[2017] UKUT 0379 (TCC)

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER **UTJR/2017/001**

BETWEEN

THE QUEEN
(On the application of
RAYMOND CLARKE and OTHERS) **Claimants**

and

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

TRIBUNAL: MRS JUSTICE ROSE

Sitting in public at The Royal Courts of Justice, Rolls Building, Fetter Lane, London EC4 on 13 and 14 July 2017

Richard Chapman (instructed by **Lockett Loveday McMahon**) for the Claimants
James Puzey (instructed by **VAT Litigation Team Solicitor's Office**) for the Defendant

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DECISION

I. INTRODUCTION

1. This is an application for permission to seek judicial review against the Defendant ("HMRC"). The proceedings began by way of application to the Administrative Court lodged on 21 October 2016. The proceedings were transferred to the Upper Tribunal (Tax and Chancery Chamber) by order of the Administrative Court on 30 December 2016.

2. The Claimants carry on business running residential care homes for profit. Until 2002 HMRC treated the supplies of services by these care homes as being exempt from VAT under what was then Group 7 of Schedule 9 to the Value Added Tax Act 1994 ("VATA"). That Group provided exemption for various supplies relating to health and welfare. The exemption meant that the Claimants were not registered for VAT, they did not charge VAT to their customers and they could not reclaim any VAT on the inputs that they acquired in order to provide their services. In 2002 the High Court held in *Customs and Excise Commissioners v Kingscrest Associates Ltd & another (trading as Kingscrest Residential Care Homes)* [2002] EWHC 410 (Ch) ('*Kingscrest*') that the exemption conferred by VATA did not cover the supplies provided by the care home which had brought the case after being refused registration. The care home was therefore entitled to be registered. Shortly after the judgment in *Kingscrest* was handed down, the wording of the exemption in VATA was amended so that it undoubtedly covered the supplies of care home service. They were properly exempt from registration from then on.

3. HMRC had to decide what to do about the fact that, because of HMRC's mistake about the proper construction of the exemption provisions, care homes in the period prior to *Kingscrest* had not been registered for VAT when they were, the High Court held, making taxable supplies. The care home operators should have been including VAT in their fees (at that time at the rate of 17.5%) and accounting for that output tax to HMRC, net of any input tax claimed. These care homes could strictly speaking have been required by HMRC to account for output VAT on the fees they had charged. Thus, if a care home had been charging £1,000 per week to a resident during the pre-*Kingscrest* period, HMRC would treat that £1,000 as being a fee of £851 and output VAT of £149 to be paid to HMRC. HMRC recognised that would be unfair because if the care home had known that it was making taxable supplies in the pre-*Kingscrest* period, it might have been able to add VAT to its fees and charge £1,175 and still keep £1,000 to fund the business whilst accounting to HMRC for the £175 (less any input tax incurred).

4. HMRC therefore adopted a policy that was set out in their publication called Business Brief 28/04 issued on 25 October 2004 ("BB 28/04"). The policy was adopted pursuant to HMRC's powers of collection and management. These powers were described by Lord Wilson in *R (Davies & anr) v HMRC* [2011] 1 W.L.R. 2625 in the following terms:

> "26 The primary duty of the revenue is to collect taxes which are properly payable in accordance with current legislation but it is also responsible for managing the tax system: section 1 of the Taxes Management Act 1970. Inherent in the duty of management is a wide discretion. Although the discretion is bounded by the primary duty (*R (Wilkinson) v Inland Revenue Comrs* [2005] 1 WLR 1718 , para 21, per Lord Hoffmann), it is lawful for the revenue to make concessions in relation to individual cases or types of case which will, or may, result in the non-collection of tax lawfully due provided that they are made with a view to obtaining overall for the national exchequer the highest net practicable return: *R v Inland Revenue Comrs v National Federation of Self-Employed and Small Businesses Ltd* [1982] AC 617 , 636, per Lord Diplock. In particular the revenue is entitled to apply a cost-benefit analysis to its duty of management and in particular, against the return thereby likely to be foregone, to weigh the costs which it would be likely to save as a result of a concession which cuts away an area of complexity or likely dispute."

5. Broadly speaking the policy set out in BB 28/04 was that care homes did not have to register for VAT in respect of the pre-*Kingscrest* period because HMRC was prepared to remit any output tax that the care homes were liable to pay on the fees that they had charged their customers. However, a care home could register if it so chose and complete a single VAT return covering the whole period for which it was unwittingly making taxable supplies pre-*Kingscrest*. If it chose to register, the care home would then have to account for VAT to HMRC.

6. A care home would, of course, only choose to register if it was likely to be beneficial for it to do so financially. There were two situations in which it might be beneficial for a particular care home to register for VAT in respect of the pre-*Kingscrest* period. One situation would be if the care home had incurred a large amount of input tax over that period, in excess of the output tax for which it had to account, for example if it had undertaken a refurbishment over the period. But the more likely reason why a care home might be financially better off would be if it was able to go back to its pre-*Kingscrest* customers and retrospectively charge them VAT on the fees that they had paid. Because the main customers for many of the care homes were local authorities, this retrospective charging of VAT was possible in a significant number of cases. BB 28/04 provided that if a care home registered for VAT in respect of the pre-*Kingscrest* period, it could account to HMRC for output VAT to the extent to which it had been able retrospectively to charge its pre-*Kingscrest* customers. It could then deduct from that charged output VAT an appropriate proportion of the input tax it had incurred. HMRC would then remit the uncharged VAT and collect the net output tax payable.

7. Some care homes registered for VAT once BB 28/04 was adopted, they completed a long first period VAT form and accounted for VAT as provided for by the policy. The Claimants did not register for VAT because for them it

was not financially worth their while to do so if BB 28/04 applied to them. However, in 2011 they became clients of a consultancy firm and in particular of Mr Terry Whittle. Mr Whittle formed the view that the policy set out in BB 28/04 was unfair because it did not compensate the care homes for all the loss that they had suffered arising from HMRC's mistake in exempting care home supplies in the pre-*Kingscrest* period. He advised the Claimants that they should register for VAT, put in a long first period VAT return and claim remission of output tax not in accordance with the policy set out in BB 28/04 but more broadly in a way which, he said, fully recompensed them for the financial detriment they have suffered as a result of HMRC's mistake.

8. HMRC have refused to deal with the Claimants' requests for remission of output tax on a more generous basis than that set out in BB 28/04. Indeed, they have now gone further and told the Claimants that since they have expressly eschewed any reliance on BB 28/04 and nailed their colours exclusively to the mast of a 'financial detriment' claim which HMRC have now rejected, they will be treated as not entitled to any remission of output tax. This means they will have to pay HMRC all the output tax (that is for £149 of every £1000 they charged in fees in respect of the pre-*Kingscrest* period) less any input tax they can prove they incurred; a position that leaves them much worse off than if they had chosen not to register for VAT at all.

9. The Claimants seek permission to challenge HMRC's stance. They say that because of the nature of the care home sector, if they had known that their supplies were taxable, they would have been able to add 17.5% as output tax to all their customers in the pre-*Kingscrest* period without suffering any reduction in the number of residents in their homes. The only way to put them back in the position they would have been in if they had been properly registered for VAT during the pre-*Kingscrest* period is for HMRC to remit all the output tax for which they would be liable to account and also allow them to reclaim all the input tax incurred.

10. There are currently 25 Claimants and, according to the claim form, there are a further 120 potential claimants who have requested remission of output tax on the basis proposed by Mr Whittle, but who had not yet received what the Claimants call "decision letters" from HMRC by the time the claim was issued.

II. AN EXAMPLE TO SHOW THE DIFFERENCE BETWEEN THE PARTIES

11. It is helpful at this stage to consider a worked example of the difference between the effect of BB 28/04 and the position that the Claimants want to achieve. The example used by the Claimants is that of Mr and Mrs Witherspoon. They put in a VAT return showing that they had charged £142,428 output tax. This output tax was a mixture of some retrospectively charged output tax added to fees paid in the pre-*Kingscrest* period and some output tax which has not been charged and which has been calculated by treating the fee originally charged as if it had included output tax. Of that £142,428 output tax, £126,697 was the un-charged output tax and £15,731 was charged output tax obtained in addition to the original fee charged. The Witherspoons worked out that the input tax they incurred over the period was

£24,611. They then calculated how much of that input tax should be attributed to the charged and uncharged output tax by working out the proportion that the two kinds of output tax bore to each other and applying that same proportion to the input tax. This meant that £21,892 of the input tax fell to be apportioned to the uncharged output tax and £2,718 fell to be apportioned to the charged output tax.

12. Without the benefit of BB 28/04 the Witherspoons, now they have registered, would be liable to pay to HMRC the excess of output tax over input tax namely £117,817 (being £142,428 output tax minus £24,611 input tax). However, if BB 28/04 applied, HMRC would forego the net uncharged output tax of £104,805 (being uncharged output tax of £126,697 minus the attributed input tax £21,892). HMRC would collect from them the net charged output tax namely £13,013 (being £15,731 minus £2,718). Although the Witherspoons would have to pay this net charged output tax to HMRC they have still benefited from registering because they have collected the additional £15,731 from their former customers who are prepared retrospectively to pay the VAT and the Witherspoons can keep £2,718 of that as reclaimed input tax. They are therefore better off than a care home which is not able to charge VAT retrospectively on its fees and so has still to forego any reclaim for the input tax paid over the relevant period, albeit that it is spared having to pay the uncharged output tax now to be regarded as having been incorporated in the fees it charged over the period.

13. The Claimants' case is that total remission of output tax is the only way that they can be fully compensated for the detriment that they have suffered as a result of HMRC's mistake. If they had been registered for VAT over the pre-*Kingscrest* period, some or all of them would have been able to add the 17.5% output VAT to the fees that they charged all their customers. They would have received that VAT and would have deducted in full the input tax that they had paid out on the goods and services they bought in, thereby in effect obtaining those goods and services more cheaply than they were able to do because they were thought to be exempt from VAT. The total remission scheme would reproduce more closely than BB 28/04 the position that they would have been in had they been registered for VAT in the pre-*Kingscrest* period.

14. What the Claimants want therefore is to have all the output tax remitted not just the uncharged output tax. They also want to be able to reclaim all input tax, subject only to deducting the charged output tax. If that was the scheme applied, the Witherspoons would have the benefit of the remission of the whole of the uncharged output tax of £126,697 and would be entitled to reclaim the whole of the input tax of £24,611 less the charged output tax of £15,731. They would therefore be able to claim from HMRC the difference between the charged output tax and the total input tax being £8,880. In this way even if a care home had not been able retrospectively to charge any output tax to its former customers, the care home would still be able to claim back all the input tax paid over the period because all the uncharged output tax would be remitted by HMRC. Under the total remission option, the Witherspoons would be substantially better off because they would have both the retrospectively charged output tax of £15,731 paid to them by their former

customers plus the rest of the input tax of £8,880 paid to them by HMRC making a total of an additional revenue for the business £24,611.

15. The Claimants recognise that if HMRC had decided as a matter of principle that there needed to be total remission of output VAT to remedy the position created by *Kingscrest*, the scheme would not allow care homes *automatically* to claim remission of output tax on that basis. Such an automatic scheme would have two serious disadvantages. First it would provide a windfall for those care homes which, because of their particular market circumstances, would not in fact have been able to add 17.5% to their fees over the pre-*Kingscrest* period. Secondly it would create a disincentive for the care homes to go back to their pre-*Kingscrest* customers and try retrospectively to impose the output VAT. Given that under the total remission scheme, any retrospective output tax recovered from old customers is deducted from the input tax reclaimed from HMRC, there is no advantage to the care home in going back to the old customers to ask them now to pay an additional 17.5%. The Claimants accept therefore that if a total remission scheme had been introduced by HMRC it would have had to provide for HMRC to investigate in respect of each care home whether (a) the business would really have been able to add 17.5% to its fees over the pre-*Kingscrest* period, at least up to the value of their input tax claim, and (b) whether the business had tried its best now retrospectively to recover output tax from the old customers.

16. It was because of the very detailed evidence relating to each individual Claimant's business and the market circumstances affecting the care home they operated that the parties accepted that it was appropriate to treat the permission stage of these judicial review proceedings in effect as raising preliminary issues which, if disposed of in favour of HMRC, would mean there was no need for all that detailed evidence to be filed and considered by the court. In this regard HMRC also point out that for these Claimants, all of whom only registered for VAT in 2012, there would be the additional point as to whether any failure on their part to be able to recover output tax from old customers now was the result not of particular market conditions but because of their own delay in registering.

III. HMRC'S POLICY AND CORRESPONDENCE WITH MR WHITTLE

17. The relevant passages of BB 28/04, under the heading "VAT - correcting liability errors", stated that changes in HMRC's interpretation of the law will usually take place as a result of litigation, meaning that the relevant legislative provision should always have been applied in accordance with the revised interpretation. It gave as an example the High Court ruling in *Kingscrest*. It went on:

> "Where past declaration errors were made on returns on the basis of Customs' interpretation of the law, there are three general principles that will apply in correcting matters. These principles also reflect our views … that businesses cannot take the benefit of the change in interpretation of the law without the burden.

> 1) Customs will not expect or require businesses to correct past declaration errors, which were made on the basis of Customs' interpretation of the law. Businesses will only be required to apply the new interpretation of the law from a current or future date, which we will announce. Where the new interpretation means that additional tax is due, this date will normally be after every registered trader has been informed of the change via VAT Notes.
>
> 2) If, following a Customs announcement of its new interpretation of the law, a business chooses to correct historical errors we will accept the corrections provided that the neutrality of the tax is respected and the business is no better off, and the Exchequer no worse off, than they would have been if the mistaken interpretation had not been made.
>
> 3) Where Customs exercise a discretion not to collect arrears of tax due, including circumstances covered by the existing misdirection class concession, we shall do so in a manner consistent with the above principles."

18. BB 28/04 then set out the text of the 'misdirection class concession' referred to there. This applies where a Customs and Excise officer has misled a registered person to his detriment. It states that in operating the misdirection class concession, Customs' policy is:

> "- to apply the concession to net tax due in the period, ie output tax net input tax and not to the tax under charged
>
> - to apply the concession across periods so that where the output tax and the related input tax fall in different periods like consequences shall ensue as if the input tax and the output tax fell in the same period and
>
> - not to apply the concession where the tax under charged has or is to be charged on to customers."

19. The effect of BB 28/04 was therefore to take a policy which had been adopted to deal with cases where an individual officer had misstated the true tax position to a tax payer and apply it to the situation where a whole class of taxpayers had been misled by HMRC's corporate mistaken interpretation of the law. The Annex to BB 28/04 set out an example of what happens where taxable supplies were treated by HMRC as exempt and the businesses were not previously registered for VAT. It says that businesses will not usually be required to register in respect of previous supplies that were treated as exempt. If a business does choose to register for VAT belatedly it will normally be asked to complete a long first period return covering the period from when it was in fact first liable to pay VAT to the end of the current period. Where the net tax position for the arrears period is that a repayment is due, Customs will repay this amount as a VAT credit. Where the net tax position for the arrears period is that an amount is due to HMRC and that amount has not been

declared or not paid, HMRC will remit the tax due under the misdirection class concession. It then states "the class concession here will be applied to net tax due (and not to output tax) and only across the whole of the arrears period". The Annexe went on:

> "A business that has registered belatedly may want to issue belated invoices to customers for VAT. Where, following the change in Customs' view of the law, a business issues additional invoices to recover undercharged VAT from his customers, the concession in the previous paragraph will not apply and he must account for and pay any VAT due. If additional invoices are issued to some customers and not others, relief under the misdirection class concession will only be available on amounts of VAT not charged, net of the associated input tax.
>
> Generally, then, there would in this example be no advantage to the taxpayer in being registered for VAT retrospectively unless large amounts of input tax were incurred in the arrears period on capital or overhead expenses."

20. On 27 March 2009, HMRC issued Revenue & Customs Brief 15/09. That stated that because of more recent case law, the misdirection class concession was being withdrawn and was being replaced by guidance on the web called "When you can rely on advice provided by HMRC".

21. The effect of RCB 15/09 on care homes covered by BB 28/04 was not clarified until the release of Revenue and Customs Brief 24/11 issued on 7 July 2011 and coming into effect from 1 August 2011. That stated that BB 28/04 was going to be withdrawn with effect from 1 August 2011 to take account of the withdrawal of the misdirection class concession in RCB 15/09. It also provided a link to the guidance in the Public Notice called "When you can rely on information or advice provided by HM Revenue & Customs". RCB 24/11 confirmed that HMRC did not require care home businesses to register. If businesses chose to register and submit a long first period VAT return, HMRC would 'accept the corrections' provided that all past errors were corrected, that the neutrality of the tax was respected and the business was no better off and the Exchequer no worse off than they would have been if the mistaken interpretation had not been applied. The Public Notice stated that where HMRC provide information or advice that is clear, unequivocal and explicit, they will be bound by that advice unless the taxpayer can show that he reasonably relied on that advice, that he made full disclosure of all the relevant facts and the application of the statute would result in his financial detriment.

22. The Claimants each applied to be registered for VAT between May 2012 and September 2015. The Claimants filed their long first period VAT returns setting out the whole of the input tax claimed by them from HMRC and the whole of the output tax due.

23. All the Claimants were sent a standard letter by HMRC in response to their registration. The letter stated in bold that BB 28/04 had made clear that traders choosing to register for VAT after the *Kingscrest* decision could take advantage of the misdirection class concession and remit tax due on certain supplies. It went on to say that this has now been superseded by other guidance in the form of RCB 15/09. Where a business cannot invoice its customers for a proportion of its sales, it must account for output tax on the full value of all its taxable supplies, but it may ask HMRC to consider remitting the tax due. The business must give its reasons for remission and state the amount of tax they would like to be remitted. That amount must be net of any associated input tax. The letters then set out various queries arising from the individual return lodged, for example if the long first period covered by the return went back further than 1 April 1993, HMRC pointed out that it was only from that date that local authorities were allowed to place and fund people in privately-owned care homes, asking the care home to check whether the date given was in fact correct.

24. Both before and after the Claimants lodged their registrations for VAT, Mr Whittle engaged in correspondence on their behalf with Mr Peter Woodham who was a Policy Adviser for Tax Admin Policy at HMRC about the claims for remission that the taxpayers would submit on his advice. Mr Whittle wrote to Mr Woodham on 8 February 2011 following discussions between them. In that letter he confirmed that Mr Woodham had told him that BB 28/04 remained HMRC policy in relation to cases of misdirection (despite the publication of RCB 15/09 withdrawing the misdirection class concession for other HMRC errors). Mr Woodham wrote back the same day confirming this. In that email Mr Woodham said that there was no guarantee that HMRC would accept any given claim and that they would only allow remission if the taxpayer would suffer real detriment if they sought to apply the law correctly for the past.

25. Later, in December 2012, Mr Woodham wrote to Mr Whittle referring to a conversation they had had shortly before. Mr Woodham wrote:

> "When we spoke in early November, I took your position to be that HMRC should look to only remit output tax amount, without taking into account any input tax. For the reasons we discussed, I pointed out that in cases such as these, this would result in the trader being in a more beneficial position than if the law had been correctly applied from the outset. As no-one can expect to gain from such a situation, account must be taken of input tax before any remission, and HMRC can only remit some or all of the net tax due, not the total output tax."

26. Mr Whittle wrote back to Mr Woodham in February 2013 challenging this view on a number of grounds and asking Mr Woodham to tell him on what aspect of his analysis HMRC differed so as to arrive at their rejection of his view of the matter. In his reply on 19 February 2013, Mr Woodham explained again that it is only the net tax due to HMRC that is remitted not the output tax in isolation: "To do otherwise would result in a gain to the taxpayer arising from HMRC's mistake".

27. Mr Whittle then wrote to Mr Woodham with detailed worked examples as to how he asserted the system should operate. Mr Woodham again rejected these in his reply on the basis that they would result in the taxpayer being better off: "No-one can have a legitimate expectation that they will gain from an HMRC mistake, and so it is the net tax due which represents the sum to be remitted." After further iterations to the same effect, Mr Woodham wrote to Mr Whittle on 15 March 2013 saying that the exchanges between them demonstrated that they fundamentally disagree on the principles in play and that he could not answer some of Mr Whittle's queries in any way other than to say that he disagrees for the reasons already expounded.

28. There was then a pause in the correspondence between mid March 2013 and June 2014. On 19 June 2014 Mr Whittle wrote to Mr Woodham to say that he was finalising requests for remission on behalf of his clients and attached a sample draft for Mr Woodham's consideration. At the close of his letter Mr Whittle said that Mr Woodham had confirmed in their discussions that he will consider the facts of each case presented. Mr Woodham replied on 22 August 2014 saying:

> "I have not found anything in your email and attachments to make me change my view that it would be beyond HMRC's powers to remit an amount of output tax rather than of net tax due."

29. Mr Woodham reminded Mr Whittle in that letter that HMRC had not required Mr Whittle's clients to do anything at all about "this historic VAT matter". Those clients had taken the decision to register for VAT and seek to charge on the VAT to pre-*Kingscrest* clients. HMRC was not asking the clients to pay the total charged and uncharged output tax shown or even the whole of the charged output tax but only the charged output tax less the appropriate proportion of input tax. He said that for HMRC to operate the scheme in the way suggested by Mr Whittle would give his clients a windfall. He concluded:

> "I can see nothing in these circumstances to indicate it would [be] significantly unfair for HMRC not to remit this extra sum.
>
> So I cannot see how a reduction in notional profits could in itself constitute detriment for these considerations, but even if it could there is no indication of how the asserted detriment is supposed to have actually affected your client nor the nature or scale of that effect."

30. Mr Whittle responded with a letter containing a point by point rebuttal of what Mr Woodham had written. In early September 2014 Mr Whittle wrote to Mr Woodham again to confirm what had been discussed by them in a conversation that morning. He said:

> "During our discussions you confirmed that HMRC will give fair consideration to claims for detriment suffered up to the value of the net tax due shown on the submitted VAT return.

> …
>
> You explained that although claims for remission of tax will be considered it is up to each trader to present to HMRC the nature and scale of the detriment they considered they have suffered by reliance on the incorrect guidance and each case would be considered on its own merits, but that remission of the net tax shown on the submitted VAT return would not be unreasonably withheld.
>
> …
>
> Could you please confirm that the above accurately reflects our discussions."

31. Mr Woodham wrote back on 5 September 2014 saying:

> "Thank you, yes that is what we discussed. We will always consider claims for remission on their own merits and will give careful thought to anything the claimant believes is relevant to the claim, though I would like to be clear that I can give no undertaking that we will agree to a claim or claims made on the basis under dispute."

32. The Claimants submitted their requests for remission between December 2012 and January 2016. A sample 28 page letter provided to the court was that of Mr and Mrs England who run a care home in Prestatyn. The letter states that:

    i) the Englands did not know of the *Kingscrest* judgment until recently informed by their tax adviser.

    ii) they have decided to register for VAT for the period 1 November 2000 to 31 March 2002 in order that they may attain the financial position they would have been in had the law always been correctly applied and they had been registered for that period.

    iii) they had made every effort to charge VAT retrospectively to all their past customers but that had not proved possible in all cases because some customers have died, others cannot be traced and others have refused to co-operate.

    iv) They have declared the full total of output tax on their VAT return including both charged and uncharged output tax.

    v) If they had been treated as making taxable supplies over the period, they would have added VAT to their fees and so would have been able to earn more profits for the business by being able to deduct all their input tax from that VAT and retain it in the business. Hence "in order to fully remedy the detriment and give effect to the trader's legitimate expectation" HMRC should remit all the output tax due which would require HMRC not only to remit the net tax due but also to make a

payment to the Englands to bring the sum up to the total uncharged output tax.

vi) In a 'spirit of compromise' the Englands are prepared to accept the remission of the sum of the total output tax due without also receiving a payment from HMRC of the excess input tax.

vii) They also sought financial redress calculated on the basis of compound interest on all input tax.

33. On 1 February 2016 HMRC issued RCB 7/16. The purpose of the brief was stated to be "as a reminder that the misdirection class concession no longer exists". RCB 7/16 stated by way of background that RCB 24/11 withdrew BB 28/04 with effect from 1 August 2011. It stated that HMRC continues to receive applications for registration for VAT in which businesses specifically request HMRC not to pursue net tax due on supplies where VAT has not been passed on to customers, that is to say, care homes were still requesting remission on the basis of BB 28/04. It went on to state that from 1 August 2016, HMRC will no longer routinely consider requests not to pursue the tax due. Any request not to pursue net VAT due, where VAT has not been charged on to customers, must be received by the HMRC VAT registration service on or before 31 July 2016.

34. HMRC wrote back to Mr Whittle substantively on 1 February 2016. They said that HMRC's position was that they will in principle not pursue the net amount of VAT due (output tax minus input tax) on supplies made before *Kingscrest* where VAT has not been charged on to customers. HMRC did not accept that interest/financial redress was appropriate in these cases. HMRC would now deal with each case and provide Mr Whittle's clients with individual responses. They also pointed out to Mr Whittle that RCB 07/16 had been published as a reminder of HMRC's policy in the area. It superseded any previous communication Mr Whittle may have had with HMRC on the issue. On 8 February 2016 HMRC wrote again to Mr Whittle in response to phone calls and emails from him. Their response was very firm and clear that they rejected any claim to remission of tax beyond the net tax in the pre-*Kingscrest* period where the output tax had not been charged retrospectively to past customers. At the end of the letter HMRC said:

> "We note that correspondence between yourself and HMRC officials on this issue has been ongoing for some time. HMRC's position has been confirmed in the letter sent to you dated 1 February. This is HMRC's final decision. We will now, as previously stated, deal with your clients' individual cases."

35. Notwithstanding that, Mr Whittle sent a further 8 page letter to HMRC and spoke on the phone to the relevant officer. Over the following days in February 2016, Mr Whittle sent further lengthy emails to HMRC setting out his position. On 24 February 2017 Paul Minns, a VAT Higher Officer from the Local Compliance, Small & Medium Enterprises Unit at HMRC wrote to Mr Whittle setting out again HMRC's position. He recorded that HMRC had

already provided Mr Whittle with a general overview of HMRC's position. He went on:

> "You have since stated that your clients have not based their claims on BB 28/04, as outlined in Revenue and Customs Brief 7/16, but on the Public Notice "*When you can rely on information or advice provided by HMRC*". You have said that you had given your clients the opportunity to apply BB 28/04 which you do not think 'appropriate'. But you consider a claim for detriment is."

36. Mr Minns then set out again HMRC's position stating "This is HMRC's position and our final communication with you on this point. We will now work through your individual clients' cases and the information they have provided." He concluded:

> "You have stated that, although businesses have made their claim on the basis of the Public Notice, that doesn't mean some businesses might change their view and accept the terms of BB 28/04. We would be prepared to accept that the claim is as per the terms of BB 28/04, provided that the business confirms this is the basis of their claim. Otherwise we will proceed, as advised by you, on the basis that claims have been made under the existing guidance.
>
> As stated above (and previously), we will now deal with your clients' cases individually, including seeking their confirmation on which basis they are seeking their claim. If the individual business is not satisfied with HMRC's response in relation to their claim, it would be open to them to challenge that decision before the Courts."

37. The reference to the 'Public Notice' there is a reference to the guidance attached to RCB 24/11 as I have described.

38. HMRC then wrote to the individual Claimants. The letter told the individual Claimants that HMRC had recently published RCB 7/16 to remind businesses that the misdirection class concession had been withdrawn. Despite this, HMRC was still receiving applications for registration and requests not to pursue VAT on supplies where businesses choose retrospectively to tax supplies but where some of the VAT has not been charged on. It points out that the RCB gives businesses until 31 July 2016 to make requests that VAT is not pursued on the terms of the misdirection class concession. It states that "Consideration will be limited to net VAT in relation to the supplies where VAT has not been charged on, which is output tax due on the supplies minus the related input tax". The letter goes on to state that the client's adviser had notified HMRC that the client had not based its request on BB 28/04 but on the Public Notice. The Public Notice states that in a small number of cases where HMRC provide advice that is incorrect in law, they will be bound by such advice provided that it is clear, unequivocal and explicit and that the client can demonstrate that it reasonably relied on the advice and that the

application of the statute would result in financial detriment. The letter said further: (emphasis in the original)

> "HMRC has made it clear that it does not require businesses to apply VAT to supplies of residential care as a result of the Kingscrest decision - the decision to tax these supplies retrospectively is one that has been made by you. The Public Notice does not provide for HMRC not to pursue VAT where a business has consciously chosen to retrospectively tax supplies.
>
> We will now look at the facts of your individual case and the information you have provided. But before doing so we require you to confirm on what basis you have made your claim. If you confirm that you want us to consider the case on the basis of BB28/04, the maximum amount that HMRC will not pursue is the net amount (output tax minus input tax) on supplies where VAT has not been charged on to customers.
>
> If you confirm that your claim has been made under the Public Notice and that you are claiming detriment, we will review the facts of your case on that basis. If we conclude that you have not suffered detriment, while input tax would be recoverable on supplies where VAT has not been charged on, output tax on those supplies would be payable to HMRC.
>
> Please provide me with written confirmation of the basis on which you have made your claim within two weeks of the date of this letter. I will pass this reply to the relevant case worker, who will review all of the information you have provided and then give you a written response in relation to your case. <u>If you are not satisfied with HMRC's response in relation to your claim, it would be open to you to challenge that decision before the Courts.</u>"

39. All but a handful confirmed that they wished to proceed on the basis of detriment and not on the basis of BB 28/04. On 20 April 2016 Mr Whittle wrote to HMRC to tell them that his clients were electing to confirm that their individual claims should be "considered on the basis of detriment rather than Business Brief 28-04.". On 20 July 2016 HMRC wrote to Mr Whittle confirming that they do not agree with his position on detriment. They would therefore respond to his clients individually. They sent Mr Whittle a draft of the main body of the letter they proposed to send to each of his clients ('the individual letters').

40. The individual letters were sent out starting in August 2016. Each of the letters referred at several points to the fact that Mr Whittle had advised HMRC that the taxpayer's claim was not based on BB 28/04 but on the basis of "current guidance", meaning the Public Notice attached to RCB 24/11. This had been confirmed directly by the taxpayer to HMRC. That current guidance required there to have been a clear, unequivocal and explicit statement on which the taxpayer could show he had relied. The taxpayer also had to show that the

application of the statute contrary to that statement would result in the taxpayer's financial detriment. HMRC accept that they did give advice before *Kingscrest* that the taxpayer's supplies were exempt and HMRC accept that they are bound by that. That was why HMRC have not required businesses to apply VAT retrospectively to supplies of residential care, because that puts the care home in the same position that it would have been in if it had indeed been exempt as HMRC said.

41. The individual letters went on to say that, as far as the application of the general guidance was concerned, (that is the guidance in the Public Notice), HMRC do not accept that they have created a legitimate expectation on which a claim to detriment can be made pursuant to that guidance:

> "As outlined above, any claim to detriment has to be based on HMRC creating a legitimate expectation that a customer will be taxed in a particular way in particular circumstances. HMRC's policy and guidance has always been that supplies of residential care are exempt from VAT, so the only expectation you could have held is that your supplies were VAT exempt. … Without establishing a legitimate expectation we do not go on to consider detrimental reliance on that expectation. Therefore, although you state that your claim (that would result in input tax recovery without the payment of output tax for supplies where VAT has not been charged on) is for 'detriment', we believe it has no merit as you have not established any expectation created by HMRC other than that you would be taxed in accordance with the stated policy/guidance."

42. HMRC's individual letters stated that the taxpayers' position was therefore that they had now registered for VAT, they had put in a return for the pre-*Kingscrest* period and they had not established a claim under the Public Notice for financial detriment. They therefore owed HMRC all the output tax included in the VAT return less input tax, regardless of whether they had been able to charge that output tax to their past customers retrospectively. The letter went on:

> "I am aware that HMRC's conclusion that your claim for detriment does not fall within HMRC's guidance (as outlined above) results in a less favourable position than had you pursued a claim on the basis of Business Brief 28/04.
>
> If, in light of this letter, you wish at this stage to change the basis of your claim, HMRC would be prepared to consider that if:
>
> - you confirm your position in writing to me within 21 days of the date of this letter; and
>
> - you confirm that you withdraw your claim to detriment and financial redress as detailed in your letter of 19 January 2016.

> This concludes my review into your claim. I appreciate that this is not the result you would have hoped and I trust that the reasons for my decision are clear. This decision does not have a right of appeal under section 83(1) of the VAT Act 1994."

IV. THE JUDICIAL REVIEW CLAIM

43. The Judicial Review claim form issued on 21 October 2016 describes the decisions challenged as "Rejection of the Claimants' requests for the remission of tax contained in decision letters received by the Claimants from HMRC". The form gives the dates of the decision as 12 August 2016, 9 September 2016 and 12 September 2016. The remedy claimed is an order quashing those decisions and remitting output tax 'to relieve the financial detriment that would be caused if such tax were collected' together with financial redress for loss of use of input tax due to HMRC's erroneous guidance and/or restitution and/or damages. The financial redress claim is said to arise from the denial of the use of funds in the business. It is quantified by a claim by the Claimants for interest at such rate as the Court seems fit, payable on a compound basis.

44. The Detailed Statement of Grounds attached to the application for judicial review puts the claim on the basis of a legitimate expectation that the Claimants would not suffer a detriment as the result of HMRC's error in treating the supplies as exempt during the pre-*Kingscrest* period. The legitimate expectation put forward by Mr Whittle in the correspondence seeking remission is an expectation that HMRC will correctly apply the law. The *Kingscrest* decision showed that HMRC had failed to fulfil that expectation. However, at the hearing before me it was accepted by Mr Chapman on behalf of the Claimants that this was not a conventional legitimate expectation claim. It is not enough to establish an expectation that HMRC will correctly apply the law, the Claimants would have to show a legitimate expectation that HMRC would seek to remedy their admitted mistake by offering remission of tax not in accordance with BB 28/04 but in the way the Claimants now seek. It is accepted that there was no representation from HMRC that it would apply any more favourable policy to the Claimants than that set out in BB 28/04. The claim is in fact a claim based on the alleged conspicuous unfairness of HMRC's conduct towards the Claimants.

45. The Detailed Statement of Grounds refer to HMRC's mistaken view that the supplies were exempt as the 'Incorrect Policy'. The Grounds then state:

> "The Claimants' position is that their detriment can only be remedied by remission of any output tax which has not been belatedly passed on to their customer. If the correct policy had been applied rather than the Incorrect Policy, the Claimants would have been able to recover the whole of their input tax and would have, because of the particular circumstances appertaining to their businesses, been able to increase the prices charged to customers to add VAT whilst maintaining the same reported sales income (where reported sales income is the

> figure net of VAT). … Remission of the net tax (being output tax less input tax) will not place the Claimants in the position that they would have been in but for the Incorrect Policy as in such circumstances the input tax is in effect being used to pay part of the output tax which the Claimant ought not to pay. The Claimants requested remission of the whole of the output tax which has not been belatedly passed on to customers and therefore ought not to pay in separate but substantially similar letters to the Defendants on the dates listed on the Schedule."

46. The Claimants state "The Defendants ought to have applied the correct policy and guidance rather than the Incorrect Policy at the time that the Claimants were making their relevant supplies". The Grounds then set out the wording of BB 28/04 and the later notices. The Grounds contend that none of the Defendants' policy documents seeking to remedy the effects of the Incorrect Policy fulfil the Claimants' legitimate expectation. In particular, BB 28/04 does not result in their detriment being adequately relieved.

47. The Detailed Statement of Grounds then asserts that the Decisions are conspicuously unfair. This is said to be because the Incorrect Policy applied inconsistently between businesses "causing comparative and significant unfairness between the Claimants and other businesses". The comparison is said to be between one trader who would have been able to charge higher fees to pass on the whole output VAT to all its customers (without losing business) if it had been registered in the pre-*Kingscrest* period and one who would not have been able to do so. The effect of the policy set out in BB 28/04 is that the first trader suffers a detriment during the period when he was not registered, that detriment being the input tax that he was unable to deduct from the additional fees. The trader who could not have charged more in the pre-*Kingscrest* period and who does not now have to register for VAT does not suffer such a detriment.

48. In the further alternative, the Claimants challenge the Decisions in so far as they state that in order to get the benefit of BB 28/04, the Claimants must withdraw their claims to detriment and financial redress.

49. In their summary grounds for contesting the claim, HMRC submitted:

    i) That the grounds for the claim arose at the latest in 2004 with the publication of BB 28/04 so that the claim is many years out of time.

    ii) There is no legitimate expectation of the Claimants that has been frustrated by HMRC. The only expectations that were created by HMRC were first, before *Kingscrest*, that the supplies were exempt and secondly that HMRC would act in accordance with BB 28/04. This second expectation ceased to operate as regards these Claimants from the date of their submissions of remission claims in which they stated that they were not asking HMRC to apply BB 28/04 to them.

    iii) The claims for detriment were wholly speculative.

iv) There was no conspicuous unfairness given that HMRC have a responsibility to all taxpayers to ensure that they are treated fairly and equally and that the law is applied in order to collect tax which is due. The claim for remission of output tax in total and the complete repayment of input tax sought by the Claimants has no legal basis and is plainly contrary to the neutrality of VAT.

50. In an order dated 28 March 2017 I directed that there be a hearing to determine the grant of permission. The issues to be considered at that hearing were directed to be:

i. Whether permission should be refused because of the Claimants' delay in bringing proceedings.

ii. Whether it is arguable that the Claimants have a legitimate expectation that:

(a) they be placed in the same position that they would have been in had HMRC implemented the law correctly; and/or

(b) that for supplies where output tax could not be charged HMRC would remit the tax in full and input tax attributable to such supplies would not be netted off against the output tax.

iii. Whether on the basis of a set of the facts agreed by the parties, or in the absence of such an agreement, on the basis of the facts of the case of one of the Claimants selected by the Claimants, it is arguable that the Claimants have suffered any detriment as a result of HMRC's implementation of their current interpretation of the law.

iv. Whether on the basis of a set of the facts agreed by the parties, or in the absence of such an agreement, on the basis of the facts of the case of one of the Claimants selected by the Claimants, it is arguable that there is conspicuous unfairness towards the Claimant in the conduct of HMRC.

51. A statement of facts was subsequently settled as described in the Tribunal's letter to the parties of 10 May 2017.

V. DELAY IN BRINGING THE CLAIM

52. The time limit for bringing a judicial review claim in the Administrative Court is set out in CPR 54.5 (1) (2) and (3) which provides:

> "(1) The claim form must be filed—"
>
> (a) promptly; and
>
> (b) in any event not later than 3 months after the grounds to make the claim first arose.
>
> (2) The time limits in this rule may not be extended by agreement between the parties.

> (3) This rule does not apply when any other enactment specifies a shorter time limit for making the claim for judicial review.

53. Rule 28 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698) ('the UT Rules') provides:

> "(1) A person seeking permission to bring judicial review proceedings before the Upper Tribunal under section 16 of the 2007 Act must make a written application to the Upper Tribunal for such permission.
>
> (2) Subject to paragraph (3), an application under paragraph (1) must be made promptly and, unless any other enactment specifies a shorter time limit, must be sent or delivered to the Upper Tribunal so that it is received no later than 3 months after the date of the decision, action or omission to which the application relates."

54. It was common ground before me that although CPR 54.5 refers to time running from the point at which the grounds for the claim first arose and the UT Rules refer to the date of decision, action or omission to which the application relates, the start date is the same, namely the moment in time when the grounds for bringing the claim crystallise. It is unlikely that the UT Rules would have been drafted with the intention of providing a different starting point from that which applies under the CPR particularly given the power to transfer cases from the Administrative Court to the UT under section 31A of the Senior Courts Act 1981.

55. The issue for determination here is therefore when the grounds for the claim first arose and whether the Claimants are right to contend that the time for filing their claims did not start to run until they received their individual letter from HMRC rejecting their claim for remission or whether HMRC are right to contend that time started to run for all the Claimants from the date of the adoption of BB 28/04.

56. The Claimants rely on the decision of Swift J in *R (on the application of NCM 2000 Ltd) v Revenue and Customs Commissioners* [2015] EWHC 1342 (Admin) ('*NCM 2000*') in support of their contention that the relevant decisions challenged are those set out in the individual letters. The applicant in *NCM 2000* had registered for VAT but discovered that some of its competitors were not charging VAT on supplies. The applicant sought clarification and was told in 1995 by an HMRC officer that VAT was payable. That advice was implemented until August 2009 when HMRC decided that VAT was not after all payable on the applicant's supplies because those supplies were exempt. The applicant sent a letter asking for repayment of VAT of over £2 million. HMRC told the applicant in August 2009 that they would only consider claims for over-declared output tax for a four-year period and that the remainder of the claim would be refused. The applicant asked for a review to be conducted by HMRC. The review led to a rejection of the claim by letter dated 2 August 2010. After that there was protracted correspondence between the applicant and the officer who had conducted the review. The officer stated that HMRC

could consider making a payment on an ex gratia basis if the applicant provided the necessary evidence of financial loss. The ex gratia claim was rejected in May 2012. There were various other meetings and correspondence culminating in a letter from HMRC in April 2013. The applicant contended that it was that final letter which constituted HMRC's decision for the purposes of the application for judicial review. HMRC contended that the decision to refuse the claim was in fact made in the letter setting out the result of the review in August 2010.

57. Swift J held that the 2010 letter had been the final decision in respect of HMRC's refusal to treat the applicant's claim as a misdirection claim. However, that letter had raised the possibility of the claim being made for an ex gratia payment. That had only been rejected in a letter of May 2012. The judge held that the terms of that letter were final and unequivocal. The later letter in April 2013 on which the applicant sought to rely had merely indicated that the latest representations sent in by the applicant did not change the author's previously expressed conclusion. She held that the letter "therefore amounted to a reiteration of a previous conclusion, not a statement of a newly made decision" (paragraph 48). The May 2012 letter was therefore the latest point at which the grounds to make the claim first arose.

58. Swift J went on to state that the fact that HMRC continued, to a limited extent, to respond to further submissions made by the applicant did not mean that no decision had yet been taken: "The mere fact that one party seeks to persuade another party to change its mind does not negate the original decision": paragraph 49. The claim was therefore substantially out of time. Further, she held that a continuing hope on the part of the applicant that HMRC would change its mind and accept his claim was not a sufficiently good reason or adequate explanation for the delay to justify the grant of an extension of time: "Such a hope must be a common occurrence in connection with decisions made in a public law context. If it were deemed to be a good reason for delay in bringing a claim, it would provide an excuse for delay in very many such claims": paragraph 50.

59. HMRC referred me to *R v Customs and Excise Commissioners ex p Eurotunnel plc* [1995] CLC 392 ('*Eurotunnel*'). In that case Eurotunnel challenged the policy adopted by HMRC to continue to allow duty and tax-free shops to operate on intra-Community flights and sea crossings until 1999, despite the introduction of the internal market by the Single European Act. Eurotunnel sought permission out of time since more than three months had elapsed since the United Kingdom had brought into force the national measures to implement the relevant EU instruments. Eurotunnel was granted leave to apply for judicial review but a large number of persons affected by Eurotunnel's application including ferry companies and airlines applied for the leave to be set aside on grounds of delay. The objectors' appeal was allowed and Eurotunnel's leave was set aside. It was common ground before the Divisional Court (Balcombe LJ and Tucker J) that Eurotunnel had not had the necessary standing to challenge the validity of the EU instruments. Their only route was the one they had chosen namely to attack by way of judicial review the validity of the UK orders made pursuant to the directives.

60. The Divisional Court held that the grounds for the Eurotunnel's application arose when they were first in a position to challenge the UK orders. The application had clearly not been made promptly in the case of any of the orders. The Court said:

> "We ignore for present purposes Eurotunnel's assertion that they were seeking to challenge the Commissioners' 'continuing practice': this is at best a disingenuous attempt to disguise the fact that Eurotunnel's real attack is on the validity of the orders and directives. In any event the 'practice' stems from, and depends on, the orders."

61. In support of its argument that time should be extended, Eurotunnel argued that it was possible that in due course the validity of the EU directives might be challenged collaterally in proceedings to which no time limit was applicable. For example a defendant in criminal proceedings might seek to raise a defence based on the invalidity of the orders and the directives and the domestic court might find it necessary to make a reference to the European Court for a preliminary ruling. The Divisional Court acknowledged that this was a perfectly possible scenario but said that that was equally possible in any case where the validity of an order, statute, directive or regulation is sought to be challenged by way of judicial review. The possibility of a subsequent collateral challenge cannot of itself preclude the validity of the time limit for bringing judicial review proceedings. They held that the application for permission had not been brought in time and there were no good reasons for extending time.

Discussion on delay

62. In my judgment the Claimants' standing to bring an application for judicial review arose when HMRC published BB 28/04 as being the policy that it would apply to care homes affected by the *Kingscrest* decision. As the Divisional Court recognised in *Eurotunnel*, there are many judicial review applications in which claimants successfully challenge secondary legislation or declared policy long after the three-month period from the first promulgation of that secondary legislation or policy has expired. That is because a claimant only acquires standing to challenge that instrument at a time when events occurs in his own life which make that legislation or policy applicable to him so that it affects his life or business. The effect of this may well be that legislation or policy on which many other people have relied for years is struck down. Indeed, that is what happened in the *Kingcrest* case.

63. The question is therefore when did the Claimants' interest in asserting the unfairness of BB 28/04 first arise? Did it only arise after the Claimants received their individual letters from HMRC rejecting their claims for total remission, or did it arise for each of them as soon as BB 28/04 was adopted? The Claimants' case is that a total remission policy should have been adopted for all of them instead of the policy in fact set out in BB 28/04, albeit that they may not all have been able to establish the facts needed to enable them to benefit from a total remission policy. Once BB 28/04 was adopted, all the ingredients for these Claimants to bring their challenge were in place: they had

been operating a care home over a period when they had been misdirected by HMRC into believing that their supplies were not taxable; they had not registered for VAT in respect of that period; they had set their fees without having regard to the need to account to HMRC for 17.5% output tax on those fees; they had incurred input tax but not been able to reclaim it from HMRC; they knew or could find out how easy or difficult it would be to go back to their old customers and ask them now to pay the additional 17.5% VAT on the pre-*Kingscrest* fees. If they had wanted to argue that BB 28/04 was conspicuously unfair because they had suffered a financial detriment which would not be remedied by them registering for VAT and seeking remission of uncharged output tax pursuant to BB 28/04, they could have done so then, using precisely the facts and arguments on which they now wish to rely. The only thing that stopped them is that the total remission idea did not occur to them. It was only after Mr Whittle started advising them that the challenge became a possibility. That is not a relevant factor when considering the issue of delay in bringing a judicial review claim. There is no additional trigger event that has occurred recently in respect of any of these Claimants that prompted them to write to HMRC asking for a different policy from BB 28/04 to be applied in their case, and which needed to be in place before they acquired standing to challenge the policy.

64. The Claimants purported to make an application for remission not on the basis of BB 28/04 but on the basis that they have suffered financial detriment as a result of the frustration of a legitimate expectation. But, as HMRC pointed out in the individual letters, there has been no expectation created other than that pre-*Kingcrest* supplies will be treated as being exempt. That expectation has been fulfilled by HMRC's policy of not insisting that care homes register for VAT for the pre-*Kingscrest* period. That puts the care homes in the same position as they would have been if what HMRC had said was true. HMRC has in fact gone further than continuing, in effect, to be bound by its statements that the care homes were exempt. It has allowed them to register for that period so that they can benefit from claiming input tax against any retrospective output tax that they are able to recover, in accordance with BB 28/04. To that extent, but no further, HMRC has created an expectation that care homes can now be better off than they would have been if they had been exempt. But there has never been a statement by HMRC that they would put care homes in precisely the position that they would have been in had they been *registered* for VAT over that period rather than *exempt* over that period.

65. The Claimants' supposed application under the Public Notice is therefore misconceived because the Public Notice only contemplates HMRC being bound by the wrong advice given provided that the taxpayer can show financial detriment by the application of the correct interpretation of the law. All care homes could show financial detriment arising from HMRC going back on its statements that care home supplies were exempt if they were now subject to a VAT liability based on the fees they had charged being treated as incorporating 17.5% output tax. That financial detriment is fully remedied by them not now being required to register for VAT. There has been no expectation created that the care home will be treated as if it had been registered in the pre-*Kingscrest* period and so there can be no financial

detriment claimed for a failure to fulfil that expectation. The rejection of the claims purportedly made under the Public Notice is, I consider, a reiteration of HMRC's consistently expressed position that for a care home which chooses to register for VAT, it is BB 28/04 or nothing.

66. Mr Chapman, appearing for the Claimants, tried to build a case that the individual letters are decisions capable of challenge by relying on HMRC's statements to Mr Whittle that (a) HMRC will consider each claim carefully and take into account any individual circumstances put forward by a claimant; and (b) the HMRC policy may be subject to exceptions if a claimant puts forward exceptional circumstances. Mr Chapman submitted that there was a sea change in HMRC's attitude when Mr Woodham wrote to Mr Whittle on 5 September 2014 saying that HMRC would always consider claims for remission 'on their own merits' and would 'give careful thought to anything the claimant believes is relevant to the claim'. Mr Chapman submitted that HMRC seemed to row back from applying BB 28/04 and instead undertook to exercise a wider discretion. Any decision is therefore only a reviewable decision when there had been an exercise of that discretion in an individual case. I disagree with that analysis. Whether taken by itself or read in the context of the chain of emails and letters, Mr Woodham's letter cannot be read as indicating that HMRC would now deal with all claims for remission on a case by case basis. A public authority must acknowledge that no policy can be applied automatically in a blinkered way. That does not mean that it is undertaking to deal with claims on a case by case basis without applying a policy to them. This claim is being brought by a large number of Claimants who all contend that they should have a different policy applied to them. They are not asserting that any one of them is in an exceptional position.

67. There is nothing in the correspondence between Mr Whittle and HMRC to suggest that at any time HMRC was abandoning its adherence to the policy that applications for remission of output tax by those care homes which choose to register for VAT will be dealt with in accordance with BB 28/04 and not in some other way. To hold that the decision letters generate a judicially reviewable decision would be to hold that a claimant can, at any time, reset the clock by writing to HMRC asking for a published policy to be dis-applied in their case and for a different policy applied, and then asserting that HMRC's refusal to change its policy in their case generates a decision capable of being judicially reviewed. That cannot be right – at least where there is nothing exceptional about these claimants that might justify dis-applying the policy from them but not from all other care homes.

68. I do not accept that *NCM 2000* supports the Claimants' case here. What *NCM 2000* does make clear is that potential claimants cannot manufacture a reviewable decision by a public authority by repeatedly writing to the authority asking for a different decision. The court must distinguish between a decision and a reiteration of a previous conclusion. The individual letters here are clearly in my view reiterations of HMRC's previous conclusion that the only legitimate expectation that the Claimants could have formed was to be treated as exempt and therefore as not required to be registered for the pre-

Kingscrest period, plus the expectation that if they did choose to register, they would be treated in accordance with BB 28/04.

69. I hold that these applications for permission are brought substantially out of time. There is no basis for extending time and no justification for allowing these Claimants to challenge the application to their business of BB 28/04.

VI. CONSPICUOUS UNFAIRNESS

70. In case I am wrong in refusing permission on the grounds of delay, I will now consider whether it is arguable that HMRC's position amounts to conspicuous unfairness. The judicial review ground of conspicuous unfairness was considered by the Court of Appeal in *R v Inland Revenue Commissioners ex p Unilever plc* [1996] STC 681 ('*Unilever*'). In that case Unilever had adopted a practice of deducting expected trading losses from its estimate of expected taxable profits in the schedule it sent to HMRC without expressly making a claim for loss relief in that schedule. On 30 occasions over a period of more than 20 years, tax computations had been submitted more than two years after the end of the accounting period to which they related but HMRC had not refused Unilever's claims to loss relief against profits of the current year on those occasions. HMRC did then refuse relief on the grounds that Unilever's claims for loss relief were not made within the statutory time limit. The Court held that although there had been no clear, unambiguous and unqualified representation by HMRC, the unique facts of the case were so unfair as to amount to an abuse of power. Sir Thomas Bingham MR said: (page 692)

> "The threshold of public law irrationality is notoriously high. It is to be remembered that what may seem fair treatment of one taxpayer may be unfair if other taxpayers similarly placed have been treated differently. And in all save exceptional circumstances the Revenue are the best judge of what is fair. It has not, however, been suggested that the detailed history described above has any parallel. The circumstances are, literally, exceptional. I cannot conceive that any decision-maker fully and fairly applying his mind to this history … could have concluded that the legitimate interests of the public were advanced, or that the Revenue's standard was vindicated, by a refusal to exercise discretion in favour of Unilever . … this refusal, if fully informed, was so unreasonable as to be, in public law terms, irrational."

71. Simon Brown LJ also accepted that Unilever could not succeed on traditional legitimate expectation grounds because there had been no conscious practice or policy on the part of HMRC to allow late claims. But that was not fatal to their case. The judge described the basis for the conspicuous unfairness ground of challenge: (page 695)

> "Unfairness amounting to an abuse of power … is unlawful not because it involves conduct as would offend some equivalent private law principle, not principally indeed because it breaches a legitimate expectation that some different substantive

> decision will be taken, but rather because either it is illogical or immoral or both for a public authority to act with conspicuous unfairness and in that sense abuse its power."

72. He emphasised that any unfairness challenge must inevitably turn on its own individual facts and could only ever succeed in exceptional circumstances. The court must always guard against straying into the field of public restoration and substituting its own view for that of the administrator: "It is certainly difficult to envisage many situations when, absent breach of a clear representation, a highly reputable and responsible body such as the Revenue will properly be stigmatised as having acted so unfairly as to abuse their powers". He went on to hold, however, that that is what had occurred in the instant case: it had crossed "the border between on the one hand mere unfairness — conduct which may be characterised as 'a bit rich' but nevertheless understandable — and on the other hand a decision so outrageously unfair that it should not be allowed to stand".

73. The nature of an allegation of conspicuous unfairness was considered by the Court of Appeal in *R (oao London Borough of Lewisham & ors) v Assessment and Qualifications Alliance* [2013] EWHC 211 (Admin). Elias LJ (with whom Sharp J agreed) expressed the view that *Unilever* has not formulated a fresh head of review conferring on the court a wide discretion to substitute its view of the substantive merits for that of the decision-maker:

> "111. … In order to constitute *conspicuous* unfairness, the decision must be immoral or illogical or attract similar opprobrium, and it necessarily follows that it will be irrational. I would treat this concept of conspicuous unfairness as a particular and distinct form of irrationality, which in essence is how it was viewed by Sir Thomas Bingham in *Unilever*. … it is only if a reasonable body could not fairly have acted as the defendants have that their conduct trespasses into the area of conspicuous unfairness amounting to abuse of power. The court's role remains supervisory."

74. The limits of the scope of the conspicuous unfairness ground of judicial review are demonstrated by the decision of Whipple J in *R (oao City Shoes Wholesale Ltd) v HMRC* [2016] EWHC 107 (Admin) ('*City Shoes*'). That challenge arose from HMRC's decision to refuse settlement on favourable terms to the claimants. Whipple J found that there was some truth in the claimants' assertion that they had been 'led up the garden path' by HMRC when they were encouraged to believe they could use a particular concession to settle their claims. But that did not get anywhere near showing that the Commissioners had treated them with conspicuous unfairness. In the absence of any legitimate expectation on the part of the claimants in *City Shoes* that a concession would apply to them, HMRC were free to withdraw or alter the concession without warning:

> "Being led up the garden path might be characterised as treatment which is 'a bit rich'. But without a guarantee or promise, the refusal to confer the particular tax treatment

> sought is not 'so outrageously unfair that it should not be stand'"

Discussion on conspicuous unfairness

75. At this stage I am considering only whether permission should be granted, not whether the claim itself should succeed. The Claimants only have to show that there is an arguable ground of review which has a realistic prospect of success. However, in my judgment, there is no prospect of the Claimants succeeding in showing that HMRC's policy to deal with the problem that arose from *Kingscrest* was conspicuously unfair. The Claimants did not have to register for VAT and so did not have to account for VAT on fees they had charged pre-*Kingscrest*. They could choose whether or not to register for VAT on the basis of whether it was in their financial interests to do so. In making such a decision the only rational basis for calculating where their financial interests lay was on the assumption that HMRC would apply the policy set out in BB 28/04 in their case. HMRC never suggested that any other policy would be applied, save where there were exceptional circumstances which do not arise in relation to any of these Claimants.

76. I do not see how HMRC's conduct could even be described as 'a bit rich', let alone as conspicuously unfair. There was no wavering on the part of HMRC and nothing that could possibly be described as misleading the Claimants or leading them up the garden path to use Whipple J's phrase. On the contrary, HMRC was entirely consistent in its correspondence with Mr Whittle in rejecting time and again his argument that a more generous policy should be applied to his clients than the one that had been on offer.

77. The Claimants' reliance on a comparison between care home businesses which it is said could have added 17.5% to their fees without suffering any loss of business and other businesses which could not does not take the Claimants any further. In *City Shoes* Whipple J summarised the test for a challenge based on a difference in treatment of taxpayers, having regard to the points made by Elias J (as he then was) in *R (on the application of British Sky Broadcasting Group plc) v Customs and Excise Commissioners* [2001] STC 437. She said:

> "67. I would order the various points made by Elias J in *BSkyB* in the following way: (1) first, it is necessary to establish whether the Commissioners knew or ought to have known of the alleged disparate treatment at the time the decision was made. If not, the challenge surely fails. (2) If that knowledge or constructive knowledge is established, then it is necessary, secondly, to establish as a matter of fact whether the Commissioners considered there to be a material difference or differences between the two groups of taxpayers, justifying the different tax treatment. If no material difference was identified, then it is difficult to see how the Commissioners' decision can stand (although issues may arise about differences which have since been identified – not an issue in *BSkyB* or this case). (3) If a material difference was identified by the Commissioners, then, thirdly, the Court should examine that asserted difference

> to determine whether it was "rational and defensible", or alternatively, "material", such as to justify the different tax treatment. There are a number of notes to append to this third step, all of which emerge from Elias J's judgment: (a) the Court's analysis is to be undertaken based on the material which was before the Commissioners at the time of their decision. (b) The Court is exercising a supervisory jurisdiction, testing the legality of the decision and not substituting its own decision. … (c) The fact that the Commissioners are prohibited from collecting the tax from other taxpayers who were in a similar position does not, in and of itself, amount to a "material" difference between the two groups of taxpayers.

78. I am prepared to assume for this purpose, though it is strongly contested by HMRC, that all or most of the Claimants will be able to prove that they could have charged an additional 17.5% extra to all their pre-*Kingscrest* customers. Since there has as yet been no disclosure from HMRC about the reasons for the adoption of BB 28/04, I am also prepared to assume that HMRC did know or ought to have known that. Even on that basis, the claim is bound to fail because no tribunal could find that the existence of businesses which are better off being treated as exempt means that businesses which would have been better off being treated as registered should benefit from a total remission scheme. Businesses in the position of the Claimants have in fact been put in a better position than the alleged comparable business because they could, in 2004, have gone back to their customers, charged VAT and then registered to benefit from offsetting input tax to the extent allowed by BB 28/04. It is impossible to contend that they should be further favoured in the way the Claimants contend.

79. The only element of HMRC's conduct here that caused me to hesitate in my conclusion was that aspect of individual letters which states that HMRC will not allow the Claimants the benefit of relying on BB 28/04. The Claimants allege that it is conspicuously unfair for HMRC, having rejected the claim under the Public Notice, not now to apply BB 28/04 despite the Claimants' continued insistence that they did not want BB 28/04 to apply in calculating the remission of output tax in their case.

80. Is it conspicuously unfair for HMRC not to allow the Claimants to default to BB 28/04 now that HMRC has rejected their claim to total remission? If BB 28/04 were still in operation, there may have been some unfairness here, though whether it crossed the high threshold set in the case law would be very doubtful. But I am satisfied that on the facts of the case, that is an unarguable proposition. HMRC is entitled to bring to an end the work they have to undertake to put right the repercussions of the *Kingscrest* decision, now many years ago. BB 28/04 was withdrawn formally in 2011 and although HMRC kept it open in practice until 2016, they stated publically in February 2016 that as from 31 July 2016 it would not be applied routinely. The requests for remission by the Claimants were in some cases at least put in before the July 2016 deadline but HMRC did, in the individual letters, give the Claimants one last chance to ask to have their claim dealt with on the basis of BB 28/04

provided that they agreed to have their claim assessed on that basis and not on the basis of the Public Notice. The Claimants all refused. I accept Mr Puzey's submission that these Claimants, encouraged by Mr Whittle, had no reason to suppose that HMRC would allow their total remission claims and yet they never asked for BB 28/04 to be applied to them as a default position after the concession had been withdrawn. No tribunal could find that HMRC acted with conspicuous unfairness in treating them in accordance with their applications.

81. Again, Mr Chapman relies on the statement in the February 2016 BB 2016 that HMRC will not 'routinely' allow reliance on BB 28/04 after July 2016. But he can put forward no arguable reason why these Claimants should be entitled to be treated other than routinely.

82. Referring back to the issues that I directed should be determined in this permission application, I hold that:

  i) Permission should be refused because of the Claimants' delay in bringing proceedings.

  ii) It is not arguable that the Claimants have a legitimate expectation that:

    a) They be placed in the same position that they would have been in had HMRC implemented the law correctly; or

    b) That for supplies where output tax could not be charged HMRC would remit the tax in full and input tax attributable to such supplies would not be netted off against the output tax.

  iii) The issue of financial detriment arising from the frustration of a legitimate expectation does not therefore arise.

  iv) It is not arguable that there had been conspicuous unfairness towards the Claimant on the part of HMRC.

MRS JUSTICE ROSE

RELEASE DATE: 29 SEPTEMBER 2017