[2016] UKUT 0564 (TCC)

Appeal number: UT/2015/0097

VAT: Group treatment s 43 VATA* –Taylor Clark *and* HMRC and BMW v MGRover *applied – whether exceptional circumstances, held not proved, application to argue that claim made on behalf of representative member dismissed.

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

GALA 1 LIMITED **Appellant**

- and -

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

TRIBUNAL: MR JUSTICE HENRY CARR
JUDGE CHARLES HELLIER

Sitting in public at The Rolls Building, London on 6 and 7 December 2016

Jonathan Peacock QC and Michael Ripley instructed by Ashursts LLP for the Appellant

Peter Mantle, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. Gala 1 Ltd ("Gala") as assignee of Gala Leisure Ltd ("GLL") appeals against a decision of the First-tier Tribunal (the "FTT") (Judge Demack and Ms Hunter) of 14 July 2015 which dismissed GLL's appeal against the rejection by the Respondents ("HMRC") of certain claims GLL had made under section 80 of the Value Added Tax Act 1994 ("VATA") to recover wrongly paid VAT.

2. The claims arose in the context of the VAT grouping provisions of section 43 VATA. These were enacted pursuant to Article 4(4) of the Sixth VAT Directive (77/388/EC). Section 43 VATA provides that companies under common control may form a VAT group. In that event it requires that one member of the group be designated as the "representative member" and that what would otherwise have been supplies to and by third parties by and to the individual members are, for the purposes of VATA, treated as supplies by and to the representative member. In what follows we call the company which made the provision of goods or services, which is treated as a supply for VAT purposes by the representative member, the Real World Supplier or RWS.

3. The appeal follows closely on the heels of the judgment of the Inner House of the Court of Session in September 2016 in *Taylor Clark Leisure plc v HMRC* [2016] CSIH 54, 2016 S.L.T 873, and the decision of the Upper Tribunal in October 2016 in *HMRC and BMW (UK) Holdings Ltd v MG Rover Group Ltd and other appeals* [2016] UKUT 434 (TCC) (*"MGR")*. The decision of the FTT, which is the subject of the current appeal, was released in July 2015 and unsuccessful attempts were made for this appeal to be heard together with the appeals in *MGR*. For the purposes of the current appeal GLL accepts the judgment in *Taylor Clark* and the decision in *MGR* but reserves its position pending any further appeals.

4. Between 1973 and 1996 ("the Claim Period") the supply of facilities for playing bingo had been treated as taxable for VAT purposes. In that period VAT had been accounted for in relation to the supply by GLL and certain other companies of those facilities. It later became clear, and is accepted by HMRC, that the supplies were exempt and that output VAT should not have been accounted for on them.

5. GLL and the other companies had been members of VAT groups during the Claim Period. Some had been members, consecutively, of more than one group. For example, GLL was a member of what was called the "194 VAT Group" until September 1983, then a member of the Bass VAT group until December 1997 when it became a member of the Gala VAT group. A number of the other companies assigned to GLL any right they had to

recover overpaid VAT in relation to such supplies, which right has now been assigned to Gala.

6. GLL made claims in respect of the overpaid VAT on 27 March 2009. That date was significant because it was four days before the end of the period set by section 121 Finance Act 2008 for making claims for overpaid VAT for periods before 4 December 1996 without constraint as to when that VAT had been accounted for.

7. HMRC accepted that where claims related to supplies made by companies when registered for VAT in their own name and under their own VAT number, and where companies were members of a VAT group which at the time of the claims had been dissolved, such VAT should be repaid to them. However, it rejected those claims which related to supplies made by any company which had been a member of a VAT group which was still in existence at the time of the claim. This was on the basis that the only person entitled to repayment was the representative member and not the relevant RWS, and the representative member had made no claim. GLL appealed to the FTT against those rejections. The FTT dismissed its appeal.

8. In its original grounds of appeal against the decision of the FTT, which were served before *Taylor Clark* and *MGR*, GLL set out six grounds of appeal. Five of those six grounds traversed matters decided in those cases. Thus only one was argued before us, although the right to rely on the other grounds in higher courts was reserved. In addition, Gala sought permission to introduce another ground of appeal in reliance on the decision in *Taylor Clark*. As a result in this decision we address only those two matters.

The key cases

Taylor Clark

9. Taylor Clark Leisure was the representative member of a VAT group. Carlton had been a member of that group. While it was a member Carlton made supplies on which VAT was accounted for by Taylor Clark. Carlton then left the VAT group. It was then established that the supplies Carlton made were not VATable. The Inner House set out the issue before it:

> "[7] …The issue that remains relevant is as follows. The only timeous claim for repayment of VAT paid by the appellant's VAT group was made by Carlton. No timeous claim was made by the appellant itself, whether in its capacity as the representative member which embodies the VAT group or as an entity in its own right. The critical question is accordingly what the effect is of the claims by Carlton: can the VAT group embodied in the appellant as representative member rely on those claims for repayment of VAT overpaid by the group, when the claims were made timeously but by another member of the VAT group rather than the representative member?"

10. Before it addressed that question the Inner House embarked on a consideration of the concept of a VAT group and its legal effect, the position of a representative member, and the position of other members of the group. It found that for the purposes of VAT, but only for those purposes, the VAT group comprising all the members is to be treated as if it were embodied in the representative member, and the VAT group as so embodied is to be treated as if it were a legal person in its own right. It said that the group as so embodied might be described as a quasi-persona. It followed that, so far as VAT was concerned, the individual members of the group had no independent existence and functioned merely as part of the quasi-persona embodied in the representative member. When an individual member left a group it had no effect on the transactions that took place when the individual member was a member of the VAT group: those transactions were the transactions of the representative member as embodying the VAT group, and to the extent that they still had tax consequences they remained the transactions of the representative member embodying the VAT group. The Inner House held at [24] that:

> "Accounting for tax and payment of tax to HMRC are carried out by the representative member, and in our opinion exactly the same must apply to any sum that HMRC are due to pay to the taxpayer. Consequently, under the scheme of section 43, it is the representative member embodying the group, and the representative member alone, that has any interest in making the claim."

11. Even if the VAT group ceased to exist, the tax consequences of transactions that took place while the group existed remained those of the group, embodied in the representative member. But:

> "If the representative member has itself ceased to exist exceptional treatment would obviously be required, but for present purposes it is unnecessary to consider that possibility. As long as the representative member remains in existence, it can continue to embody and represent the affairs of the group."

12. The Court then answered the question before it in the affirmative, holding that the claim by Carlton must be treated as a claim made on behalf of the representative member as embodying the group. We set out its reasoning on this issue later in our decision.

MGR

13. *MGR* concerned appeals against two conflicting decisions of the FTT in relation to section 43, which the Upper Tribunal called the *Lloyds/SC* decision and the *BMW/MGR* decision. In *Lloyds/SC* the FTT had held that the right to

claim under section 80 lay with the representative member, not the RWS; this was in conflict with the decision of the FTT in *BMW/MGR*.

14. Three possibilities were canvassed before the Upper Tribunal, namely that the right to claim: (i) lay with the representative member for the time being of the VAT group of which the RWS had been a member at the time of the supply; (ii) lay with the representative member of that group until the RWS left it, when it reverted to the RWS, and (iii) lay with the representative member while the VAT group was extant but on the coming to an end of the VAT group devolved on the company which had borne the economic burden of the wrongly charged VAT.

15. In reaching its conclusions in *MGR* the Upper Tribunal found that:

(i) legislation implementing Article 4(4) must have the effect that members of a group were not recognised as individual taxable persons but must treat them as if they were a single taxable person [166],

(ii) the representative member must be treated as a continuing entity akin to a corporation sole [171];

(iii) as the members were to be treated as a single person they must be treated as having the rights of a single person [172]. Art 4(4) did not specify how the rights and obligations of that notional single person accrued to the persons recognised by the legal order of the State: that was left to the discretion of the State [167];

(iv) those rights were not however individual rights but rights together to be so treated [174];

(v) vesting those rights in the representative member achieved the effect of treating all the members as one taxable person because they were free to deal among themselves with the benefits arising from such rights [176]. No right arose to any member unless it was virtually impossible for the representative member to exercise it [183-4];

(vi) the effect of section 80 was to restrict the right to make a claim to the representative member [173];

(vii) a member state was not required to unravel the grouping arrangement to discover whether a particular member had any particular interest [179]; and;

(viii) the effect of grouping was intended to be permanent and not to be unravelled when members left a group or a group changed [181].

16. The tribunal had also considered the line of cases starting with *Amministrazione della Finanze dello Stato v SpA San Giorgio* Case C-199/82, [1983] ECR 3595 ("*San Giorgio*"), in which the CJEU developed the principle that a taxpayer has an EU law right to the repayment of a wrongly levied EU tax, and a member state must provide for the effective exercise of such a right. The tribunal approved the reasoning of the FTT in *Lloyds/SC* that this right in the context of VAT extended only to the taxpayer, or to a person such as the final consumer who *as a result of the operation of the VAT system* had borne the burden of the wrongly collected tax, but not to any other person ([86] and [185]).

17. The tribunal concluded at [113] that conferring that right upon the notional single person and giving it effect by paying the representative member for the members to deal with between themselves was an effective implementation of the right they together held.

> "Conferring the right on the RWS alone would ignore the fact that the burden fell on the members treated as a single person, not just the RWS. Treating the right as reverting to or remaining with a RWS is… inconsistent with the principle that all the members should be treated as the single taxable person".

18. Any *San Giorgio* right was to be treated in the same way as a right such as that to the credit of input tax. Vesting it in the representative member "achieved the effect of treating all the members as one taxable person because they are free to deal between themselves with the benefits arising from such rights." [176].

19. The tribunal thus preferred the reasoning of the FTT in *Lloyds/SC.* It held that the right to claim wrongly paid VAT under section 80 was held only by the representative member for the time being. It stated that:

> "[183] We conclude that section 43 requires and Article 4(4) permits rights in relation to wrongly paid tax arising under section 80 to be held only by the representative member both before and after the relevant RWS has left the group, or the group has been dissolved."

20. However, it also recognised the possibility of special cases, where an exception to this principle might need to be allowed:

> " [184] There may be cases, for example where a group is dissolved and the representative member has been irrevocably dissolved, in which it is virtually impossible for wrongly paid tax to be recovered through the representative member. That is not the situation in any of the appeals. If it arose it might, depending on the facts, be necessary to provide some other method by which the members could be treated as having the rights that would be ascribed to the representative member."

Gala's submissions of law

21. Mr Peacock, on behalf of Gala, notes that in *Lloyds/SC* the FTT discussed the possibility of exceptional circumstances requiring a right to be vested in a person other than the representative member. Having reached the conclusion that the right to claim vested only in the representative member, it said:

> "[113] The position is different, however, if the right of the representative member does not, in given circumstances, provide an effective remedy. This applies both to the case of a continuing group, and one that has ceased to exist. In those circumstances, if it is impossible or excessively difficult for the representative member to obtain reimbursement from the tax authority, so that the burden of the tax on the group has not been economically neutralised, a San Giorgio right will arise in favour of another person. However, such an enquiry does not encompass ascertaining where the burden of the tax has fallen, otherwise than through the operation of the VAT system itself. Questions of internal funding, whether they are general intra-group funding arrangements or arrangements for the contribution of a group member's share of the VAT to the representative member, are not relevant in identifying the person with the right to claim.
>
> [114]. Such an issue is likely to arise only in a case where either the group has ceased to exist, or a company that was formerly in the group has left in circumstances where a claim by the representative member of the continuing group does not provide an effective remedy. In the former case, the group itself has ceased to be subject to the statutory fiction, and in the latter it is the individual company that has so ceased. In each of those circumstances, that factor in our view dictates that, in determining where the claim should lie, regard should be had to the real transactions that have been undertaken. On that basis, such a right would, in our view, fall on the company that, had the single taxable person fiction not applied, would have been the taxable person in relation to the activity giving rise to the tax."

22. Mr Peacock notes the reference in [114] to a member leaving a group which continues (and the parallel with the facts of this appeal) and says that in *MGR:* the tribunal summarised the FTT's analysis in *Lloyds/SC*, recited its conclusion that in ordinary circumstances the section 80 right was that of the representative member unless it became impossible or unduly difficult for the representative member to obtain reimbursement, and, at [81], said that it had come "to the same conclusions as regards the outcome of these appeals and for much the same reasons as those of the FTT", later saying at [185]:

> "For the reasons set out above we conclude that the FTT in *Lloyds/SC* came to the correct conclusions for the correct reasons."

23. As a result, he says that the Upper Tribunal accepted the *Lloyds/SC* reasoning at [114] that where a claim by the representative member of the continuing group does not provide an effective remedy a claim may lie with the RWS,

being the person who, had the single taxable person fiction not applied, would have been the taxable person.

24. However, we do not consider that either in [81] or [185] the Upper Tribunal endorsed the example given by the FTT in [114]. The Upper Tribunal agreed with the reasons which led the FTT to their conclusion. Paragraph [114] was not among those reasons.

25. In particular, we do not consider that the Upper Tribunal assented to the proposition that only one of many members of the group, the RWS, would necessarily have a right to claim in such circumstances, given its statement in [184] that if a special case arose it might be necessary to provide some other method by which the "members", could be treated as having the rights which accrued to the representative member. The reasoning of the Upper Tribunal, which speaks of the rights belonging to the members rather than to any one of them, indicates that it did not consider that the principle of effectiveness required that only one should be chosen to exercise the right simply because recovery by the representative member was not possible or practical.

26. Gala rightly says that the example given in [184] of *MGR* is only an example. We agree that there may be other instances when permitting none other than the representative member to claim may render the right of the several persons in the group which are to be treated as a single person to recover unduly difficult. But we do not agree that where an RWS has left a group, VAT has been overpaid in respect of its supplies and for some reason a claim by the representative member is not an effective remedy, the only remedy will be a claim by the RWS.

27. Nor do we accept that just because an RWS has left a group, recovery of overpaid tax by the representative member will necessarily be an ineffective remedy: that would be a conclusion contrary to that reached in *MGR*. We accept however that there may be circumstances in which it is virtually impossible or excessively difficult for the representative member to obtain reimbursement.

28. Mr Peacock notes that at [120] the Upper Tribunal in *MGR* said that when a member leaves a group it takes with it rights which remain entangled with those of the other members. He argues that this must include a right to pursue a claim for overpaid tax. But this forgets the context of that paragraph which was an argument of one of the parties that, because the representative member dealt on behalf of the members, the rights it exercises were those of particular individual members. The Upper Tribunal did not accept that argument: it said that the rights were those given to the members as a group – as if they were a single person, so that when the RWS left the group it took with it the rights which it had before – rights which remain entangled with those of the other members with which it was to be treated as a single taxable person as regards the period of grouping. The Tribunal's conclusion was the reverse of that which Gala seeks to draw.

29. The principle of effectiveness requires that the state provides to the persons who together are treated as a single taxable person a mechanism for the exercise of their single right to the repayment of wrongly paid VAT. It is in that context that the Upper Tribunal's caveat in para [184] must be seen. If the mechanism provided – recovery through the representative member - is virtually impossible then it may be necessary to provide some other method by which the members may exercise their right. That is quite different from according to one member who happens to be the RWS the right to recover because it has had difficulties in discovering the representative member.

30. If it could be shown that it would be virtually impossible or excessively difficult for the representative member to claim then it would be necessary to determine which company or companies could make a claim. However in the light of our conclusion below in relation to Ground 4 it is unnecessary for us to address this issue.

Areas of agreement

31. On the basis of *Taylor Clark* and *MGR*, Gala accepted for the purposes of the appeal before us that the right to reclaim repayment of overpaid VAT was the right of a single taxable person, and that those rights were vested in the representative member. Therefore, save in an exceptional case, VAT could only be reclaimed by the representative member and not by the RWS. In addition, HMRC accepted that, although the case where a group has been dissolved and the representative member has been irrevocably dissolved is the paradigm example of an exceptional case where it was virtually impossible or excessively difficult for wrongly paid tax to be recovered through the representative member, it was not the only case, since it is not possible to define, in advance, all cases which could be regarded as exceptional.

Ground 4 of the Appeal

32. By Ground 4 of the Grounds of Appeal, which was argued before us, Gala relies on the acceptance by the Inner House in *Taylor Clark* and the Upper Tribunal in *MGR* that there could be special cases in which it would be necessary to provide a right other than to the representative member to recover wrongly paid VAT. It argues that the circumstances of the present case were sufficiently exceptional that it was in practice virtually impossible or excessively difficult for the recovery of the wrongly paid tax to be made at the time of the claim. It is said that the FTT erred in law in failing to reach this conclusion.

33. A very real difficulty with this ground of appeal is that GLL had no evidence of fact to establish what those exceptional circumstances were and, understandably, Gala did not attempt to adduce fresh evidence on this appeal. The key facts which would be necessary to establish that this was an exceptional case do not appear in the agreed statement of facts, and are not accepted by HMRC.

The first circumstance relied on

34. Gala submits that the tax was not due and was wrongly collected. In principle it should be repaid. In this case, there are no competing claims. Unlike some of the claims in *MGR* only one claim has been made. Therefore, if this claim is not successful, it will constitute an unwarranted windfall to HMRC, in breach of the effective right to recover tax wrongly collected, which is provided for by European law.

35. We do not accept this argument for the following reasons. First, it wrongly assumes that the right to repayment is vested in the entity which bore the economic burden of paying the tax, which it assumes is the RWS. That argument was expressly rejected by the Upper Tribunal in *MGR* at [84], [89], [96] and [180] – [181]. It therefore ignores the key concept of a single taxable person, vested in the representative member. A remedy to recover wrongly paid tax is given to the single taxable person through the representative member, which is compliant with the principle of effectiveness. Overpaid tax should not be repaid to the wrong person. Furthermore, the argument assumes that there is no effective remedy because the relevant representative member would have been virtually unable to reclaim the tax by March 2009. However, there is no evidence to establish this fact, and it is not accepted by HMRC. Unless it was virtually impossible for the representative member to claim, the fact that it did not claim and cannot now claim does not breach the principle of effectiveness.

The second circumstance relied on

36. Gala points out that the Claim Period goes back to 1973. It asserts that determining in 2009 what happened in the period from 1973 to 1996 would have been extremely difficult. During that period businesses have changed ownership; the representative member of the VAT group at the time of the claim might never have been related to any of the companies which made the supplies; and some companies had passed through three VAT groups in that time.

37. We do not accept this argument for the following reasons. In the absence of evidence, it is based entirely on speculation as to possible difficulties which might emerge if the relevant VAT groups, which still exist, were contacted. However, there is no evidence that Gala, or GLL, have tried to contact any of those groups, to ascertain whether any such difficulties exist in practice. There is no evidence that Gala or GLL have asked any of the VAT groups to identify the relevant representative members.

The third circumstance relied on

38. Gala submits that the only records of the transactions were likely to be those of the supplier rather than the representative member. Each member of the group is likely to have the best records of its own transactions including the nature and the value of the corresponding VAT overpayments.

39. We do not accept this argument for the following reason: there is no evidence about who holds the relevant records, and the assertions are not accepted by HMRC. It may well be incorrect. Given that claims for repayment had to be claimed by the representative member, it is possible that it kept, and it or its successor retains, the records of the individual members of the group. Furthermore, there is no evidence about what arrangements, if any, were established between the VAT groups and the companies who have assigned their rights to Gala, before they left the group. It may be that there is a contractual right to require disclosure of information from the VAT groups, but in the absence of evidence, Counsel for both parties could do no more than speculate.

The fourth circumstance relied on

40. Gala submits that when the relevant companies left the VAT groups there was at best uncertainty as to which entity could claim overpaid tax, and, for the greater part of the Claim Period, no expectation that tax was being wrongly collected. It was commercially unrealistic that the members would, at the time they left the relevant groups, have agreed some method for claiming and repaying tax many years after the event.

41. We do not accept this argument. First, in September 2008, before this claim was made, HMRC published guidance which made it clear at [6.2] that where the VAT group was still in existence, HMRC considered that the correct claimant in respect of overpaid tax was the representative member at the time when the claim was made. That guidance was not followed by GLL. Secondly, there is no evidence, and it is not accepted by HMRC, that the former members of the VAT groups, who have assigned their rights to GLL/Gala, did not make arrangements for claiming and repaying tax, should such claims arise after they had left.

The fifth circumstance relied on

42. Gala submits that at the time of the claims the companies did not know, and could not have known, the then representative members of the groups they had left: it was not enough to recall that a company was part of a group if one had to identify the current representative member at the time of the claim. It further submits that the FTT made a finding of fact that the relevant companies did not have such knowledge at [28] – [29] of the decision under appeal.

43. We do not accept this submission for the following reasons. First, although the FTT recorded at [28] – [29] that the name and address of the representative member could not have been found through the VAT Information Exchange System, and that there was no information in the public domain that would enable a person to identify the representative member of an extent UK VAT group, it made no finding about the state of knowledge of any of the companies who left the VAT groups. Secondly GLL/Gala serve no

evidence about the state of knowledge of those companies, which would have been essential to establish the relevant facts.

Assessment

44. We have considered the circumstances relied upon by Gala, which are said to render this case exceptional. We do not agree that such alleged circumstances, individually or cumulatively, make this a case in which it can be said that it was virtually impossible or excessively difficult for the representative member to claim. Gala's arguments wrongly focus upon the RWS, rather than the representative member, and rely upon assertions which it would have required evidence to establish.

45. We also bear in mind that this is an appeal which can only succeed on the basis of an error of law by the FTT. The FTT gave careful consideration to the arguments of GLL as to why this was an exceptional case, and did not accept them. We find no error of law in their decision.

The new Ground of Appeal

46. In its application to introduce a further ground of appeal Gala relies on the conclusion in *Taylor Clark* that Carlton's claim should be treated as made on behalf of Taylor Clark. Gala says that if we find against it on Ground 4, we should nonetheless find that the claims by GLL were brought on behalf of the relevant representative members. Whilst not accepting that the Appellant's Notice requires amendment, a draft amendment was submitted by Gala during this Appeal. We consider that the Appellant's Notice would require amendment for this ground to be argued. It does not appear in the Appellant's Notice, and was not argued before the FTT. Gala submits that this raises a pure point of law, and so amendment at this late stage should be permitted.

On the basis of Taylor Clark, can Gala claim under section 80?

47. There is an important distinction between the present case and *Taylor Clark*. In *Taylor Clark* the appellant ("TCL") was the person entitled to payment under section 80, because it was the last, and indeed the only, representative member of the relevant VAT group. The relevant section 80 claims were advanced by a different company, Carlton. In *Taylor Clark*, the appeal of TCL was allowed because repayment under section 80 was due to TCL as the representative member of the relevant VAT group. The Inner House made this clear at [37]:

> "The VAT in question was paid, in consequence of section 43, by the representative member as embodying the single taxable person. Any repayment will be due to the representative member as embodying the single taxable person."

48. In the circumstances of that case, the Inner House considered that the claims made by Carlton must be regarded as having been made on behalf of the Taylor Clark VAT group and stated at [31] that:

> "The result is that the appellant, as the representative member embodying the group at the relevant time, is entitled to repayment of any VAT that has been overpaid."

49. It was critical to the reasoning of the Inner House that the claim was made by the representative member. The Court stated at [24] that:

> "Consequently, under the scheme of section 43, it is the representative member embodying the group, and the representative member alone that has any interest in making the claim."

50. This argument raises an issue relating to the jurisdiction of the FTT and this tribunal. The argument is that in law the representative members made the claims. Section 83(1)(t) VATA provides a right of appeal with respect to a claim under section 80 but does not specify who may bring such an appeal. The long standing practice of the FTT (at least in relation to decisions involving the VAT chargeable on a supply for which an appeal lies under section 83(1)(b)) has been to permit an appeal to be made by a person with sufficient interest: thus a customer is permitted to appeal against a decision of HMRC in relation to a supply made to her. In this appeal Gala recognises that if this ground of appeal is introduced and is successful, repayment will have to be made to the relevant representative members. As a result, for Gala or GLL to maintain an appeal it would have to show either: (i) some economic interest in the payment which would be made to the representative members; or (ii) that the appeal was brought on behalf of the representative members. But there is no finding of fact by the FTT, and no evidence which permits a conclusion that Gala or GLL have such an interest, and no evidence that the representative members, if they were known, have appointed Gala or GLL their agent. Nor, for the reasons explained below, does the logic of *Taylor Clark* extend to requiring that an appeal by Gala is as a matter of law to be taken as an appeal by the representative members.

51. For this reason alone, we would refuse permission to amend the Appellant's Notice to introduce this new ground of appeal. However, in case we are wrong, we shall consider the other arguments that were addressed to us on this issue.

Did GLL make the relevant claims on behalf of the representative members?

52. In *Taylor Clark* the Court stated at [27 and 28] that:

> "In the context of section 43, and in particular the structures and relationships required by that section, we are of opinion that a claim for repayment or crediting of tax by an individual member of the VAT group must normally be construed as a claim made on behalf of the

representative member as embodying the group. Otherwise the claim would have no meaning: the individual member does not pay VAT while it is in the group and is not entitled to any repayment of VAT … a literal interpretation of such a claim is plainly inconsistent with the scheme of the legislation. In that situation we are of opinion that the claim must be construed purposively…

[28]… Consequently, notwithstanding that the letters bear to be claims written in the first person, we consider that the full legislative context taken together with a purposive interpretation of the letters requires that they be treated as claims made on behalf of the representative member of the VAT group."

And later the Court gave two reasons for its conclusion that the identity of the claimant for the purposes of section 60 was not a straightforward factual issue:

[35] …First, as we have indicated, the notion of a "claimant" in the present context can mean either the person who advances the claim or the person on whose behalf the claim is made. The first of these is essentially formal, and might, if it were correct, amount to a relatively straightforward issue of fact. The second meaning, by contrast, goes to the substance of the claim and allows for the possibility of a claim made by an agent. In the context of section 43, this may even be an unwitting agent. In our opinion it is this second construction that must be given effect…

53. The court concluded that the claim made by Carlton was to be treated as a claim made on behalf of TCL, due to the nature of a VAT group. Its conclusion was strengthened by the fact that in all four claim letters the heading gave the VAT reference number of Taylor Clark and in three of the four claim letters the heading referred to Taylor Clark by name, although Carlton's name and/or then VAT number was also included in the heading of some of the claim letters .

54. Gala submits that the Inner House held that as a matter of law, rather than of construction of the letters of claim, the claims had to be treated as made by TCL. That, it says, is a pure point of law on which no further evidence is needed. It is a point which can be dealt with by this tribunal and considering it causes no prejudice to HMRC which cannot be remedied in costs. Mr Peacock explained in the course of his argument that the only fact which it was necessary to establish was that letters of claim had been sent. It was not necessary to interpret those letters, or even to read them, in order to see whether the claim could be said to have been made on behalf of the representative member. As a matter of law, this was deemed to be the case

55. We do not agree with this interpretation of the *Taylor Clark* judgment, for the following reasons. First, the Inner House made clear that in the context of the legislation, a letter of claim by an individual member should "normally" be

construed as having been made on behalf of the representative member. This admits the possibility that the letter might not be so construed. If Gala's submission was correct, this would never be the case.

56. Secondly, it is clear from the *Taylor Clark* judgment, when read as a whole, that the Court conducted the exercise of construing the letters of claim in the context of the scheme of the legislation. The letters were construed "purposively" in that context; there was no principle of law being enunciated that any letter making a claim by a group member can only be written as agent of the representative member no matter what its content or the circumstances of its creation.

57. In particular. the Inner House stated at [35] that:

> "In our opinion it cannot be said that the identity of the claimant is a straightforward issue of fact. Clearly the facts are relevant to the issue, but the question as to who is the claimant for the purposes of section 80 claim involves the application of the legal test to the facts, and in the present case it is the application of that legal test that is in dispute."

That passage makes clear, in our judgment, that this question is not simply the application of a rule of law, but rather the application of a legal test to the facts of the case.

58. For that reason, the Inner House made clear that it was essential to interpret the letters that passed between Carlton and HMRC, in order to ascertain whether they were capable of being construed as a claim on behalf of TCL. It stated at [35] that:

> "While the letters sent by Carlton to HMRC are in themselves facts, the critical question for present purposes is the interpretation of those letters. In particular, on the basis of the letters, it must be determined who is the claimant for the purposes of section 80."

59. If Gala's submission was correct, it would be unnecessary to interpret the letters sent by GLL to HMRC, or even to read them. Indeed, Mr Peacock explained that, since, as a matter of law, those letters had to be regarded as claims made on behalf of a representative person, even if they expressly stated that they were made only on behalf of GLL, and no one else, that would make no difference. In our judgment, this cannot be right, given that the critical question is the interpretation of the letters.

60. Gala accepts that there is nothing in the letters of claim in the present case to suggest that the claims were being made on behalf of a representative member. HMRC points out that, in contrast to the facts in Taylor Clark, in the heading of the letters there was only the name of GLL and the only registration number given was that of GLL (and its then VAT group) not that of any of the relevant VAT groups. Furthermore, the letters made clear that the claims were made by GLL. They expressly stated that GLL had included certain clubs in its claims

"as it is its right as the current owner where the clubs have been acquired by way of business as a going concern". GLL expressly claimed in those letters that it was entitled to repayment under section 80, on the basis of a valid assignment.

61. That analysis is confirmed by the findings of the FTT in the decision under appeal at [23] and [26]. For example:

> "By a letter of 27 March 2009… GLL sought to reclaim amounts that had been accounted for to HMRC as output tax in relation to [Main Stage Bingo] for prescribed accounting periods in the claim period."

62. HMRC further submits, and we accept, that the alternative ground now sought to be introduced by Gala is inconsistent with the way in which the case before the FTT had proceeded. Gala maintained that it was itself entitled to be paid, in circumstances where the overpayment related to a VAT group that had been dissolved before 27 March 2009.

63. HMRC further submits that if this point had been argued before the FTT it would have been appropriate to look at all the relevant background facts available at the time of the claim letters, in order to reach a finding of whether they were claims made by GLL on its own behalf, or as agent for the relevant representative members. If the ground of appeal is introduced at this stage, it has lost the opportunity to make those investigations. We agree.

64. Our understanding of the judgment of the Inner House means that the exercise Mr Peacock wishes us to conduct must be one of the proper construction of the letters written by GLL in making the claims. That is a question of law but one which is dependent on factual findings as to the background against which the documents were created. Whilst the decision of the FTT supports the fact that the letters were in fact written, it provides no factual findings as to the circumstances in which they were written. We are thus not equipped to undertake the exercise without further factual findings. But unless we find that the FTT made an error of law we are not permitted to make factual findings: see s 12(4) Tribunals Courts and Enforcement Act 2007. We have found no error of law by the FTT; thus we cannot properly undertake the exercise which would be required by this argument. Furthermore, having looked at the merits of this argument, we do not consider that it has any realistic prospect of success. We therefore refuse the application to amend the Appellant's Notice.

A Reference to the CJEU

65. Finally, Gala argued that, if its other arguments were not unsuccessful, we should make a reference to the CJEU. It submitted that the present appeal is the first to require detailed consideration of what makes an exceptional case, which is a question of European law that depends upon what is required by the principle of effectiveness, having regard to all the circumstances of the case. We do not think it necessary to make a reference to the CJEU. The principle of

effectiveness is settled law and does not require a reference for it to be clarified. The question of whether or not a case is exceptional requires application of the facts to those settled principles of law. In those circumstances a reference would not be appropriate; *John Wilkins (Motor Engineers) Ltd v HMRC* [2011] STC 371. Furthermore, Gala proposed three questions which it contended should be referred. The first two appeared to us to raise matters which were common ground on this appeal between the parties, and the third to raise issues which were a matter for the national court to decide.

Conclusion

66. We dismiss the appeal.

MR JUSTICE HENRY CARR

JUDGE CHARLES HELLIER

JUDGES OF THE UPPER TRIBUNAL
RELEASE DATE: 3 January 2017