March 2009 the appellant, as representative member, was entitled to claim repayment of overpaid output tax for the whole period 1973 to 3 December 1996.

Whether, even if the right to repayment of overpaid VAT for 1973-1990 was assigned by the appellant to Carlton, the appellant (as the VAT group representative member) remained the person entitled to claim repayment of it?

44. On this scenario the appellant argued that one of the consequences of VATA 1994, s. 43 (and its predecessor VATA 1983, s. 29) was that the Commissioners' relationship with the representative member could not be affected by an assignation by the representative member in favour of another member of the VAT group (*cf.* para 90 of the FTT's decision). In my opinion the argument is not supported by a proper reading of s. 43. It is also inconsistent with principle and authority.

45. S. 43 makes provision for supplies of goods or services by or to a member of the group being treated as supplies by or to the representative member (s. 43(1)(b)). Supplies by a member to another member of the group are to be disregarded (s. 43(1)(a)). The VAT unit is the VAT group and the legal emanation of it is the representative member. The VAT legislation takes effect subject to the general law unless the general law is excluded (*Midland Co-operative Society Ltd v Revenue and Customs Commissioners*, *supra,* per Arden LJ at paras 9, 18). Under the general law incorporeal rights such as a claim under s. 80 may be assigned (*ibid.* per Arden LJ at para 31). There is nothing in s. 43 which prohibits - either

expressly or by necessary implication - a representative member from assigning a right to seek repayment of overpaid VAT. Were such an assignation to be made - to a group member or to an unrelated third party - it would effect no alteration to the legal regime imposed by s. 43. The VAT unit would remain the group, with supplies between the group and third parties being treated as supplies by or to the representative member. The representative member would continue to be treated by the Commissioners as the legal emanation of the VAT group. The representative member would have assigned its right to recover tax overpaid by it as representative member of the group: but the group's VAT dealings before and after the assignation would still be regulated in accordance with s. 43. Where the assignee was a group member the assignation would not result in it becoming a single taxable person in its own right. It would merely be enforcing a specific right of the representative member which the representative member had assigned.

Conclusions and disposal

46. Prior to 1 April 2009 the appellant as representative member of the VAT group would have been entitled to claim repayment of output tax overpaid by it in respect of the period 1973 - 3 December 1996. The appellant made no s. 80 claims before the expiry of the limitation period. Its claims are time-barred. The appeals are dismissed. I reserve meantime all questions of expenses.

Signed Date

Lord Doherty

Released on 08 September 2014