UT Neutral citation number: **[2024] UKUT 00023 (TCC)**

UT (Tax & Chancery) Case Number: UT/2022/000018
UT/2022/000021

Upper Tribunal
(Tax and Chancery Chamber)

Hearing venue: Rolls Building, Fetter Lane, London EC4A 1NL

Heard on: 21-23, 26 June 2023
Judgment date: 25 January 2024

Corporation tax – double taxation relief on foreign dividend income – portfolio holdings – procedural issues arising out of claims for relief and claims for repayment of overpaid tax following the UK's established breach of EU law

Before

MR JUSTICE RICHARD SMITH
JUDGE JONATHAN CANNAN

Between

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Appellants/Cross Respondents

and

(1) APPLICANTS IN THE POST PRUDENTIAL CLOSURE NOTICE APPLICATIONS GROUP LITIGATION

(2) TAXPAYERS IN THE POST PRUDENTIAL CLOSURE NOTICE APPEALS GROUP LITIGATION

Respondents/Cross Appellants

Representation:

For the Appellants/Cross Respondents: David Ewart KC, Barbara Belgrano and Laura Ruxandu of counsel, instructed by the General Counsel and Solicitor for His Majesty's Revenue and Customs

For the Respondents/Cross Appellants: Jonathan Bremner KC instructed by Joseph Hage Aaronson LLP

DECISION

Introduction

1. These appeals concern the validity of claims in relation to foreign tax on overseas dividend income received by various investment funds and an insurance company ("the Taxpayers" or "the Taxpayer" as appropriate). One group of appeals relates to applications made by some of the Taxpayers to the First-tier Tribunal ("the FTT") for directions that HMRC should issue closure notices in relation to open enquiries. The other group relates to appeals against closure notices and decisions of HMRC refusing to make repayments of tax.

2. The Taxpayers held "portfolio holdings" of shares in non-UK resident companies. A portfolio holding represents less than 10% of a company's share capital. A non-portfolio holding represents 10% or more. The Taxpayers have made, or purport to have made, claims for repayment of tax on dividends from portfolio holdings on the basis that double taxation relief ("DTR") was available. The claims cover various accounting periods between 1991 and 2010.

3. There has been a long history of litigation concerning the UK tax treatment of foreign tax on such dividends. It is now established that the UK tax provisions breached EU law in failing to make appropriate provision for DTR. These appeals concern the procedural methods by which the Taxpayers could or should have reclaimed the tax which HMRC accept was overpaid and certain other procedural issues. Certain substantive issues also arise as to the amount of relief available.

4. The FTT heard the applications and appeals in a number of lead cases. The decisions in the present appeals will be applied to many applications and appeals which are presently stayed. There were 14 issues addressed at the hearing before the FTT, identified as Issues 1–14. Following circulation of the FTT's draft decision, a further 5 issues were identified on which the FTT received further submissions, identified in the final decision as Issues A–E. We adopt the same issue numbering and lettering in this decision. The FTT's final decision was released on 8 December 2021 ("the Decision"). Overall, the FTT found in favour of the Taxpayers. Various issues were pursued by the Taxpayers in the alternative, on some of which the FTT found in favour of HMRC. However, that did not affect the overall result because the Taxpayers were successful on their primary arguments and the applications and appeals were allowed in full.

5. HMRC have appealed with permission of the FTT on the issues on which they were unsuccessful. The Taxpayers have cross-appealed, again with permission of the FTT, on four issues on which they were unsuccessful.

6. We are grateful to counsel on both sides for their helpful written and oral submissions, and to the FTT for its careful analysis of the issues. The oral hearing lasted 4 days, a significant proportion of which was devoted to the circumstances in which the Court of Justice of the European Union ("CJEU") and the UK courts have held that the UK's provisions for relieving foreign tax on dividends breached EU law. It is essential to understand the UK domestic provisions, the timeline of the litigation and the findings of the various courts along the way before considering the specific issues arising on these appeals.

Background

7. We have set out in the Appendix to this decision the relevant legislation. Save where otherwise stated, all references are to the legislation as it applied during the relevant accounting periods. We were also referred to a large number of cases and we adopt the following shorthand for the principal authorities:

Test Claimants in the FII Group Litigation v IRC (C-446/04) [2012] 2 AC 436 ("**FII CJEU 1**")

Test Claimants in the FII Group Litigation v Revenue and Customs Commissioners [2008] EWHC 2893 (Ch) ("**FII HC 1**")

Test Claimants in the FII Group Litigation v Revenue and Customs Commissioners [2010] EWCA Civ 103 ("**FII CA 1**")

Test Claimants in the FII Group Litigation v Revenue and Customs Commissioners [2012] UKSC 19 ("**FII SC 1**")

Test Claimants in the FII Group Litigation v HMRC (C-35/11) ("**FII CJEU 2**")

Prudential Assurance Co Ltd and another v Revenue and Customs Commissioners [2013] EWHC 3249 (Ch) ("**Prudential Ch**")

Prudential Assurance Co Ltd v Revenue and Customs Commissioners [2016] EWCA Civ 376 ("**Prudential CA**")

Prudential Assurance Co Ltd v Revenue and Customs Commissioners [2018] UKSC 39 ("**Prudential SC**")

Claimants in Class 8 of the CFC and Dividend Group Litigation v Revenue and Customs Commissioners [2019] EWHC 338 (Ch) ("**Class 8**")

Test Claimants in the FII Group Litigation and others v Revenue and Customs Commissioners (formerly Inland Revenue Commissioners) [2021] UKSC 31 ("**FII SC 3**")

8. At all material times, UK dividends received by UK resident companies were exempt from corporation tax pursuant to section 208 Income and Corporation Taxes Act 1988 ("ICTA 1988"). The purpose of this provision was to prevent economic double taxation of the underlying profits of the relevant company declaring the dividend.

9. Where UK resident companies received dividends from shareholdings in foreign companies, DTR was available either by way of treaty relief or unilateral relief.

10. Treaty relief was given by way of arrangements in a double taxation treaty pursuant to section 788 ICTA 1988. A claim for treaty relief had to be made to HMRC (see section 788(6)). Relief was available for:

(1) Any withholding tax ("WHT") deducted on payment of the dividend, subject to any limit in the arrangements on the amount of such relief.

(2) The underlying tax actually paid by the overseas company on profits from which the dividend was paid. Such relief was generally limited to non-portfolio holdings. It was given by way of credit for the foreign tax against UK tax chargeable.

11. Unilateral relief was available pursuant to section 790 where there was no relief pursuant to a double taxation treaty. Section 793A provided that unilateral relief was not available where treaty relief was available or where a treaty expressly provided that relief was not available. The relief was given as if there was a treaty in existence containing the reliefs in section 790. As such, a claim for unilateral relief also had to be made to HMRC pursuant to section 788(6). In fact, the UK has double

taxation treaties with almost all jurisdictions, including all the jurisdictions relevant to the Taxpayers in these appeals.

12. Unilateral relief was available pursuant to section 790(4)–(6) ICTA 1988 for:

> (1) WHT deducted in the relevant foreign jurisdiction.
>
> (2) The underlying tax on profits from which the dividend was paid. However, relief for underlying tax was expressly excluded in relation to portfolio holdings by section 790(5)(c)(ii) and (6).

13. Non-portfolio holdings fell within section 790(6) such that relief was available for foreign tax paid on the underlying profits from which the dividend was paid in addition to WHT. The relief for foreign tax on the underlying profits was calculated by reference to the actual foreign tax paid by the dividend paying company. Again, it was given by way of credit against the UK tax chargeable.

14. These provisions breached articles 49 and 63 of the Treaty on the Functioning of the European Union (previously articles 43 and 56 of the EC Treaty) in relation to freedom of establishment and free movement of capital by failing to accord foreign dividends equivalent treatment to domestic dividends in preventing economic double taxation. Various taxpayers challenged the UK tax treatment of foreign dividends in relation to both portfolio and non-portfolio holdings.

15. There were two potential challenges available to investors who had paid tax without appropriate DTR. First, they could bring common law claims in unjust enrichment on the basis the tax had been paid under a mistake of law and/ or under the principles established in *Woolwich Equitable Building Society v IRC* [1993] AC 70. Such claims have been brought in the High Court and managed pursuant to Group Litigation Orders. *Prudential* is the test claimant in relation to portfolio holdings litigation under the CFC GLO. The FII GLO is concerned with non-portfolio holdings. Many of the authorities referred to on these appeals arose in the context of those common law claims.

16. The alternative challenge available to investors was to make statutory claims for DTR and/ or for repayment of overpaid tax. Such claims fall within the jurisdiction of the FTT and it is the existence, validity and extent of those claims which the FTT considered in the Decision. There are various ways in which the Taxpayers have asserted their right to DTR and/ or their right to reclaim overpaid tax. For example, some of the Taxpayers included foreign dividend income received in their company tax returns but treated it as exempt income. Other Taxpayers included dividend income as taxable income and accounted for tax without any claim for DTR, but then purported to make statutory claims for repayment of overpaid tax.

17. We are concerned on these appeals with statutory claims made by the Taxpayers which have been refused by HMRC or upon which the Taxpayers rely in their applications for closure notices. In the latter case, concerning four Taxpayers, HMRC have opened enquiries into those claims without prejudice to their contention that they are not valid because they are out of time. The validity of those claims is being tested in the closure notice applications. If the claims are in time, then it was open to the FTT to direct HMRC to issue a closure notice and, in those circumstances, HMRC would not object to such a direction.

December 2006 – FII CJEU 1

18. The requirement in EU law to accord foreign dividends equivalent treatment to domestic dividends was described in *FII CJEU 1* in the Court's judgment released in December 2006 in the following terms:

> 46. … the freedoms of movement guaranteed by the Treaty preclude a member state from treating foreign-sourced dividends less favourably than nationally-sourced dividends, unless such a difference in treatment concerns situations which are not objectively comparable or is justified by overriding reasons in the general interest…
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> 48. Thus, Community law does not, in principle, prohibit a member state from avoiding the imposition of a series of charges to tax on dividends received by a resident company by applying rules which exempt those dividends from tax when they are paid by a resident company, while preventing, through an imputation system, those dividends from being liable to a series of charges to tax when they are paid by a non-resident company.
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> 49. In order for the application of an imputation system to be compatible with Community law in such a situation, it is necessary, first of all, that the foreign-sourced dividends are not subject in that member state to a higher rate of tax than the rate which applies to nationally-sourced dividends.
>
> 50. Next, that member state must prevent foreign-sourced dividends from being liable to a series of charges to tax, by offsetting the amount of tax paid by the non-resident company making the distribution against the amount of tax for which the recipient company is liable, up to the limit of the latter amount.

19. Thus, it was established that an exemption method for domestic dividends and an imputation method (essentially a system of tax credits) for foreign dividends could accord equivalent treatment provided two conditions were satisfied, namely:

> (1) The tax rate applied to foreign dividends was not higher than the tax rate applied to domestic dividends; and
>
> (2) The tax credit was at least equal to the amount of tax paid in the foreign state, up to the limit of the tax charged in the UK.

20. In relation to non-portfolio holdings, the CJEU held at [56] that it was for the national court to determine whether the tax rates applied to domestic and foreign dividends were the same:

> 56. … it is for the national court to determine whether the tax rates are indeed the same and whether different levels of taxation occur only in certain cases by reason of a change to the tax base as a result of certain exceptional reliefs.

21. In relation to portfolio holdings, the Court held that there was a restriction on the free movement of capital required by Article 56 of the EC Treaty because there was a breach of the second condition:

> 63 While, in the case of a resident company receiving dividends from another resident company, the exemption system that applies eliminates the risk of the distributed profits being subject to a series of charges to tax, the same is not true for profits distributed by non-resident companies. If, in the latter case, the state in which the company receiving the distributed profits is resident grants relief on withholding tax levied in the state in which the company making the distribution is resident, such relief does no more than eliminate a double legal charge to tax in the hands of the company receiving those profits. Conversely, that relief does not extinguish the series of charges to tax which arises when distributed profits are subject to tax, first of all, in the form of corporation tax for which the company making the distribution is liable in the state in which it is resident and, subsequently, in the form of corporation tax for which the company receiving the distribution is liable.
>
> 64 Such a difference in treatment has the effect of discouraging United Kingdom-resident companies from investing their capital in companies established in another member state. In addition, it also has a restrictive effect as regards companies established in other member states in that it constitutes an obstacle to their raising of capital in the United Kingdom…

> 65 It follows that the difference in treatment arising from legislation such as that at issue in the main proceedings as regards dividends received by resident companies from non-resident companies in which they hold fewer than 10% of the voting rights constitutes a restriction on the free movement of capital which is, in principle, prohibited by article 56EC.

22. Arguments on justification for the unequal treatment were rejected. The conclusion in relation to portfolio dividends was stated at [74]:

> 74. Article 56EC precludes legislation of a member state which exempts from corporation tax dividends which a resident company receives from another resident company, where that state levies corporation tax on dividends which a resident company receives from a non-resident company in which it holds less than 10% of the voting rights, without granting the company receiving the dividends a tax credit for the tax actually paid by the company making the distribution in the state in which the latter is resident.

23. In relation to remedy, the Court stated at [203] and [220]:

> 203. In the absence of Community rules on the refund of national charges levied though not due, it is for the domestic legal system of each member state to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from Community law, provided, first, that such rules are not less favourable than those governing similar domestic actions (principle of equivalence) and, secondly, that they do not render virtually impossible or excessively difficult the exercise of rights conferred by Community law.
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> 220. … Those courts and tribunals are, however, obliged to ensure that individuals should have an effective legal remedy enabling them to obtain reimbursement of the tax unlawfully levied on them and the amounts paid to that member state or withheld by it directly against that tax.

24. The decision in *FII CJEU 1* was applied and reflected in a reasoned order of the CJEU in April 2008 in the *Prudential* litigation.

November 2012 – FII CJEU 2

25. Subsequent developments in the litigation in relation to non-portfolio dividends culminated in a further reference to the CJEU in *FII CJEU 2*. It appeared to be common ground at the hearing before us that, until the decision in *FII CJEU 2* in November 2012, taxpayers and HMRC assumed that any remedy in respect of the UK tax treatment of foreign dividends was likely to involve them being treated as exempt.

26. The first question referred to the Court in *FII CJEU 2* involved consideration of whether the reference in the first condition in *FII CJEU 1* to "tax rates" and "different levels of taxation" referred solely to what were described as statutory or nominal rates of tax, or whether it also referred to the effective rates of tax. The effective rate of tax may be less than the nominal rate because of the availability of reliefs, such as group relief or relief for trading losses carried forward. The question was formulated at [36] in the following terms:

> 36. By its first question, the referring court asks, in essence, whether arts 49 TFEU and 63 TFEU must be interpreted as precluding legislation of a member state which applies the exemption method to nationally-sourced dividends and the imputation method to foreign-sourced dividends when, in that member state, the effective level of taxation of company profits is generally lower than the nominal rate of tax.

27. The Court re-stated some of the principles from *FII CJEU 1*, including at [39]:

> 39. It is to be recalled, next, that the court has held that a member state is, in principle, free to prevent the imposition of a series of charges to tax on dividends received by a resident company by opting for

> the exemption method when the dividends are paid by a resident company and for the imputation method when they are paid by a non-resident company. Those two methods are in fact equivalent provided, however, that the tax rate applied to foreign-sourced dividends is not higher than the rate applied to nationally-sourced dividends and that the tax credit is at least equal to the amount paid in the state of the company making the distribution, up to the limit of the tax charged in the member state of the company receiving the dividends …

28. The CJEU went on to hold that member states had to give credit for what was described as the "foreign nominal rate" of tax or "FNR". This solution to the unequal treatment was not based on any proposal by the UK government or the taxpayers but on the Commission's submission in the following terms:

> … to exempt domestic dividends (which in effect amounts to giving credit for the full amount of tax at the statutory rate even where this full amount has not been paid) while giving credit only for the actual amount of tax paid in respect of the profits giving rise to foreign dividends results in more favourable treatment for domestic dividends.

29. The CJEU's reasoning that it was the absence of credit at the FNR that gave rise to a breach of EU law appears at [43] to [52] of its decision:

> 43. It must in fact be held that the tax rate applied to foreign-sourced dividends will be higher than the rate applied to nationally-sourced dividends within the meaning of the case law cited in para 39 of the present judgment, and therefore that the equivalence of the exemption and imputation methods will be compromised, in the following circumstances.
>
> 44. First, if the resident company which pays dividends is subject to a nominal rate of tax below the nominal rate of tax to which the resident company that receives the dividends is subject, the exemption of the nationally-sourced dividends from tax in the hands of the latter company will give rise to lower taxation of the distributed profits than that which results from application of the imputation method to foreign-sourced dividends received by the same resident company, but this time from a non-resident company also subject to low taxation of its profits, inter alia because of a lower nominal rate of tax.
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> 45. Application of the exemption method will give rise to taxation of the distributed nationally-sourced profits at the lower nominal rate of tax applicable to the company paying dividends, whilst application of the imputation method to foreign-sourced dividends will give rise to taxation of the distributed profits at the higher nominal rate of tax applicable to the company receiving dividends.
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> 46. Second, exemption from tax of dividends paid by a resident company and application to dividends paid by a non-resident company of an imputation method which, like that laid down in the rules at issue in the main proceedings, takes account of the effective level of taxation of the profits in the state of origin also cease to be equivalent if the profits of the resident company which pays dividends are subject in the member state of residence to an effective level of taxation lower than the nominal rate of tax which is applicable there.
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> 47. The exemption of the nationally-sourced dividends from tax gives rise to no tax liability for the resident company which receives those dividends irrespective of the effective level of taxation to which the profits out of which the dividends have been paid were subject. By contrast, application of the imputation method to foreign-sourced dividends will lead to an additional tax liability so far as concerns the resident company receiving them if the effective level of taxation to which the profits of the company paying the dividends were subject falls short of the nominal rate of tax to which the profits of the resident company receiving the dividends are subject.

48. Unlike the exemption method, the imputation method therefore does not enable the benefit of the corporation tax reductions granted at an earlier stage to the company paying dividends to be passed on to the corporate shareholder.

49. Accordingly, the determination which the referring court was called upon to make by the court, in para 56 of its judgment in *Test Claimants in the FII Group Litigation*, relates both to the applicable nominal rates of tax and to the effective levels of taxation. The 'tax rates' to which para 56 refers relate to the nominal rate of tax and the 'different levels of taxation … by reason of a change to the tax base' relate to the effective levels of taxation. The effective level of taxation may be lower than the nominal rate of tax by reason, in particular, of reliefs reducing the tax base.

50. As regards any difference between the nominal rate of tax and the effective level of taxation to which the resident company paying dividends is subject, it is admittedly apparent from para 56 of the judgment in *Test Claimants in the FII Group Litigation* that the exemption and imputation methods do not immediately cease to be equivalent as soon as exceptional cases exist in which nationally-sourced dividends are exempt although the profits out of which those dividends have been paid have not been subject in their entirety to an effective level of taxation corresponding to the nominal rate of tax. The court made it clear, however, that it was for the referring court to determine whether or not the difference between the effective level of taxation and the nominal rate of tax was exceptional in nature.

51. It is apparent from the order of the referring court that the latter made the determination asked of it in para 56 of the judgment in *Test Claimants in the FII Group Litigation*. It found that, in the main proceedings, the same nominal rate of tax applies both to the profits of the resident company paying dividends and to those of the resident company receiving them. On the other hand, it is apparent from the order for reference that the circumstance referred to in para 46 of the present judgment is present, and not by way of exception: according to the referring court, in the United Kingdom the effective level of taxation of the profits of resident companies is lower than the nominal rate of tax in the majority of cases.

52. It follows that application of the imputation method to foreign-sourced dividends as prescribed by the legislation at issue in the main proceedings does not ensure a tax treatment equivalent to that resulting from application of the exemption method to nationally-sourced dividends.

30. Henderson J (as he then was) considered the judgment in *FII CJEU 2* at [65]–[79] of *Prudential Ch*, where he described it as "*not entirely easy to follow*". Mr Bremner KC for the Taxpayers put forward a helpful illustrative example which involved a dividend-paying company with profits in the relevant tax year fully offset by losses brought forward. If that company is UK resident, the dividend is exempt in the receiving company and no tax is payable. If it is non-resident, the receiving company would be entitled to credit for the actual tax paid. However, there would be no foreign tax paid because the profits had been fully offset by losses brought forward. Therefore, the receiving company would receive no DTR and UK tax would be paid on the full dividend. However, in light of *FII CJEU 2*, it would be entitled to DTR credit at the FNR.

31. The CJEU in *FII CJEU 2* went on to adopt the solution proposed by the Commission, which was to have regard to the FNR in calculating the tax credit on foreign dividends. It described the solution in the following terms:

61. The tax exemption to which a resident company receiving nationally-sourced dividends is entitled is granted irrespective of the effective level of taxation to which the profits out of which the dividends have been paid were subject. That exemption, in so far as it is intended to avoid economic double taxation of distributed profits, is thus based on the assumption that those profits were taxed at the nominal rate of tax in the hands of the company paying dividends. It thus resembles grant of a tax credit calculated by reference to that nominal rate of tax.

> 62. For the purpose of ensuring the cohesion of the tax system in question, national rules which took account in particular, also under the imputation method, of the nominal rate of tax to which the profits underlying the dividends paid have been subject would be appropriate for preventing the economic double taxation of the distributed profits and for ensuring the internal cohesion of the tax system while being less prejudicial to freedom of establishment and the free movement of capital.

32. The FNR credit enables the benefit of corporation tax reliefs and allowances in the overseas jurisdiction to be passed on to the UK shareholder. The Supreme Court in *Prudential SC* described the Commission's proposal involving credit at the FNR as a "neat solution".

July 2018 – Prudential SC

33. In *Prudential SC*, HMRC submitted that *FII CJEU 2* and the FNR credit applied only to non-portfolio holdings and continued to argue that, in the case of portfolio holdings, the credit to be imputed should be in respect of the actual tax incurred overseas. The Supreme Court rejected that submission. By July 2018, it was therefore established that the UK provisions for portfolio dividends were defective in two respects:

> (1) There was no credit for the underlying foreign tax actually paid. The credit was wrongly limited to WHT.
>
> (2) There was no credit for tax at the dividend paying company's FNR.

34. The result was that investors with portfolio holdings were potentially entitled to three credits for DTR:

> (1) Credit for WHT, for which provision had always been made by way of treaty relief or unilateral relief.
>
> (2) Credit for actual foreign tax paid on the underlying profits of the foreign company. In practice however, a portfolio investor would not have access to information to make a claim for this credit.
>
> (3) Credit at the FNR, to the extent that it exceeded any credit for underlying tax. In practice this was the only credit available to portfolio investors in addition to the credit for WHT because such investors would have no information as to the actual foreign tax paid.

35. Henderson J described credits (2) and (3) above in *Prudential Ch* in October 2013 at [95] and [96] as "dual" credits, in the sense that they were treated as alternatives with credit to be granted for whichever amount was the highest, up to the limit of the UK charge to tax, reduced by WHT. In the context of portfolio dividends, Henderson J held that the FNR was the headline rate of corporation tax applicable to the dividend paying company. It was not necessary to look any further down the corporate chain. A different approach was taken in the context of non-portfolio holdings in *FII HC 2* but we are not concerned with non-portfolio holdings on these appeals.

36. Henderson J also considered the relationship between exemption and credit at the FNR at [92]:

> 92. A crucial part of [the analysis in *FII CJEU 2*] is the theoretical assumption that the exemption from tax of a dividend is to be regarded as equivalent to the grant of a tax credit at the nominal rate, and the concomitant principle that a state of residence which grants exemption to domestic dividends must, at least, grant credit for the nominal rate of tax paid in the source state, although it remains free to charge a higher nominal rate itself (and thus to top up the charge by the difference between the domestic and foreign nominal rates).

37. Henderson J then considered how effect should be given to the judgment in *FII CJEU 2*:

> [100] Having now identified the respects in which the UK legislation infringed art 63 TFEU, and how it could have been rendered compliant, the next question is whether this result can be achieved by a process of conforming construction of the UK legislation, or whether the Case V charge must be disapplied. If I am right in my analysis so far, the answer to this question will be of little, if any, practical significance, because a conforming construction which required a dual credit to be granted would in practice probably always extinguish the Case V charge, as would the de facto exemption of portfolio dividends if the charge were to be disapplied in its entirety…

38. In the event, the breach of EU law was remedied by virtue of a conforming interpretation of section 790 applying the *Marleasing* principle. In *Prudential Ch*, Henderson J held at [103] and [104] that section 790 could be construed as providing for the grant of a tax credit to the extent necessary to comply with EU law. It was not necessary to disapply the Schedule D Case V charge pursuant to which foreign dividends were taxed:

> 103. Applying these principles, I consider that it falls well within the scope of conforming interpretation to construe s 790 of ICTA 1988 as providing for the grant of a tax credit for foreign dividends to the extent necessary to secure compliance with EU law. Since s 790 already provides for the grant of tax credits, in the case of both portfolio and non-portfolio dividends, the grant of a further tax credit for portfolio dividends would not in my judgment go against the grain of the UK tax legislation. Nor would it require the court to make policy decisions for which it is not equipped, because the sole purpose of the tax credit would be to secure compliance with the judgments of the ECJ in which the UK tax system has been held to infringe art 63 TFEU.
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> 104 In reaching this conclusion, I am accepting the Revenue's submission that a conforming interpretation is possible, and that it is therefore unnecessary for the Case V charge on portfolio dividends to be disapplied in cases where it infringes art 63 TFEU. The Revenue's submission was, of course, advanced on the basis that the additional credit would be confined to the actual underlying tax paid on the distributed profits in the source country. However, I can see no reason why the same principles should not apply if the credit is of the more complex dual nature which I have held to be appropriate. The underlying purpose is still exactly the same, and the machinery of the grant of a credit still goes with the grain of the legislation.

39. In April 2016, the Court of Appeal in *Prudential CA* held that Henderson J had been entitled to apply a conforming interpretation.

February 2019 – Class 8

40. The group litigation continued in relation to various other aspects of the common law claims seeking recovery of overpaid tax on foreign dividends. It is convenient at this stage to say something about the decision in *Class 8*. We understand that it is the subject of an appeal to the Court of Appeal which is presently stayed. The proceedings in *Class 8* are part of the CFC GLO and concern common law claims made after 31 March 2010 to recover overpaid tax on foreign dividends. The significance of that date is that it gave rise to what was described as "the paragraph 51(6) issue". Paragraph 51 Schedule 18 Finance Act 1998 ("FA 1998") makes provision for a company to make a claim for repayment of tax where it has overpaid tax as a result of some mistake in a return. Paragraph 51(6) was amended with effect from 1 April 2010 to provide that HMRC were not liable to give relief in respect of claims except as specifically provided for by specified tax legislation. Subject to the challenge in *Class* 8, the effect of paragraph 51(6) was that all such common law claims brought on or after 1 April 2010 were ousted.

41. In short, the claimants contended that paragraph 51(6) breached the EU law principle of effectiveness because it undermined their rights to make effective claims. The taxpayers contended that they had made every conceivable form of statutory claim possible, but HMRC had said that they were insufficient, despite the fact the taxpayers were not aware that they could claim DTR by

way of credit for FNR or how to make such a claim. HMRC acknowledged that the principle of effectiveness required a claimant to have the means to make a claim, but submitted that it was irrelevant whether the claimant knew that it could do so before the ability to make such a claim was taken away by a validly implemented limitation period. HMRC contended that at all material times the claimants could have made claims for DTR pursuant to section 790 ICTA 1988.

42. The Chancellor addressed nine sub-issues in relation to paragraph 51(6) and we summarise those relevant for present purposes.

43. The second sub-issue was whether Henderson J in *Prudential Ch* misunderstood the CJEU decision in *Haribo Lakritzen Hans Riegel Betriebs GmbH v. Finanzamt Linz* (Joined Cases C-436/08 and C-437/08) when he held that the principle of effectiveness was not violated by the fact a taxpayer had to state in a claim how much tax the foreign company had paid, but could not find out.

44. The Chancellor held at [81] and [82] that Henderson J had not misunderstood *Haribo* and was right to hold that there was no breach of the principle of effectiveness. It was not the responsibility of a member state if investors could not obtain sufficient information to make a claim.

45. The third sub-issue was whether the fact that section 790 only applied to portfolio dividends as a result of *Marleasing* prevented it from being an effective remedy. It was held that this did not prevent section 790 from being an effective remedy. In reaching that conclusion the Chancellor stated at [83] and [84]:

> 83. The third sub-issue was only faintly argued as a free-standing point apart from the arguments concerning the proper interpretation of *Haribo.* It has been clear since *FII CJEU 1* in December 2006 that, in order to comply with EU law, section 790 had to be given a conforming interpretation so that it applied to portfolio dividends. That was an application of the *Marleasing* principle. In those circumstances, section 790 must, at least from that date, be taken to apply fully to portfolio dividends. As Lord Sumption said at paragraph 176 of *FII SC*, "… however strained a conforming construction may be, and however unlikely it is to have occurred to a reasonable person reading the statute at the time, a later judicial decision to adopt a conforming construction will be deemed to declare the law retrospectively in the same way as any other judicial decision". That is the position here, and the claimants must be deemed to have known since 2006 that such relief was available in respect of portfolio dividends under the conforming construction of section 790.
>
> 84. I, therefore, conclude that the relief allowed by section 790 is not prevented from being an effective remedy for the recovery of overpaid tax because it only applies to portfolio dividends as a result of *Marleasing*.

46. Accordingly, although it was not until *Prudential Ch* in 2013 that Henderson J actually held that foreign portfolio dividends were to be afforded DTR at the FNR (later confirmed by the Supreme Court in *Prudential SC* in 2018), the Chancellor found that taxpayers must be deemed to have known, since *FII CJEU 1* in December 2006, that section 790 required a conforming construction to comply with EU law.

47. The fourth sub-issue was whether, as the claimants argued, the fact they did not actually know they could bring a claim under section 790 prior to it becoming statute barred, prevented the claim from being an effective remedy.

48. In this context, Marcus Smith J had held in *Jazztel plc v. Revenue and Customs Commissioners* [2017] EWHC 677 (Ch) that a claimant who does not know that a remedy is available to him prior

to the introduction of a limitation period cannot have an effective remedy for the purposes of EU law. Marcus Smith J described this as "hidden retrospectivity". The Chancellor considered that *Jazztel* was wrongly decided on this point and declined to follow it, stating at [88] what he considered to be the correct principle which he then applied at [94]:

> 88. …The principle was best expressed in *FII CJEU 3* as follows: "[t]he detailed procedural rules governing actions for safeguarding a taxpayer's rights under EU law … must not be framed in such a way as to render impossible in practice or excessively difficult the exercise of rights conferred by EU law". It is the procedural rules that must not be framed in such a way as makes it impossible to claim. The knowledge of the claimant as to the existence of a claim is nothing to the point.
>
> …
>
> 94. Thus, in my judgment, the relief allowed by section 790 is not prevented from being an effective remedy because in some cases the claimants can show that they did not *actually know* that they had such a remedy before the abbreviated limitation periods meant that their remedy had become statute barred.

49. The Chancellor's rejection of hidden retrospectivity in the context of the introduction of limitation periods was endorsed by the Court of Appeal in *Jazztel Plc v HM Revenue & Customs* [2022] EWCA Civ 232.

50. The fifth sub-issue was whether the relief afforded by section 790 was prevented from being an effective remedy because taxpayers could not have been certain how much to claim. The claimants alleged that it was not an effective remedy because paragraph 54 Schedule 18 required a claim for relief to be for an amount which is quantified at the time the claim is made. However, they would not have known that DTR was available at the FNR until the decision in *FII CJEU 2*.

51. The Chancellor held at [100] that this did not prevent section 790 from being an effective remedy because a taxpayer could claim for any quantified amount, even if at the time it did not know that the relief would be calculated by reference to the FNR. The lack of knowledge of the precise rate did not make it impossible in practice to make a claim.

52. The seventh sub-issue concerned a potential defence to a claim for repayment which appeared to be available in paragraph 51A(8). This provided that HMRC were not required to give effect to a claim for repayment under paragraph 51 to the extent that the liability to tax had originally been calculated in accordance with the practice generally prevailing at that time. The claimants argued that this meant a claim for repayment under paragraph 51 relying on relief under section 790 would not provide an effective remedy. HMRC argued that paragraph 51A(8) fell to be disapplied in order to comply with the EU law principle of effectiveness. The Chancellor accepted HMRC's argument at [106].

Procedural provisions

53. In large part, the present appeals concern the procedure by which the Taxpayers were entitled to claim DTR by way of credit at the FNR, or repayment of tax overpaid in the absence of such a claim.

54. The procedural provisions in relation to company tax returns and claims are contained in Schedule 18 FA 1998. To some extent, they incorporate the procedural provisions of Taxes Management Act 1970 ("TMA 1970"). By way of overview, there are provisions for company tax returns (paragraph 3) and enquiries into those returns (paragraph 24). Where a company has made a company tax return, it can amend it by notice in the prescribed form within 12 months of the filing

date (paragraph 15). There are also provisions dealing with the situation where a company amends its return after an enquiry has been opened into the return (paragraph 31).

55. Paragraph 32 provides that an enquiry is completed when HMRC issue a closure notice stating their conclusions.

56. Paragraph 33 makes provision for a company to apply to the Tribunal for a direction that HMRC give a closure notice within a specified period. The Tribunal is required to give a direction unless HMRC have reasonable grounds for not giving a closure notice within a specified period.

57. Paragraph 34 sets out what happens at the conclusion of an enquiry. At all material times for the purposes of these appeals, HMRC were required to state that no amendment to the return was required or to make amendments to the return to give effect to the conclusions stated in the closure notice. Prior to 1 April 2010, the procedure was slightly different. Once a closure notice was issued stating HMRC's conclusions, the company had 30 days in which to amend its return in accordance with those conclusions. If HMRC were not satisfied that all necessary amendments had been made, then HMRC could amend the return as they considered necessary.

58. Paragraph 51 provides that a company can make a claim for relief where it has overpaid tax as a result of some mistake in a return. Paragraph 51(3)(b) provides that no relief shall be given under paragraph 51 in respect of a mistake in a claim which is included in the return.

59. Paragraph 54 is a general provision about making claims for relief, which would include claims for DTR. It provides that a claim for relief shall be for an amount which is quantified at the time the claim is made.

60. Paragraph 56 applies where a company makes a claim and subsequently discovers a mistake in the claim. Provision is made for the company to make a supplementary claim.

61. Paragraphs 57-59 set out how a claim should be made, in particular whether a claim should be made in a company tax return or outside the return. Claims made outside a return are generally described as "freestanding" claims and are governed by Schedule 1A TMA 1970. Schedule 1A sets out the procedure for HMRC to enquire into claims made outside a return, including claims for DTR made outside a return. Where a claim to DTR is made in a return, Schedule 18 provides the procedure for enquiring into the return and the claim.

62. Finally, section 806 ICTA 1988 provides a time limit for taxpayers to make claims for credit in relation to foreign tax on income, including dividends.

Requirements of EU law

63. In relation to some of the issues arising on these appeals, the Taxpayers rely on various EU law principles set out in a number of cases in the CJEU and the European Court of Human Rights ("ECtHR") to support their claims for repayment of tax levied in breach of EU law. There is no real dispute as to the principles involved which were set out by the FTT at [68]–[89]. The dispute is as to their application to the circumstances of the Taxpayers. It is well-established that member states have procedural autonomy in setting the detailed procedural rules which give effect to rights under EU law. However, that procedural autonomy is subject to the closely related EU law principles of effective judicial protection, effectiveness, legal certainty and equivalence.

Effective judicial protection

64. The principle of effective judicial protection is enshrined in the Charter of Fundamental Rights of the European Union which was given legal effect by the Lisbon Treaty on 1 December 2009. Article 47(1) is based on Article 13 of the European Convention on Human Rights and provides:

> **Article 47: Right to an effective remedy and to a fair trial**
>
> (1) Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this article.

65. The authorities to which we were referred elaborated on the scope and substance of the right under Article 47. For example:

> (1) The right applies to tax proceedings. Community law requires that national legislation does not undermine the right to effective judicial protection and that national courts should interpret procedural rules and adapt their procedures to ensure Community law rights are protected (see *Unibet (London) Ltd v Justitiekanslern* C-432/05) [2007] ECR I-2271 at [37]–[44] and *T-Mobile (UK) Ltd v Office of Communications* [2008] EWCA Civ 1373 at [22]).
>
> (2) For the right to a remedy to be effective, an individual must have a clear, practical opportunity to challenge an act that is an interference with his rights (See *Bellet v France* (23805/94 ECtHR at [36]).
>
> (3) Excessive formalism should not present a barrier to prevent a case being determined on its merits. The unforeseeability of a procedural requirement applied retroactively may impair the right to effective judicial protection (see *Gil Sanjuan v Spain* (No 48297/15 ECtHR and *Dos Santos Calado v Portugal* (55997/14 ECtHR).

66. It is common ground that these principles are applicable in the context of the enforcement of EU law rights before national courts. Indeed, the CJEU has itself deprecated undue formalism (see *Meilicke II* (Case C-262/09) [2013] STC 1494) at [46] and [47]).

Effectiveness

67. The principle of effectiveness was considered at [31] and [32] in *FII CJEU 3*, as referred to by the Chancellor in *Class 8*:

> 31 In the absence of EU rules on the recovery of national taxes unduly levied, it is for the domestic legal system of each member state, in accordance with the principle of the procedural autonomy of the member states, to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions at law for safeguarding the rights which taxpayers derive from EU law. The member states none the less have responsibility for ensuring that those rights are effectively protected in each case …
>
> 32 The detailed procedural rules governing actions for safeguarding a taxpayer’s rights under EU law must thus be no less favourable than those governing similar domestic actions (principle of equivalence) and must not be framed in such a way as to render impossible in practice or excessively difficult the exercise of rights conferred by EU law (principle of effectiveness) …

68. Legal uncertainty may give rise to a breach of the principle of effectiveness. In *Raffaello Visciano v Istituto nazionale della previdenza sociale* (C-69/08) [2009] ECR I-6741, the claimant was an employee whose employer went into liquidation. He applied to an Italian guarantee fund for compensation in respect of his unpaid wages. The fund paid him a lesser amount than was due.

Following judgments of the CJEU, the claimant applied to the Italian court for it to review the difference between the amount he had been paid and the amount due to him. The fund objected on the basis that a one-year limitation period applied to the claim (see [22]). The Court recognised that Member States were in principle free to lay down in their own national law provisions establishing a limitation period. However, it held at [46]:

> 46 … in order to serve their purpose of ensuring legal certainty, limitation periods must be fixed in advance. A situation marked by significant legal uncertainty may involve a breach of the principle of effectiveness, because reparation of the loss or damage caused to individuals by breaches of Community law for which a Member State can be held responsible could be rendered excessively difficult in practice if the individuals were unable to determine the applicable limitation period with a reasonable degree of certainty…

69. The CJEU found at [47]-[48] that:

(1) Italian law fixed a limitation period but did not determine when it started to run;

(2) The Italian court had changed its approach to the classification of such claims with the result that rules on the suspension of the limitation period were not applicable.

70. The CJEU then held at [49]:

> 49 Those two findings are liable to give rise to legal uncertainty which might constitute a breach of the principle of effectiveness, if it is found, and it is for the national court to make any such finding, that such legal uncertainty may explain the late lodging of Mr Visciano's application before it.

Legal certainty

71. The principle of legal certainty requires that rules involving negative consequences for persons should be clear and precise and that their application should be predictable for those subject to them (see *FII CJEU 3* at [44]). In *Banco de Portugal v VR* (Case C-504/19) at [51], the CJEU re-stated that principle and that in order to meet those requirements, legislation must enable those concerned to know precisely the extent of the obligations imposed on them. Those persons must be able to ascertain unequivocally their rights and obligations and take steps accordingly. The CJEU went on to say at [63]:

> 63. To accept that reorganisation measures taken by the competent authority of the home Member State subsequent to the bringing of such an action and such a judgment, which have the effect of modifying, with retroactive effect, the legal framework relevant to the resolution of the dispute which gave rise to that action, or even directly to the legal situation which is the subject matter of that dispute, might lead the court seised to reject that action, would constitute a restriction on the right to an effective remedy within the meaning of the first paragraph of Article 47 of the Charter, even if such measures are not in themselves contrary to Directive 2001/24, as set out in paragraph 61 of the present judgment.

Equivalence

72. The principle of equivalence requires rules regulating the right to recover taxes levied in breach of EU law to be no less favourable than the rules governing similar domestic actions (see *FII CJEU 3* at [32] quoted above). Lord Clarke in *FII SC 1* at [137] cited with approval AG Sharpston in *Unibet* at [32]):

> … the system of legal protection established by the Treaties implies that it must be possible for every type of action provided for by national law to be available for the purpose of ensuring observance of Community provisions having direct effect.

Consideration of the Issues

73. The overarching issue on these appeals is whether the Taxpayers have made valid, in-time claims for DTR or for repayment of overpaid tax on foreign dividends. There are also issues as to the effect of those claims if they are valid and timely. Most of the issues relate to procedural aspects of the UK provisions for claiming DTR or repayment of overpaid tax. We are concerned with the construction and practical effect of the procedural provisions in the context of the group litigation which established that section 790 must be given a conforming interpretation to provide for the FNR credit.

74. Issue 1 was concerned with those Taxpayers who made returns treating foreign dividend income as exempt. It is common ground that Issue 1 is academic for the reasons set out by the FTT at [116] and [117] of the Decision. In short, HMRC accepted that those taxpayers were in time to bring their claims for DTR following closure notices imposing a charge to tax on those dividends. There is therefore no need for us to address Issue 1.

75. The remaining issues may be summarised as follows.

> **Issues 2–5** concern the procedural approach the Taxpayers have taken in seeking to recover overpaid tax on foreign dividend income. The issues address in particular the appropriate statutory mechanism for the Taxpayers to recover tax levied in breach of EU law.
>
> **Issues 6–8** concern the extended time limit for claims to DTR provided by section 806(2) ICTA 1988. These issues arise only where a Taxpayer does not have a valid claim in light of the answers to Issues 2–5.
>
> **Issue 9** concerns the question of how HMRC should give effect to an amendment to a return where the amendment was made in time before the anniversary of the filing date, but after an enquiry into the return had already been opened.
>
> **Issues 10–13** concern computational issues and the interaction between DTR and the rules for setting off management expenses against profits chargeable to corporation tax.
>
> **Issue 14** was a factual dispute relevant to a closure notice application made by Baillie Gifford. There is no appeal against the findings of the FTT on Issue 14 and therefore no need for us to address it.
>
> **Issues A–E** were identified when the FTT circulated its decision in draft as consequential on the FTT's findings in relation to Issues 1–14. They were addressed by the FTT in the Decision as released in final form.

76. We address the issues in the same order as the FTT. The representative lead cases for each issue are set out at [7] and [231] of the Decision.

Issue 2

77. This issue concerns Taxpayers who made paragraph 51 claims on the basis that they had overpaid tax as a result of some mistake in a return. The principal lead case is SLMM European Equity Fund which purported to make a claim pursuant to paragraph 51 on 15 December 2009 for accounting periods ending 31 March 2004, 2005 and 2006. It is common ground that, if the claim is valid, it was made in time.

78. Various sub-issues arise as follows:

(1) Was there a valid claim for relief under paragraph 51; in particular was there any mistake in a return.

(2) If not, can the claim nevertheless properly be characterised as a claim for DTR pursuant to section 790.

(3) Can any defect in the form of the claim be cured by section 114 TMA 1970.

(4) If not, do principles of EU law nevertheless require the claim to be accepted.

79. Paragraph 51 Schedule 18 FA 1998 (until it was amended with effect for claims made from 1 April 2010 onwards) provided as follows in so far as relevant:

> 51(1) A company which believes it has paid tax under an assessment which was excessive by reason of some mistake in a return may make a claim for relief —
>
> (*a*) by notice in writing,
>
> (*b*) given to the Board,
>
> (*c*) not more than six years after the end of the accounting period to which the return relates.
>
> (2) On receiving the claim the Board shall enquire into the matter and give by way of repayment such relief in respect of the mistake as is reasonable and just.
>
> (3) No relief shall be given under this paragraph —
>
> (*a*) in respect of a mistake as to the basis on which the liability of the claimant ought to have been computed when the return was in fact made on the basis or in accordance with the practice generally prevailing at the time when it was made, or
>
> (*b*) in respect of a mistake in a claim or election which is included in the return.

80. The FTT considered Issue 2 at [118]–[127] of the Decision. It held that there was a mistake in the return and the claim under paragraph 51 was valid. If the claim was not valid, it appears that the FTT would have found that it could be characterised as a claim for DTR or that the claim was validated by section 114 TMA 1970, presumably as a claim for DTR. The FTT did not need to consider whether EU law otherwise required an effective remedy.

81. The claim was made by the Taxpayer in a letter dated 15 December 2009 which stated as follows:

> Please treat this letter as a claim to the Commissioners of HM Revenue and Customs under paragraph 51 Schedule 18 FA 1998 for a repayment of tax. The repayment claimed represents excessive tax paid as a result of a mistake in the company tax return for the above period.
>
> …
>
> The mistake relates to the erroneous inclusion, within the taxable profits computation, of overseas source dividend receipts shown in the final return as Schedule D Case V income. We consider that the correct application of section 208 ICTA 1988, read in compliance with EU law, (specifically Articles 43 EC and 56 EC dealing with the freedom of establishment and free movement of capital and payments), provides that all overseas source dividends should not be chargeable to UK corporation tax.
>
> The attached appendix identifies the dividend receipts relevant to this claim and the resulting excessive tax paid. We believe that the ECJ ruling in the FII test case (Case C-446/04) supports this position.

82. HMRC acknowledged the claim on 22 January 2010 and stated that it would be subject to enquiry. HMRC's letter also addressed the Taxpayer's returns for 2007 and 2008:

> I have today given notice under Paragraph 24(1) Schedule 18 of the Finance Act 1998 to your client fund of my intention to carry out a compliance check of the fund's return for the period 1 April 2006 to 31 March 2007 as amended on 31 March 2009 and also for the period 1 April 2007 to 31 March 2008. I also acknowledge receipt of the mistake relief claims for the periods 20 February 2004 to 31 March 2004, 1 April 2004 to 31 March 2005 and 1 April 2005 to 31 March 2006. These claims will be subject to enquiry.
>
> In this instance the compliance check has been opened on a protective basis because of claims under Section 208 ICTA 1988 in light of Article 43 of the EC Treaty. You will be aware that this matter is currently being considered by the European Courts of Justice and relates to the taxation of foreign dividends and in particular dividends received from EU countries.

83. In the event, formal notice of HMRC's intention to enquire into the paragraph 51 claims was not given until 10 December 2019 and on 21 April 2020 HMRC issued decisions rejecting the claims. In those decisions, HMRC asserted that there was no mistake in the returns because the income was properly treated as taxable.

(1) Was there a mistake in a return?

84. The Taxpayer submits that the relevant mistake was to treat tax as lawfully due when in fact it was not. Mr Bremner also referred us to the decision in *Prudential Ch* from which he said it is clear that there was no requirement for a DTR claim. Prudential had not made any prior claim to DTR and it was common ground in that case that tax was in fact paid under an operative mistake, the mistake being that the tax was lawfully due and payable. He noted that Henderson J had considered the relationship between common law claims and statutory claims. Both parties accepted in that case that Henderson J would determine issues of principle. In relation to open years, where there was still an open enquiry, such determinations would where possible be given effect to through the statutory appeals procedure. The FTT accepted the evidence of Mr Anderson, a solicitor with first hand knowledge, that those open years were ultimately settled on the basis of claims by Prudential pursuant to paragraph 51, with HMRC not suggesting that there had been no mistake for the purposes of paragraph 51.

85. The Taxpayer says that even if it is necessary to look more specifically at the type of mistake that will trigger paragraph 51, there was a mistake in the Taxpayer's erroneous belief that no DTR credit was available in the UK tax system. That mistake falls within paragraph 51.

86. The FTT agreed with those submissions and considered that a mistake which would support a common law claim would also support a claim pursuant to paragraph 51, stating at [123]:

> 123. … there is no difference between a mistake in a common law unjust enrichment claim and a claim under Paragraph 51. The mistake in the return was that tax was paid on the basis that the statutory provisions were lawful when they were not. This led to an overstatement of tax in the return. As such, a payment was made under an assessment which was excessive by reason of a mistake in a return. It therefore follows that the claims under Paragraph 51 are valid and that a specific claim for DTR is not necessary.

87. HMRC submit that the CJEU did not decide that the UK taxing provisions had to be disapplied so as to provide exemption from tax for foreign dividends. It was the denial of a DTR credit which was unlawful, and this was cured by a conforming interpretation of section 790. That conforming interpretation does not dispense with the requirement for a claim to DTR.

88. A common law claim in unjust enrichment based on mistake has a different jurisprudential basis to a claim made under paragraph 51. In our view, simply because there was a mistake which might found a common law claim does not mean that the same mistake will also found a claim for repayment pursuant to paragraph 51. Paragraph 51(3)(b) contains an express exclusion for mistakes in a claim. This is because there are specific provisions for making claims with specific requirements and specific time limits. It ensures that claims are dealt with under the relevant provision applicable to the particular claim being made. There is a six year time limit for a claim pursuant to paragraph 51 which runs from the end of the accounting period to which the claim relates. There is a separate six year time limit for claims to DTR in section 806 ICTA 1988 which runs from the end of the accounting period or, if later, one year after the end of the accounting period in which the foreign tax is paid. Paragraph 56 Schedule 18 provides a separate regime for correcting mistakes in a claim by way of a supplementary claim, to which the separate time limit would apply.

89. The Taxpayer included foreign dividends in its returns for accounting periods 2004 to 2006 as taxable, without claiming DTR, and paid tax accordingly. There were no mistakes in the returns whereby the tax paid under the self assessment was rendered excessive. The foreign dividends were always taxable, albeit with the opportunity to make a claim for DTR pursuant to section 790. The mistake which the Taxpayer made was in not making a claim for DTR, which is required by section 788(6).

90. Paragraph 51(3)(b) makes clear that no relief is to be given in respect of a mistake in a claim or election which is included in the return. The Taxpayer submitted that this paragraph is not relevant. Even if the mistake was failing to make a claim, that was not a "mistake in a claim" but a mistake in the return. We do not consider that paragraph 51 can fairly be construed in that way. If a claim has not been made, the remedy is to make a claim within the appropriate time limits. The fact that HMRC settled statutory claims of a different taxpayer on the basis of a mistake does not affect the proper construction of paragraph 51.

91. In support of its argument on Issue 2, the Taxpayer pointed out that HMRC had argued in *FII CA 1* in 2010 that section 33 TMA 1970, which applied to corporation tax prior to the introduction of paragraph 51 in FA 1998 and was in similar terms, afforded the appropriate remedy. As such, HMRC argued that it ousted common law claims for recovery of overpaid tax.

92. Although HMRC did argue in *FII CA 1* that section 33 ousted the common law claims, we do not consider that the stance it took in 2010 provides useful insight into the proper approach to be taken on these appeals to Issue 2, not least given the assumed and hypothetical basis on which the section 33 issue was canvassed in that case (see [251] of *FII CA 1*).

93. Following *FII CA 1*, HMRC issued *Business Brief 22/10, Overpayment Relief and Practice Generally Prevailing* on 3 June 2010. The purpose of the Business Brief was expressed to be:

(1) To publicise the introduction of overpayment relief with effect from 1 April 2010, and

(2) To advise on HMRC's approach to "practice generally prevailing".

94. Certain amendments were made to paragraph 51 with effect from 1 April 2010. At the same time, overpayment relief replaced error and mistake claims in relation to other taxes under section 33 TMA 1970. The overpayment relief provisions under both versions of paragraph 51 included an exception where the relevant tax had been calculated in accordance with the prevailing practice at the time. HMRC set out their understanding of that exception, in light of comments of the Court of Appeal in *FII CA 1*, as follows:

> In the view of the court, the practice generally prevailing exception is to be read as subject to the limitation "that it applies only if and to the extent that the United Kingdom can consistently with its [EU] treaty obligations impose such a restriction". The court concluded that practice generally prevailing does not affect a claim for repayment of taxes paid in breach of EU law.
>
> HMRC understand this principle also applies to the new overpayment relief. Therefore, if a claim for error or mistake relief or overpayment relief relates to taxes paid in breach of EU law, HMRC will not seek to disallow it on the basis that the tax liability was calculated in accordance with the prevailing practice.
>
> The other conditions for error or mistake relief and overpayment relief, such as time limits, will still need to be met in all cases.

95. The Taxpayer relies on the stance taken by HMRC in this document to support its argument on Issue 2. However, the Business Brief does not invite claims pursuant to paragraph 51. It was relevant to many types of claims that were being made, not specifically claims in relation to foreign dividends. There is no mention about how to bring claims for DTR in relation to foreign dividends. As such, the Taxpayer's reliance on this document did not seem to advance matters.

96. Finally, the Taxpayer also submits that it is implicit in [104] of *Class 8* that the Chancellor and HMRC considered that paragraph 51 claims were available in relation to the FNR credit. In *Class 8*, the claimants contended that the "practice generally prevailing" defence in paragraph 51A(8) would make recovery of overpaid tax practically impossible in the absence of a common law remedy. This was the seventh sub-issue which the Chancellor described as follows:

> 104 The seventh sub-issue concerns Mr Aaronson's argument that paragraph 51A(8) makes recovery of the overpaid tax practically impossible because it provides that HMRC "are not liable to give effect to a claim under paragraph 51 if or to the extent that … liability was calculated in accordance with the practice generally prevailing at the time". It is common ground that in some cases, at least, it is likely that HMRC could show that the overpaid tax was calculated in accordance with the practice generally prevailing at the time. HMRC, however, submit that, even if some claims would, in theory, have been excluded by paragraph 51A(8), the legislation must be read without the practice generally prevailing defence in order to comply with the EU law principle of effectiveness. In this regard, HMRC submits that *FII SC*'s decision refusing to exclude section 33 of the TMA on the same basis can be distinguished. Section 33 did not, unlike paragraph 51(6), seek expressly to oust common law claims, so what was said in *FII SC* at paragraphs 119 (Lord Walker) and 204 (Lord Sumption) is not applicable here.

97. As noted above, the Chancellor accepted HMRC's submission that the defence would fall to be disapplied to ensure that taxpayers had an effective remedy. Mr Bremner submitted that this presupposes that a claim could be brought under paragraph 51. In our view, this is a somewhat strained view of the matter. The Chancellor approached this sub-issue as a matter of principle, his focus being on whether there was an effective remedy under section 790. There is no warrant for reading *Class 8* as an endorsement of a claim under paragraph 51 as an available remedy.

98. For these reasons, we consider that the FTT erred in law in finding that the Taxpayer's claims were valid claims made under paragraph 51.

(2) Was this a claim for DTR?

99. The Taxpayer contends that if the claims pursuant to paragraph 51 were invalid because there were no mistakes in the returns, then the claims may yet be properly characterised as claims for "full DTR", including credit at the FNR. This is essentially an issue as to how the letter dated 15 December 2009 should properly be construed. It was common ground that we should give the letter

the meaning it would convey to a reasonable HMRC officer having all the background knowledge which would reasonably have been available.

100.The Taxpayer relied on *BT Pension Scheme v HMRC* [2014] EWCA Civ 23, which concerned the time limits applicable to claims for relief from tax, in that case by way of tax credit for advance corporation tax ("ACT") pursuant to section 231 ICTA 1988 on dividends from non-UK companies. The first issue was whether the trustees needed to make a claim for relief. If so, the further issue arose whether the time limits in sections 42 and 43 TMA 1970 were applicable, in which case the claims would be out of time. The third issue arose on the basis that the taxpayer did need to make a claim for relief. The taxpayer argued that their original claim for exempt status as a pension fund pursuant to section 592 ICTA 1988 and claims to the same effect in their annual returns amounted to claims for relief made in time. The Court of Appeal found that a claim for repayment of the ACT was required and such a claim would fall within section 43. It went on to reject the taxpayer's arguments that claims had been made.

101.Lewison LJ addressed the argument that claims for relief had in fact been made at [29] and [30]:

> 29. So far as the first of these is concerned, the exemption from income tax on income applied for the purposes of the exempt approved scheme does not turn on any particular form that the income takes. It applies just as much to income from property (e.g. rents) as to dividends. I do not consider that this kind of exemption from income tax can be regarded as a claim to tax credits. Whether a claim of the latter kind can be made, and if so for how much, will depend on the make-up of the Trustees' income in any particular year of assessment. Moreover, this argument does not overcome the more general objection to a claim for money that can be made without limit of time.
>
> 30. So far as the second argument is concerned, the problem here, as I see it, is that the annual returns did not in fact claim tax credits in respect of foreign dividends. That is not surprising, because until the CJEU's ruling, no one thought that they could be claimed. But I do not see how a failure (or omission) to claim something can amount to a claim to the very thing that has been omitted.

102.Mr Bremner submitted that the Court of Appeal did not reject the taxpayer's arguments on the basis that a claim for exemption could never be a claim for relief by way of tax credit. Rather, it found that a claim for that kind of exemption could not be characterised as a claim for credit. In contrast, the present claim was made expressly to vindicate the Taxpayer's EU law rights and was seeking a result which treated foreign dividends in the same way as domestic dividends. In practical terms, the Taxpayer was seeking to eliminate the UK tax liability on foreign dividends.

103.We do not consider that *BTPS* assists the Taxpayer on this issue. Lewison LJ was not addressing any wider question as to whether a claim to exemption could be regarded as a claim to something else. We must consider how a reasonable officer of HMRC would interpret the Taxpayer's letter dated 15 December 2009. In doing so, we take into account the relevant circumstances in December 2009, including the stage of the group litigation. We accept that labels are not determinative, which is common ground. Hence the fact that the claim is described as a claim under paragraph 51 does not mean that it might not fairly be considered a claim for DTR.

104.We note HMRC's response to the claim in their letter dated 22 January 2010. HMRC recognised that the Taxpayer was asserting its EU law rights. A protective enquiry was opened into the returns because the matter was currently being considered by the CJEU. The intention to subject the claims to enquiry arose for the same reasons.

105.In our view, a reasonable HMRC officer would appreciate that the Taxpayer was seeking to vindicate its EU law rights at a time when it had been established that there was a breach of EU law. Although the courts had not yet determined that DTR was to be made available at the FNR, both the Taxpayer and HMRC would be deemed to know as a matter of law that the remedy would involve a conforming construction of section 790 so as to give relief for portfolio dividends, even though in December 2009 the UK provisions expressly denied relief.

106.Mr Bremner also argued that the letter should be read in light of the fact that DTR by way of credit at the FNR was equivalent to exemption. Although the Taxpayer's letter of claim asserted that foreign dividends were not chargeable to UK Corporation Tax, this had the same practical effect as a claim for DTR.

107.We have already referred above to various passages in the authorities which indicate that credit at the FNR is equivalent to exemption. In particular, [39] of *FII CJEU 2* and [92] of *Prudential Ch*. It is clear however, that the CJEU did not regard credit at the FNR as the same as exemption and did not require the UK to give foreign and domestic dividends the same treatment. In *FII CJEU 2*, the CJEU stated at [52] that the UK legislation did not ensure equivalent treatment for foreign dividends. When it came to look at whether the different treatment was justified and issues of proportionality it stated at [61] that exemption "resembles" the grant of a tax credit at the FNR. The solution of a credit at the FNR was said at [62] to be "less prejudicial" to freedom of establishment and free movement of capital. This was confirmed at [64]:

> 64. It is true that calculation, when applying the imputation method, of a tax credit on the basis of the nominal rate of tax to which the profits underlying the dividends paid have been subject may still lead to a less favourable tax treatment of foreign-sourced dividends, as a result in particular of the existence in the member states of different rules relating to determination of the basis of assessment for corporation tax. However, it must be held that, when unfavourable treatment of that kind arises, it results from the exercise in parallel by different member states of their fiscal sovereignty, which is compatible with the Treaty…

108.Further, credit at the FNR will not necessarily produce the same result as exemption. The FNR may well be lower than the UK rate of corporation tax in which case credit clearly does not have the same effect as exemption. There are arguments about what the FNR is in any particular case, and those arguments featured in *Prudential Ch*. In *Prudential SC,* the Supreme Court said:

> 31. … It is clear that the ECJ was well aware that the adoption of the FNR would not eliminate all inequities or incongruities: see the commission's written observations, para 34, cited in para 22 above, the Advocate General's question put to Mr Lyal and Mr Lyal's answer cited in para 24 above and the ECJ's own judgment, para 64, cited in para 26 above. There could, depending on the incidence of nominal and effective tax rates, be swings and roundabouts in the equivalence achieved by a mixed system of domestic exemption combined with overseas credits. But the "ideal" alternative of a comparison between two tax systems to ensure equivalence (subject only to each state's right to set its own nominal tax levels) was consciously rejected as wholly impractical…

109.Overall, we consider that whilst the CJEU was aiming for equivalent treatment, it recognised that credit at the FNR was not the same as exemption, even if the two may give the same numerical result in certain circumstances.

110.It is also relevant that there is no such thing as a claim for exemption. The income is either exempt under section 208 ICTA 1988 or it is chargeable. It is then included or omitted from the return and the computation of tax accordingly. If it is included, an appropriate claim for relief by way of credit must be made. The purpose of a claim is to give notice to HMRC of what is being claimed and in what amount. If a taxpayer does not state what is being claimed, then it cannot be said to have made a claim. Unless the taxpayer indicates that it is claiming credit, it is not entitled to credit. In our view, the Taxpayer cannot say one thing and be treated as saying another merely because it produces the same result. That was the point being made by Lewison LJ at the end of [30] in *BTPS*. We cannot see how a document which seeks repayment of tax on the grounds that foreign dividends are exempt can be construed as a claim for credit on the basis that they are taxable.

111.We were told that international double taxation treaties regard exemption and credit as alternative ways of providing DTR, although exemption and credit are dealt with separately in treaties. A treaty may provide that income is taxable only in one state, in which case it will be exempt in the other state. Alternatively, it will provide that it can be taxed in both states which is where credits may be applied. We were not taken to any examples of this treatment in any double taxation treaties, but it is common ground at least that treaties do distinguish between exemption and credit.

112.In our judgment, the claim made on 15 December 2009 could only reasonably be construed as a claim purportedly pursuant to paragraph 51 for repayment of tax paid as a result of a mistake. It cannot be construed as a claim for DTR. We consider that the FTT erred in law in finding otherwise.

(3) Application of section 114 TMA 1970

113.The Taxpayer says that section 114 TMA 1970 cures any defects in the claims identified by HMRC. The issue here is whether section 114 can apply to taxpayer's documents and if so which types of documents.

114.Section 114 TMA 1970 provides as follows:

> 114(1) An assessment or determination, warrant or other proceeding which purports to be made in pursuance of any provision of the Taxes Acts shall not be quashed, or deemed to be void or voidable, for want of form, or be affected by reason of a mistake, defect or omission therein, if the same is in substance and effect in conformity with or according to the intent and meaning of the Taxes Acts, and if the person or property charged or intended to be charged or affected thereby is designated therein according to common intent and understanding.

115.The Taxpayer submits that, in a self-assessment system, there is no sensible reason to exclude taxpayer documents from section 114. It points to a decision of the FTT in *McGuinness v HM Revenue and Customs* [2013] UKFTT 88 (TC) at [54], where it was said to be an essential step in the FTT's reasoning that the taxpayer's self-assessment return was an "other proceeding" for the purposes of section 114. The case was referred to by the Court of Appeal in *R (otao Archer) v HM Revenue and Customs* [2017] EWCA Civ 1962 at [34] without disapproval.

116.In *McGuinness*, the FTT was not concerned with whether a defect in a taxpayer's document could be cured by section 114. It was concerned with whether a defect in HMRC's notice to file a self-assessment return could be cured by section 114. It was accepted by HMRC that there was a slight error in the taxpayer's name on the notice to file. The FTT held that a notice to file was an "other proceeding" and fell within section 114. As part of its reasoning, the FTT stated at [54]:

> 54. If this is correct, then an SA tax return would be an "other proceeding" as it is a "document required to be used in assessing…tax". A Notice to File takes the place of an SA return for those who are expected to file online. If it is correct that an SA return is an "other proceeding", then it must also be correct that a Notice to File such a return falls within TMA s 114(1).

117.When the FTT said that a notice to file takes the place of a self-assessment return for those who are expected to file online, it must have been referring to the fact that the paper copy of a self-assessment return addressed to a taxpayer incorporated the notice to file required by section 8 TMA 1970. The FTT was plainly not saying that section 114 could apply to documents submitted by taxpayers. Indeed, the same judge sitting in the FTT in *GLL BVK Internationaler Immobilien Spezialfonds and another v Revenue and Customs Commissioners* [2018] UKFTT 384 (TC) ("GLL BVK") held that section 114 could not as a matter of principle apply to claims by taxpayers. Further, whilst the Court of Appeal in *Archer* did refer to *McGuinness,* it cannot be taken as having endorsed the application of section 114 to taxpayer's documents. We are satisfied that the FTT in the present appeal was wrong at [127] where it considered that *McGuinness* involved an unequivocal finding that section 114 applied to taxpayer documents that was tacitly approved by the Court of Appeal.

118.HMRC rely on *GLL BVK* in the Upper Tribunal ([2019] UKUT 17 (TCC)) which concerned a claim to repayment of tax pursuant to Schedule 1AB TMA 1970. The Upper Tribunal did not have to decide whether section 114 could apply to claims made by taxpayers, but it did consider in any event whether the claim letter could be an "other proceeding" for the purposes of section 114:

> [40] We accept Ms Shaw's submission, that is supported by para [34] of Lewison LJ's judgment in *Archer*, that 'other proceedings' for the purpose of s 114 include 'every document required to be used in assessing, charging, collecting and levying tax' for the purposes of s 113(3) of TMA. However, that definition does not apply to the Claim Letter. By the time of that letter, the process of assessing, charging, collecting and levying tax was complete and indeed the Claim Letter sought to establish that that process had resulted in the Appellants paying the wrong amount of tax. No doubt Ms Shaw is correct to say that the process of determining how much tax is due can be an iterative process. But Parliament has not specified that any document relevant to a taxpayer's final tax liability falls within s 113(3). Rather, Parliament has singled out documents *required* to be used in assessing, charging, collecting and levying tax. That process ended well before the Claim Letter was written and, moreover, there was no 'requirement' to submit the Claim Letter at all.

119.The Upper Tribunal referred to *Archer* and *Donaldson v HM Revenue and Customs* [2016] EWCA Civ 761 where the Court of Appeal found that section 114 applied to defects in form and not substance. It would not apply where a reasonable recipient of the document would have been confused or misled by the document. Further, section 114 cannot remedy "fundamental" or "gross" errors. It held at [42]–[44] that even if section 114 could in principle apply to the document, it would not provide relief because:

> (1) There was no mistake in the claim letter. Viewed objectively, it claimed repayment of the precise amount of tax which it intended to claim.
>
> (2) As such, if the claim letter was intended to take effect as the taxpayer argued, a reasonable HMRC officer would have been confused or misled.
>
> (3) The alleged mistake in the claim letter was fundamental.

120.Mr Bremner submitted that the process of assessing, charging, collecting and levying tax was not complete here. The claim would be in time and was part of the process of charging and levying tax. There is no reason in principle to exclude a claim for DTR from relief under section 114.

121.We agree with HMRC that section 114, even if it did apply to taxpayers' documents, would not cure the defect in the Taxpayer's claim. It is clear that the Taxpayer intended to assert that the income was exempt rather than taxable with DTR. That is not a defect that could be cured by section 114. The mistake would clearly be gross or fundamental. It would have misled a reasonable officer reading the letter dated 15 December 2009. The FTT was therefore wrong to conclude that section 114 could cure the defect in the claim.

(4) Do principles of EU law require the claim to be accepted?

122.The Taxpayer says that if the previous issues are resolved in favour of HMRC, principles of EU law still require its claim to be accepted as a claim for DTR. Otherwise, it has been deprived of an effective remedy. In December 2009, a claim pursuant to paragraph 51 reasonably appeared to be the correct route. HMRC cannot require taxpayers to effectively guess what the appropriate remedy might be.

123.We have outlined above the principles of EU law relied on by the Taxpayer. The issue between the parties is whether those principles are engaged in the circumstances of this case. The FTT did not need to consider this sub-issue because it found that the claim was valid as a matter of domestic law.

124.The Taxpayer submits that HMRC cannot impose a requirement to make a claim for DTR pursuant to section 790 in circumstances where at the time UK law did not permit such a claim and group litigation was being conducted on the basis that foreign dividends would be either taxable with no DTR credit or exempt from tax. It was not contemplated in 2009 that DTR by way of credit at the FNR might be available. It is said that HMRC's position turns the enforcement of EU law rights into a game of "guess the remedy" and is inconsistent with the EU law authorities, in particular:

(1) *Unibet* at [44] and *T-Mobile* at [22] which require procedural rules to be interpreted in such a way as to attain the objective of ensuring effective judicial protection.

(2) *Sanjuan* at [31] and [44] and *Meilicke II* at [46] to the effect that excessive formalism should not be a barrier to a litigant having its case determined on the merits and that the unforeseeability of a procedural requirement applied retroactively impaired the right of access to a court.

(3) *Bellet* at [37] that the procedures should be sufficiently clear for litigants to make available use of remedies without misunderstanding.

(4) *Banco de Portugal* at [51] that rules of law must be clear and precise and their application foreseeable.

(5) *Visciano* at [49] that significant legal uncertainty, in that case arising from a retroactive change in procedural rules, can give rise to breach of the principle of effectiveness.

125.The Taxpayer essentially relies on the same background facts relied on for the purposes of sub-issue (2), emphasising that:

(1) The FNR credit was not recognised in December 2009 and the UK provisions expressly denied relief so that there was no procedure to claim relief.

(2) The Taxpayer sought to assert its EU law rights and it used the remedy which appeared most appropriate. HMRC was aware what the Taxpayer was seeking to claim.

(3) HMRC argued in *FII CA 1* that paragraph 51 claims were the appropriate remedy.

(4) A claim for exemption is equivalent to a claim for DTR by way of credit at the FNR which HMRC now say the Taxpayers should have made.

(5) The retroactive conforming interpretation of section 790 cannot impose a requirement to make a section 790 claim, and invalidate steps which at the time were reasonable.

126.Mr Bremner distinguished the position of (1) a taxpayer who fails to make a claim to recover tax because it did not know that there was a remediable breach of EU law, and (2) a taxpayer who believes that there is a remediable breach but reasonably makes one type of claim in seeking to resolve uncertainty as to the correct procedure. In the first situation, the state's right to legal certainty and finality prevails. In the second situation, the state has been alerted to the claim and cannot rely on procedural uncertainty to deny relief.

127.Mr Ewart KC for HMRC submitted that there is a short answer to the Taxpayer's claim that it does not have an effective remedy. HMRC accept that in 2009 the Taxpayer could have made a common law claim for unjust enrichment. The Taxpayer therefore had an effective remedy. However, it chose to go down the route of a statutory claim when the UK statutory provisions did not on their face provide a remedy.

128.In our view, that submission fails to meet the point that whilst UK domestic legislation did not recognise the Taxpayer's right to relief for underlying tax, the conforming interpretation provided the Taxpayer with entitlement to such relief.

129.Mr Ewart also submitted that the circumstances of the cases relied on by the Taxpayer are far removed from the present appeals. The difficulties in those cases were caused by procedural rules of the domestic courts and not by EU law or the decisions of the CJEU. In the present appeals, the problems and uncertainties were caused by EU law itself, including *Marleasing*, which is an EU law principle and which EU law requires to be applied retrospectively. The UK domestic procedures for claiming a tax credit were clear. *Unibet* itself makes clear at [37]-[44] that procedural rules are a matter for domestic law.

130.In our view, this submission was more compelling. If the CJEU had decided the case on the basis of the FNR credit in *FII CJEU 1* in 2006, it may well have made it easier for the Taxpayer to make an effective claim. However, we agree with Mr Ewart that it is not the case that the UK procedural rules were overly formulaic or somehow breached Article 47. They were perfectly adequate for making claims. No form is laid down. Claims can be made in a return or outside a return. There was a clear procedure for amending a claim and there was a reasonable time limit. There are procedural rules for enquiries, closure notices and appeals. It cannot be suggested that the procedure, in principle, is non-compliant with Article 47 or does not give an effective remedy.

131.The Taxpayer relies on the decision of the CJEU in *Metallgesellschaft v Inland Revenue Commissioners* (Cases C-397 and 410/98) to contend that it is not permissible for the state to require a prior domestic step to be taken as a condition of recovering overpaid tax. *Metallgesellschaft* concerned ACT on distributions by UK resident companies. Where the distributing company was a 51% subsidiary of another UK company, the two companies could make a group income election with the consequence that no ACT was due on the distribution. Where the parent company was not UK resident, there was no provision for a group income election. The CJEU found that this was a breach of EU law. It acknowledged at [102] that the common law claim for restitution being brought by the taxpayer was subject to national rules of procedure, but it was no answer to that claim that the taxpayer had not made a group income election where UK law expressly denied it that opportunity. The Court stated at [103] and [106] as follows:

> 103 Next, it is not disputed that in the cases in the main proceedings the tax legislation of the United Kingdom clearly denied resident subsidiaries of non-resident parent companies the benefit of the group income election, with the result that the claimants cannot be faulted for failure to indicate their intention to apply to make a group income election. According to the orders for reference, it is not disputed that,

> had the claimants applied for that taxation regime, their application would have been refused by the inspector of taxes because the parent companies were not resident in the United Kingdom.
>
> 106 The exercise of rights conferred on private persons by directly applicable provisions of Community law would, however, be rendered impossible or excessively difficult if their claims for restitution or compensation based on Community law were rejected or reduced solely because the persons concerned had not applied for a tax advantage which national law denied them, with a view to challenging the refusal of the tax authorities by means of the legal remedies provided for that purpose, invoking the primacy and direct effect of Community law.

132.Similarly, in *Deutsche Morgan Grenfell Group Plc v Inland Revenue Commissioners* [2006] UKHL 49 the absence of a domestic election was no bar to recovery by way of a common law claim.

133.HMRC say that the proposition relied on by the Taxpayer is true for the purposes of a claim in mistake, but not for the purposes of a statutory claim. The principle in *Metallgesellschaft* arose in the context of a defence which alleged that the taxpayer had failed to mitigate its loss because it failed to make a group income election. It has no application in the context of a statutory claim. The Taxpayer in the present proceedings had to bring some appropriate proceedings. If it had brought proceedings for restitution it would have succeeded. However, having chosen to go down the route of a statutory claim, it had to make an appropriate claim for DTR.

134.We accept that *Metallgesellschaft* does not support the proposition contended for by the Taxpayer on these appeals. What was said in that case was in the context of an assertion that the taxpayer had failed to act diligently by not making a group income election. In this case, we are considering a different question, namely whether the Taxpayer had an effective remedy in December 2009.

135.HMRC place particular reliance on *Class 8*, in particular the third and fourth sub-issues concerning the claimants' ignorance of a statutory remedy prior to the introduction of the relevant limitation period. The question was whether, in those circumstances, a claim under section 790 nevertheless provided an effective remedy. The Chancellor decided that section 790 claims were an effective remedy. HMRC say that we are being asked to depart from the decision in *Class 8* on the basis it was wrongly decided and that we should only do so if it is obviously so.

136.In *Class 8* at [83] and [84], the Chancellor held that the fact section 790 only applied as a result of the *Marleasing* principle did not prevent it from being an effective remedy. As he said, "*the claimants must be deemed to have known since 2006 that such relief was available in respect of portfolio dividends under the conforming construction of section 790*". Similarly, under the fourth sub-issue he held at [88] and [97] that the claimants' lack of knowledge that they could make a claim under section 790 did not render the exercise of their rights excessively difficult.

137.The FTT in the present appeal stated at [67] that Class 8 did not address the scope of what amounts to a valid statutory claim or whether there were other statutory mechanisms by which the Taxpayer's EU law rights could be vindicated. That is certainly true, but as we have said there is no difficulty with the procedural rules for making a claim. In *Class 8*, the Chancellor held that a claim under section 790 provided an effective remedy and the taxpayer's lack of knowledge did not mean that they had no effective remedy. We should follow that decision unless we consider that it is manifestly wrong (see most recently *Mercy Global Consult Limited v Adegbuyi-Jackson* [2023] EWCA Civ 1073 at [31]–[37]). We are not satisfied that it is manifestly wrong. Nor, in our view, does the Taxpayer's reliance on principles of effective judicial protection, legal certainty or equivalence, which were not specifically considered in *Class 8*, affect that conclusion.

138.We do not consider that principles of EU law require the Taxpayer's letter dated 15 December 2009 to be accepted as a valid claim to DTR.

Issue 3

139.Issue 3 concerns claims made in returns for relief for WHT on foreign dividends where HMRC opened enquiries into the returns. The issue is whether HMRC should have allowed DTR by way of credit at the FNR when closing the enquiry.

140.The principal lead appeal is Schroder Institutional Growth which filed a return for accounting period ending 30 June 2004 on 19 October 2004. Non-EU dividends were treated as taxable and the Taxpayer claimed credit for WHT. HMRC gave notice of their intention to enquire into the return on 15 February 2006. The enquiry was closed on 27 March 2020.

141.The FTT considered Issue 3 at [128]–[138] of the Decision. It held that HMRC should have allowed relief for the underlying tax at the FNR when closing the enquiry.

142.Part XVIII ICTA 1988 covers DTR generally. Chapter 1 identifies the principal reliefs, in particular treaty relief under section 788 and unilateral relief under section 790. Chapter 2 makes provision for general rules governing relief by way of credit, whether by way of treaty relief or unilateral relief.

143.It appeared to be common ground for the purposes of this issue that once section 790 is read with a conforming interpretation, the other provisions in relation to claims apply according to their terms. Having said that, the provisions say nothing about the mechanics of making a claim, save that section 788(6) requires any claim to be made to HMRC. Further, paragraph 54 Schedule 18 FA 1998 provides that a claim must be quantified. Other than that, there are no provisions which set out any requirements as to what must be contained in a claim for DTR. There is no express indication as to what level of detail a claim must provide, in particular whether it is for treaty relief, unilateral relief or both, and whether it is for WHT or underlying tax or both.

144.The Taxpayer's case is essentially that the provisions envisage a single claim for DTR covering treaty relief, unilateral relief and all related credits covered by those reliefs. Further, it was established in *Class 8* that a claim for relief must be quantified but it need not be accurately quantified. Here, the claim has been quantified by reference to WHT, but that is irrelevant. At the conclusion of the enquiry, the claim should be adjusted so that it reflects the correct amount of DTR.

145.HMRC say that this is not simply a matter of quantification. What is required is a specific claim for credit at the FNR. Mr Ewart pointed out that the claim in the present case was for treaty relief, whereas what the Taxpayer is now seeking is a credit for unilateral relief. Further, a claim for WHT is entirely different to a claim for what is in effect underlying tax at the FNR. Relief for WHT gives juridical double tax relief whereas credit at the FNR gives relief for economic double taxation.

146.We accept Mr Ewart's analysis of the differences between a credit for WHT by way of treaty relief and a credit for underlying tax at the FNR by way of unilateral relief. However, that does not help in identifying whether a claim for relief for WHT can be treated as a claim for DTR generally which encompasses a claim for relief by way of credit at the FNR.

147.HMRC point out that the company tax return for the period ended 30 June 2004 required taxpayers to put an "X" in Box 61A if its claim for DTR included a claim for any underlying tax. Unsurprisingly, the Taxpayer in this case put no X in the box. HMRC say that is because the

Taxpayer's claim was limited to credit for WHT. It is consistent with HMRC's case that the Taxpayer was not making a claim for unilateral relief by way of credit for underlying tax.

148.We accept that the Taxpayer did not intend to claim unilateral relief by way of credit at the FNR on those foreign dividends where it claimed relief for WHT. At the time of the claim, no-one was aware that relief might be available for underlying tax whether by way of credit at the FNR or otherwise. In any event, we understand the company tax return is not a prescribed form as such. Paragraph 3 Schedule 18 makes provision for HMRC to require a company to deliver a return containing such information as may reasonably be required. There are certain statutory requirements for what is to be included in the return, but nothing specifically relevant to claims for DTR.

149.Mr Bremner submitted that the provisions indicate that taxpayers make only one claim to DTR which encompasses all types of relief which might be available. In particular, he relied on section 788(6) which refers to "*a claim for an allowance by way of credit in accordance with Chapter II*" and "*a claim for relief under subsection 3(a)*". He submitted that this suggests that there is a single credit and a single claim for DTR. He pointed out that section 790 defines unilateral relief as encompassing relief for WHT as well as underlying tax, and that section 806 which provides the time limit for "*any claim for an allowance under any arrangements by way of credit for foreign tax*". Mr Bremner also relied on the fact that Henderson J considered that the grant of credit at the FNR did not go against the grain of the legislation in section 790. He submitted that HMRC's position cannot be reconciled with the reasoning of Henderson J in *Prudential Ch*. If there was something fundamentally different about WHT, underlying tax and credit at the FNR, it is difficult to see how Henderson J could have relied on the fact section 790 already provides for tax credits.

150.We do not consider that the reasoning of Henderson J in the context of whether a conforming interpretation was possible assists on the present issue. He was simply identifying another form of credit for which DTR could be claimed. He was not saying anything about how claims for relief should be made or whether a claim could be treated as encompassing a claim for treaty relief and unilateral relief.

151.Mr Ewart submitted that section 790(5)(b) makes clear that unilateral relief and treaty relief cannot both be claimed in relation to the same foreign tax. That is true, but it does not prevent a claim for both treaty relief and unilateral relief in relation to the same income. That is reflected in the remedy for the breach of EU law, which was given by way of a conforming interpretation to section 790. No double tax treaties made provision for relief by way of FNR credit, but taxpayers were entitled to both treaty relief, for example in relation to WHT, and credit at the FNR by way of unilateral relief.

152.HMRC say that a claim directed towards one type of DTR cannot cover another type of DTR, even if it relates to the same income. That is because HMRC need to know what is being claimed and on what basis so that they can open an enquiry if appropriate. There may be no reason for HMRC to open an enquiry into a claim for WHT by way of treaty relief. It is a straightforward calculation for which the taxpayer should have a certificate of tax paid. Mr Ewart submitted rhetorically that if part of a claim for DTR is "invisible" then how can HMRC enquire into it.

153.Even if that is right, it is not what the statutory provisions say and we do not consider that it gives rise to any difficulty. The taxpayer could make a new claim or a supplementary claim for additional DTR at any time within the time limits in section 806. Outside the time limits, the claim becomes final. If HMRC opens an enquiry into the return or the claim, then the taxpayer can assert an entitlement to the proper amount of DTR even if the enquiry is not closed until after the time limit has expired. There is nothing surprising about such a result. Indeed, section 788(7) and section

790(11) seek to ensure that the "*proper credit*" is given in respect of any particular amount of income. The point is not that a claim is "invisible". Rather it is only after HMRC have opened an enquiry that consideration may be given to the proper credit available in relation to any particular source of income.

154.We accept HMRC's submission that they are entitled to know that a claim to DTR is being made and the amount which is being claimed. However, in circumstances where the provisions do not identify any additional level of detail to be included in a claim, we cannot read any further requirement into the provisions. There are various forms of DTR described in Part XVIII ICTA 1988, and they are all reliefs which mitigate the effects of double taxation, whether it is juridical double taxation or economic double taxation. We agree with Mr Bremner that a claim for DTR encompasses all types of double taxation. Hence, if a company claimed treaty relief when it ought to have claimed unilateral relief, or vice versa, we cannot see anything to suggest it should be denied relief because of that error. Similarly, if a company limits its claim to WHT when it could have claimed relief for underlying tax, there is no reason it should not make a supplementary claim which is within time. It would not need to make a new, separate claim.

155.It may be that HMRC wish to know whether the claim to DTR includes a claim for underlying tax, and the tax return supplies that information. However, we cannot see that HMRC are in any way prejudiced by a construction which treats a claim to DTR as encompassing both WHT and underlying tax, either by way of treaty relief or unilateral relief.

156.The Taxpayer also relied on the same arguments based on EU law principles that we have considered under Issue 2. We have not found it necessary to consider those principles in the context of this issue.

157.For the reasons given above, we are satisfied that the FTT was correct to find that where a taxpayer has claimed DTR by way of WHT, and an enquiry is opened into the return, HMRC must reflect in its closure notice any entitlement to DTR by way of credit at the FNR.

Issue 4

158. This issue arises to the extent that the Taxpayers' claims did not constitute valid claims for repayment of overpaid tax or for credit at the FNR. The Taxpayers say that the documents relied on in support of those claims take effect as claims pursuant to Schedule 1A TMA 1970.

159.Paragraphs 57-59 Schedule 18 FA 1998 have the effect that Schedule 1A shall apply to a claim for DTR made outside a company tax return. Schedule 1A provides a scheme for taxpayers to make claims and for HMRC to enquire into claims which are not contained in a return.

160.The FTT rejected the Taxpayers' case on Issue 4. It held at [139] to [141] of the Decision that the documents could not take effect as claims pursuant to Schedule 1A. The reasoning of the FTT was based on the fact that Schedule 1A did not provide for any time limit within which claims were required to be made or any right as such to make a claim. The Taxpayers cross-appeal against this aspect of the Decision.

161.The Taxpayers say that a six year time limit for claims under Schedule 1A is to be found in paragraph 55 Schedule 18. Paragraph 55 is the default position in relation to substantive claims under the Corporation Tax Acts. However, it only applies where the Corporation Tax Acts make provision for a substantive claim to be made.

162.Schedule 1A is introduced by section 42(11) TMA 1970 which deals with the procedure for making claims. It is simply a procedural code for dealing with claims made outside a return, and does not itself give any substantive right to make a claim. If there are no valid claims, Schedule 1A cannot assist the Taxpayers. The Taxpayers say that Schedule 1A must apply if the documents are not effective to make valid claims. They rely on general principles of EU law and on *Visciano* in particular. For the reasons we have given under Issue 2, we do not accept that argument.

163.It is true that paragraph 4(1) Schedule 1A expressly contemplates claims for repayment of tax. However, it does not give any substantive right to make a claim for repayment. That is the role of paragraph 51 in relation to corporation tax.

164.We are satisfied therefore that the FTT was right to find in favour of HMRC on this issue.

Issue 5

165.This issue arises where a Taxpayer has filed a return showing foreign dividend income as taxable, but then purports to amend the return to show the income as exempt after the first anniversary of the filing date but within the time period in section 806(1) ICTA 1988. The Taxpayers say that such an amendment is to be regarded as a claim for credit at the FNR made within time.

166. There is a time limit in section 806 ICTA 1988 for taxpayers to make claims for an allowance by way of credit for foreign tax on income, including dividends. The basic time limit in section 806(1) is that a claim to DTR must be made within 6 years after the end of the accounting period in which the income fell to be charged to corporation tax:

> 806(1) Subject to subsection (2) below and section 804(7), any claim for an allowance under any arrangements by way of credit for foreign tax in respect of any income or chargeable gain —
>
> (a) …
>
> (b) shall, in the case of any income or chargeable gain which falls to be charged to corporation tax for an accounting period, be made not more than —
>
> (i) six years after the end of that accounting period, or
>
> (ii) if later, one year after the end of the accounting period in which the foreign tax is paid.

167. The basic time limit may be extended where the conditions in section 806(2) are satisfied. Section 806(2) is the subject of Issue 6.

168. The principal lead appeal is Fidelity UK Index Fund. Fidelity treated EU dividend income as exempt and non-EU dividend income as taxable in its company tax returns for accounting periods ending 28 February 2009 and 2010. Enquiries were opened into those returns. Fidelity then purported to amend the returns in relation to non-EU dividends. This was after the time limit for making amendments in paragraph 15 Schedule 18, which was 12 months after the filing date. The purported amendment was made by Fidelity in a letter dated 25 February 2013 which stated as follows:

> We are writing with regard to the above mentioned fund and would like to amend the tax filing positions for the 2009 and 2010 accounting periods stated above under paragraph 31, schedule 18 FA 1998.
>
> The original tax computations and returns were submitted to HMRC on the basis that third country dividends (i.e. non-EU dividends) were brought into the charge to tax. The amendment is to exempt third country dividends for the relevant periods above.

169.The FTT records at [146] that a computation attached to the letter reduced the non-EU dividend income to zero and "*removes the sum claimed as DTR*", presumably in respect of WHT.

170.By letter dated 18 March 2013, HMRC "held" these amendments because there were open enquiries into the returns. The Taxpayer points out that in relation to other Fidelity funds where similar out of time amendments were made but no enquiries were open, HMRC treated those amendments as claims for overpayment relief.

171.The FTT held at [142]–[151] that the purported amendments amounted to claims for credit at the FNR under section 806(1). It appears to us that the FTT intended to refer to a claim under section 790, which was within the time limit set out in section 806(1). It found support for that conclusion in *BTPS*. In the alternative, the FTT found that the amendments could operate as claims for repayment of overpaid tax within paragraph 51.

172.The Taxpayer repeats the submissions made under Issue 2 and submits that the amendments should be construed as a claim for additional DTR. A reasonable reader of the letter dated 25 February 2013 would regard the assertion that non-EU dividends should be treated as exempt as a claim for sufficient DTR credit to eliminate the UK corporation tax liability.

173.The Taxpayer further argues that it is not open to HMRC to take the point that the amendments are not effective claims for repayment pursuant to paragraph 51 because that would be contrary to HMRC's response in relation to the other Fidelity funds and also contrary to the agreed formulation of Issue 5.

174.We do not consider the Taxpayer has made out any case that in relation to this fund, HMRC are bound by their response in relation to other Fidelity funds. Further, we are not satisfied that the agreed formulation of Issue 5 binds HMRC to accept that the purported amendments operate as valid claims under paragraph 51.

175.HMRC submit that for the same reasons that the claims for relief under paragraph 51 in Issue 2 were not valid and could not be construed as claims for DTR, so too these claims could not be construed as claims for DTR and could not be valid claims for relief.

176.We have taken into account the specific terms of the Taxpayer's letter dated 25 February 2013. For the reasons given in relation to Issue 2, we do not consider that the letter amounted to a claim to DTR or to additional DTR. The Taxpayer was seeking to amend its returns out of time to treat the income as exempt. Exemption is not the same as taxable with a deduction for DTR by way of credit at the FNR. The FTT found that the computation removed sums claimed as DTR. In those circumstances, the purported amendment cannot be construed as a claim to DTR. For the reasons given under Issue 2, *BTPS* does not support any different conclusion.

177.We are satisfied that the FTT therefore erred in law when it found that the purported amendments amounted to claims for DTR by way of credit at the FNR, and in the alternative that they amounted to claims for overpayment relief pursuant to paragraph 51.

Issue 6

178.This issue concerns a point of construction of section 806(2) ICTA 1988 which extends the basic time limit for DTR claims in section 806(1). There are competing interpretations of the conditions required to engage section 806(2) and the date from which time runs under that section.

179.The principal lead appeal is Avon Insurance, which included foreign dividends in its company tax returns for accounting periods between 1997 and 2003. It treated that income as taxable and claimed credit for WHT. On 8 November 2018, following the decision in *Prudential SC,* the Taxpayer made claims for DTR by way of FNR credit.

180.HMRC responded on 14 February 2019 stating that the claims were out of time and that the extended time limit in section 806(2) was not engaged. The claims were therefore invalid. Without prejudice to that argument and to the extent that the claims were in time and valid, HMRC gave notice of their intention to enquire into the claims.

181.The Taxpayer applied for a closure notice on 9 April 2019. The question of whether the FTT should have directed HMRC to issue a closure notice depends on whether the Taxpayer's claims were valid and in time.

182.Section 806(2) provides as follows:

> 806(2) Where the amount of any credit given under the arrangements is rendered excessive or insufficient by reason of any adjustment of the amount of any tax payable either in the United Kingdom or under the laws of any other territory, nothing in the Tax Acts limiting the time for the making of assessments or claims for relief shall apply to any assessment or claim to which the adjustment gives rise, being an assessment or claim made not later than six years from the time when all such assessments, adjustments and other determinations have been made, whether in the United Kingdom or elsewhere, as are material in determining whether any and if so what credit falls to be given.

183.Section 806(3) complements section 806(2) in providing that a taxpayer must give notice to HMRC if an adjustment is made to the foreign tax payable on the income which renders excessive the amount of a credit previously allowed.

184.HMRC say that section 806(2) is intended to apply in two situations:

> (1) Where the amount of UK tax on the income becomes the subject of a dispute, and the determination of that dispute affects the maximum amount of DTR credit available to the taxpayer. DTR is limited by reference to the UK tax on the income.
>
> (2) Where the amount of foreign tax on the income becomes the subject of a dispute which affects the amount of DTR credit available to the taxpayer.

185.Disputes as to the amount of tax chargeable may not arise or be resolved for many years, outside the basic time limit for making a claim in section 806(1). The time limit for an assessment by HMRC or for a claim by a taxpayer resulting from an adjustment in the amount of UK tax or foreign tax chargeable is therefore extended to 6 years from the date of the adjustment.

186.By way of illustration, HMRC pointed to one situation in which section 806(2) would be engaged which is also relevant to Issue 7. The situation concerns a taxpayer which treated foreign dividend income as exempt in a return. If HMRC open an enquiry into the return and conclude that the income was taxable then there would be an increase in the amount of UK tax payable. The return shows no UK tax payable but in fact the income was subject to full UK corporation tax. HMRC accept that in those circumstances the taxpayer could make a claim for DTR by way of credit at the FNR within the extended time limit. This was the case in respect of claims by some Taxpayers which returned EU dividend income as exempt.

187.The FTT held at [152]–[161] that the conditions in section 806(2) were engaged in relation to the Taxpayer's claims and that the six-year time limit in section 806(2) began to run from the date of the judgment in *Prudential SC,* which was 25 July 2018.

188.It is common ground that the declaratory theory of law, that judges do not make the law but only declare what the law has always been, is not a bar to the application of section 806(2). Decisions of courts and tribunals on the application of a taxing statute will have retroactive effect, but it is accepted that they may still result in an adjustment to the tax payable.

189. HMRC's case is that Section 806(2) does not apply where there is a change in legal understanding regarding the rate at which DTR credit was available which is not based on the amount of tax actually payable in the UK or the relevant foreign state. The decisions in *FII CJEU 2* and *Prudential SC* did not affect the amount of foreign tax payable. They simply provided that the UK must provide a credit for foreign tax at the FNR. It is not the case that the foreign tax payable increased because it now included tax at the FNR. The adjustment to foreign tax payable must be "*under the laws of any other territory*". Nothing has changed according to the laws of the other territories. The conforming interpretation which gives rise to credit at the FNR arises under the laws of the UK. In the circumstances, the FTT was wrong to find at [156] that there was an increase in tax payable under the laws of another territory.

190.HMRC do accept that there may be an adjustment to the amount of UK tax payable as a result of a credit being available at the FNR. However, it cannot be said that the credit has been rendered excessive or insufficient by reason of that adjustment. The adjustment is the credit which the taxpayer is seeking to claim under the extended time limit. It is entirely circular to claim a credit when it is that credit which results in the adjustment to UK tax. Otherwise, whenever additional credit is claimed there would be an adjustment to UK tax. Section 806(2) only refers to adjustments to the tax against which the credit is to be set off.

191.We agree with HMRC's analysis as to the circumstances in which the extended time limit is intended to apply, and we accept HMRC's submissions as to why section 806(2) in not engaged in relation to the Taxpayer's claims. The Taxpayer's interpretation would mean that whenever additional credit is claimed there would be an adjustment to UK tax. The Taxpayer characterised HMRC's objection as a floodgate-type argument. It was pointed out to us that what is now section 38 Finance (No 2) Act 2023 prevents new claims from 20 July 2022 onwards. In our judgment, this does not affect the clear terms of section 806(2).

192.The Taxpayer's primary submission was that credit at the FNR must be treated as tax payable under the laws of a foreign territory as a result of the conforming interpretation of section 790, described by Henderson J at [103] of *Prudential Ch*. It is said that sections 790(4) to (6) are given a conforming interpretation and that other provisions must take effect in accordance with their terms. As a result, the reference to "*tax payable under the law of any territory outside the United Kingdom*" in section 790(1) must be construed as including tax that would be payable applying the FNR. Tax at the FNR is therefore to be treated as such for the purposes of section 806(2).

193.We accept that once section 790 is given a conforming interpretation, then other DTR provisions will apply in accordance with their ordinary meaning (see *Prudential CA* at [109]). However, we do not accept that this requires the reference to "tax payable" in section 790(1) to include tax at the FNR. The remedy of providing credit at the FNR under section 790 did not involve the courts reading specific words into section 790. That is not required or necessary for a conforming interpretation, as made clear by the Court of Appeal in *Vodafone 2 v HM Revenue and Customs* [2009] EWCA Civ 446 (No 2) at [37] where it held that the precise form of words to be implied does not matter. Henderson J held that section 790 was to be read as making provision for a tax credit "*to the extent necessary to secure compliance with EU law*". That does not include requiring section 790(1) to be read as treating tax at the FNR as being tax payable under the law of a foreign jurisdiction.

194.The Taxpayer says that its interpretation chimes with section 788(5) which states in the context of treaty relief that tax which would have been payable under the law of a foreign territory but for certain reliefs, shall be treated as having been payable. We do not consider that this assists in identifying the effect of the conforming interpretation of section 790.

195.The Taxpayer's alternative argument was that in computing the UK tax on non-portfolio dividends, section 795(2)(b) required the foreign dividend to be grossed up for the foreign tax. The gross dividend was then taxable, but with DTR credit for the foreign tax. This treatment must now be applied to portfolio dividends, with the dividend grossed up for tax at the FNR, and HMRC accept that is the case. The result is an increase in the amount of UK tax payable which engages section 806(2). Similarly, it is said that credit at the FNR causes an adjustment to the UK tax payable, calculated in accordance with paragraph 8 Schedule 18 FA 1998. The Taxpayer says that when you look at these detailed provisions, on any view there is an increase in the amount of UK tax payable against which credit at the FNR is to be set off.

196.We do not accept that submission. There is no adjustment to the UK tax payable other than by reference to the FNR credit for which relief is being claimed. The Taxpayer's argument is circular and would defeat what we have found to be the object of section 806(2). The original credit has not been rendered insufficient by reason of any adjustment to the UK tax payable. The alleged adjustment arises from the additional credit which is being claimed.

197.The Taxpayer says that the last determination that was material in determining what credit falls to be given cannot be earlier than either *FII CJEU 2* which made provision for credit at the FNR or *Prudential SC* which confirmed the FNR credit applies to portfolio holdings. In all cases, the claims were within 6 years of both those decisions. However, in circumstances where there is no relevant adjustment to the tax payable, it is not necessary to identify the date on which any adjustment was determined.

198.Finally, the Taxpayer says that even if its arguments are wrong, the same result is mandated by the EU law principle of equivalence. That principle requires that the Taxpayer should be able to use all relevant national remedies and section 806(2) is one such remedy. It enables a claim outside the normal time limit. We cannot see how that principle is engaged in these circumstances.

199.For the reasons given above, we consider that the FTT erred in law in determining Issue 6 in favour of the Taxpayer and should not have directed HMRC to issue a closure notice. The claims for DTR were out of time which meant that there were no valid enquiries for which HMRC could be directed to issue a closure notice.

Issue 7

200.This issue arises where HMRC's closure notice brings into charge foreign dividend income previously returned as exempt. As indicated above, HMRC accept that the extended time limit in section 806(2) applies in such circumstances. The question is whether the extended time limit applies only to DTR claimed on the income previously returned as exempt, which will generally be dividends paid by EU companies, or whether it also applies to claims relating to dividends returned as taxable, generally dividends paid by non-EU companies with credit for WHT.

201.The principal lead appeal is Schroder Institutional Growth. In so far as material to this issue, the Taxpayer returned all foreign dividend income as taxable and claimed credit for WHT in its company tax return for the accounting period ended 30 June 2004. It then amended its return in time to show EU dividend income as exempt. HMRC subsequently opened an enquiry into the return. The Taxpayer then made a claim dated 24 March 2015 to claim a tax credit at the FNR in respect of non-EU dividends.

202.On 27 March 2020, HMRC issued a closure notice amending the return to treat EU dividends as taxable. HMRC accepted that the Taxpayer was entitled to make claims for DTR in relation to those dividends under the extended time limit in section 806(2), but not in relation to non-EU dividends.

203.The FTT held at [162]–[165] that DTR could only be claimed on the income previously returned as exempt. It found that section 806(2) clearly relates only to those claims arising by reason of any adjustment to the amount of tax payable in the UK. The Taxpayers cross-appeal against this aspect of the Decision.

204.HMRC's case is that it is necessary to look at each dividend separately, because each dividend requires a separate calculation and claim to DTR. The fact that there was some adjustment to tax when the return was amended following the enquiry does not mean that claims can be made relying on the extended time limit in relation to any other income, whether it be dividend income or non-dividend income.

205.The Taxpayer says that DTR claims are made in respect of accounting periods generally. It is not a question of there being a credit in respect of particular dividends. Section 806(1) and (2) are engaged by reference to particular accounting periods.

206.We agree with HMRC's submissions. It is clear from section 790(5)(c) and (6) that credits are calculated separately by reference to each foreign dividend. On its terms, the extended time limit applies only to an "*assessment or claim to which the adjustment gives rise*". There must therefore be a causal connection between the adjustment and the claim which could be made following the adjustment. There is no connection between the adjustment to the tax payable in respect of EU dividends in the lead appeal and the claim for relief in respect of non-EU dividends. The Taxpayer's argument gives no meaning to the requirement for the additional claim to be one to which the adjustment gives rise.

207.That result is consistent with the purpose of section 806(2) which is to extend the limitation period where a further claim has become possible. In relation to EU dividends, no claim was possible where they were treated as exempt. A claim was only made possible by HMRC's closure notice bringing them into account as taxable. The non-EU dividends were always taxable and a claim could have been made at any time. Nothing has changed in relation to those dividends.

208.We are satisfied therefore that the FTT was correct to find that the extended time limit in section 806(2) did not apply to the non-EU dividend income which was returned as taxable.

Issue 8

209.This issue arises where section 806(2) is engaged. It concerns whether credit at the FNR can give rise to eligible unrelieved foreign tax ("EUFT") for which relief is separately available and, if so, the time limit for making such a claim.

210.Until 2001, multi-national groups of companies commonly used "mixer companies" with a view to maximising relief for foreign tax. A UK company might receive dividends from companies in both low tax jurisdictions and high tax jurisdictions. A small amount of relief would be available on dividends from low tax jurisdictions and the relief on dividends from high tax jurisdictions would be capped at the amount of UK tax on that dividend. If these dividends were mixed in a foreign company, the UK company would receive a single dividend from the mixer company attracting relief at an average rate of tax.

211.In 2001, the UK removed the ability of UK companies to use mixer companies, but introduced the EUFT provisions in section 806A–806J ICTA 1988. These provisions provided for what was known as "onshore mixing". Henderson J described the EUFT provisions in *FII HC 1* at [106]:

> 106. The EUFT rules are complex in detail, but the broad principles can be stated quite briefly. The advantages of offshore mixing were largely nullified by the introduction of a 'mixer cap', which operated to restrict the amount of underlying foreign tax which could be credited against the UK corporation tax liability on foreign dividends. The cap applied not only where a dividend was paid by a non-resident company direct to the UK, but also, and critically, where a cross-border dividend was paid at any earlier stage within the group by one non-resident company to another. The mixer cap limited the creditable underlying tax to the UK corporation tax rate. Any unrelieved foreign tax (EUFT) would then be eligible for onshore pooling, and could be offset against the UK corporation tax payable on certain dividends from low tax countries. However, the dividends against which EUFT could be offset ('qualifying foreign dividends', or 'QFDs') excluded certain important categories of dividend, including in particular:
>
> > (a) dividends paid indirectly to the UK in respect of which EUFT had arisen at any point in the corporate chain, subject to a right to disclaim the underlying tax concerned in order to prevent EUFT from arising at that point and thereafter 'tainting' the dividend; and
> >
> > (b) dividends paid by a controlled foreign company ('CFC') which escaped the application of the CFC rules by pursuing an 'acceptable distribution policy', which in practice meant distributing 90% or more of its profits.
>
> Furthermore, the amount of EUFT which could be relieved was subject to an upper limit of 45% of the aggregate amount of the dividend declared and the underlying tax (including any withholding tax incurred by an intermediate company). There were, however, also some countervailing advantages, which had not been available under the previous regime. For example, surplus EUFT could be carried back and set off against tax payable on QFDs of the same company in the previous three years, and could also be carried forward indefinitely by the same company or surrendered to another group company.

212.We do not need to set out the provisions in detail, but we do need to refer to section 806A which defines what is meant by EUFT, section 806D which describes how relief is given and section 806G which requires a claim for relief and provides a time limit for such claims:

> **806A Eligible unrelieved foreign tax on dividends: introductory**
>
> (1) This section applies where, in any accounting period of a company resident in the United Kingdom, an amount of eligible unrelieved foreign tax arises in respect of a dividend falling within subsection (2) below paid to the company.
>
> (2) …
>
> (3) For the purposes of this section —

(a) the cases where an amount of eligible unrelieved foreign tax arises in respect of a dividend falling within subsection (2) above are the cases set out in subsections (4) and (5) below; and

(b) the amounts of eligible unrelieved foreign tax which arise in any such case are those determined in accordance with section 806B.

(4) Case A is where —

(a) the amount of the credit for foreign tax which under any arrangements would, apart from section 797, be allowable against corporation tax in respect of the dividend, exceeds

(b) the amount of the credit for foreign tax which under the arrangements is allowed against corporation tax in respect of the dividend.

(5) Case B is where the amount of tax which, by virtue of any provision of any arrangements, falls to be taken into account as mentioned in section 799(1) in the case of the dividend (whether or not by virtue of section 801(2) or (3)) is less than it would be apart from the mixer cap. But if that is so in any case by reason only of the mixer cap restricting the amount of underlying tax that is treated as mentioned in subsection (2) or (3) of section 801 in the case of a dividend paid by a company resident in the United Kingdom, the case does not fall within Case B.

806D Utilisation of eligible unrelieved foreign tax

…

(4) The relievable underlying tax arising in an accounting period of the company shall be treated for the purposes of allowing credit relief under this Part as if it were —

(*a*) underlying tax in relation to the single related dividend that arises in the same accounting period,

(*b*) relievable underlying tax arising in the next accounting period (whether or not any related qualifying foreign dividend in fact arises to the company in that accounting period), or

(*c*) underlying tax in relation to the single related dividend that arises in such one or more preceding accounting periods as result from applying the rules in section 806E,

or partly in one of those ways and partly in each or either of the others.

(5) The relievable withholding tax arising in an accounting period of the company shall be treated for the purposes of allowing credit relief under this Part as if it were —

(*a*) foreign tax (other than underlying tax) paid in respect of, and computed by reference to, the single related dividend or the single unrelated dividend that arises in the same accounting period,

(*b*) relievable withholding tax arising in the next accounting period (whether or not any qualifying foreign dividend in fact arises to the company in that accounting period), or

(*c*) foreign tax (other than underlying tax) paid in respect of, and computed by reference to, the single related dividend or the single unrelated dividend that arises in such one or more preceding accounting periods as result from applying the rules in section 806E,

or partly in one of those ways and partly in any one or more of the others.

806G Claims for the purposes of section 806D(4) or (5)

(1) The relievable underlying tax or relievable withholding tax arising in any accounting period shall only be treated as mentioned in subsection (4) or (5) of section 806D on a claim.

(2) ...

(3) A claim under subsection (1) above may only be made before the expiration of the period of —

(*a*) six years after the end of the accounting period mentioned in that subsection; or

(*b*) if later, one year after the end of the accounting period in which the foreign tax in question is paid.

213.The principal lead appeal for Issue 8 is Schroder Institutional Growth. The Taxpayer had made claims for DTR for its accounting period ending 30 June 2004 on the basis that the extended time limit in section 806(2) was engaged. On 1 July 2020, the Taxpayer made a claim for relief on the alternative basis that it was entitled to relief by way of EUFT.

214.The Taxpayer says that an FNR credit on a particular dividend may be greater than the UK corporation tax on the dividend. It accepts that the DTR credit is capped at the UK rate. However, it says that the excess which would otherwise be unrelieved is available as a credit by way of EUFT. In so far as necessary, the EUFT provisions must be given a conforming interpretation to allow that credit.

215.The FTT held at [166] to [178] that EUFT can arise by reference to unrelieved credit at the FNR. Further, the time limit in section 806(2) would apply to a claim for such relief, rather than the time limit in section 806G(3). The Taxpayer supports that decision.

216.HMRC say that the Taxpayer's case is misconceived. The FNR credit simply solves the particular problem arising from unequal tax treatment of UK and foreign dividends. There is no such problem in the EUFT provisions. UK dividends do not come within the EUFT provisions and there is no need to give those provisions a conforming interpretation. The FNR credit does not represent foreign tax actually payable. As such, it does not fall within the EUFT provisions. Further, it is established that the FNR credit cannot exceed the UK corporation tax paid on the dividend.

217.EUFT arises in Cases A and B. Both cases refer to foreign tax which is allowable or falls to taken into account under any arrangements. The term "arrangements" includes a reference to unilateral relief under section 790, which itself refers to "*relief ... in respect of tax payable under the law of any territory outside the United Kingdom*". The question therefore is whether the FNR credit falls within the meaning of "tax payable". For the reasons given under Issue 6, we do not consider that the FNR credit falls within that description, and therefore it does not fall within the EUFT provisions.

218.We also agree with HMRC that, in any event, the FNR credit cannot exceed the UK corporation tax paid on a dividend. That was the finding of the Court of Appeal in *FII CA (2016)*, which the Supreme Court in *FII SC 3* described as follows:

> 216. In the present case the restriction on the free movement of capital guaranteed by art 63 of TFEU was analysed in *FII* (*CJEU*) *1* as qualified by *FII* (*CJEU*) *2* as the failure of the UK tax provisions to give foreign-sourced dividends a tax credit which had substantially the same economic effect as the exemption which s 208 of ICTA gave to UK-sourced dividends. To achieve that equivalence of effect, Henderson J in *FII* (*HC*) *2* declared (at [22]) that—
>
> > 'the unlawfulness of the Case V charge lay in its failure to provide:
> >
> > …

(b) a dual credit for whichever was the higher of (i) tax at the FNR on the gross amount of the dividend, and (ii) the foreign underlying tax actually paid in respect of the dividend, subject in each case to a cap at the UK nominal rate of corporation tax.'

That ruling on issue 1 in *FII* (*HC*) *2* was upheld on appeal by the Court of Appeal and forms no part of the appeal to this court.

219.There are numerous references to the same effect in the authorities, including the decision of Henderson J in *Prudential Ch* at [98] and the decision in *FII CJEU 2* at [39]. We see no reason why the FNR credit should effectively be uncapped as a result of the EUFT provisions.

220.The Taxpayer submits that as a matter of UK law, relief under the EUFT provisions is available for underlying tax and WHT to the extent that they exceed the UK corporation tax rate. The FNR credit should be treated no differently and the decision in *FII SC 3* confirms that is the case.

221.The Supreme Court in *FII SC 3* was concerned with the "standstill" provision in Article 64(1) TFEU, and whether the UK's treatment of Case V dividends which was in effect prior to 31 December 1993 had the benefit of the standstill provision. It was argued that the introduction of the EUFT provisions in 2001 amounted to a new approach which meant that the UK lost the benefit of the standstill provision. The Supreme Court held that the introduction of the EUFT provisions meant that the UK did lose the benefit of the standstill provision. It was not concerned with the present issue.

222.The Taxpayer relies on the following passages in *FII SC 3*:

132. Following the introduction of the Eligible Unrelieved Foreign Tax rules ("the EUFT rules", discussed at paras 206-209 below), applicable to dividends arising after 30 March 2001, surplus EUFT could be carried forward or surrendered to another group company. The credit continued to be based on the foreign tax paid rather than the FNR, and it could only be set against particular categories of dividend income.

…

140. In the light of this decision [in *Salinen*], it is clear that in so far as UK law prevented the carrying forward of unused DTR credits, prior to the introduction of the EUFT rules (and to the extent, if any, that those rules may themselves have prevented the carrying forward of unused credits in full), it was in breach of article 63 of the TFEU. It is not suggested that the position would be any different under article 43, which is also relevant in the present proceedings, and the same reasoning would appear to apply, mutatis mutandis.

…

145. In principle, therefore, the problem can be resolved by disapplying the domestic rule that the DTR credit given in respect of particular income can only be allowed against tax computed by reference to the same income, to the extent that it prevents unused DTR credits from being carried forward and applied against tax liabilities arising in subsequent years, and giving effect instead to the EU rule that unused DTR credits (calculated on a FNR basis) can be carried forward for use against tax liabilities arising in subsequent years. The disapplication of the domestic rule is in accordance with the approach which has been taken to legislation which is incompatible with directly applicable EU law …

Looking to the future, therefore, any unused DTR credits (calculated on a FNR basis) must in principle be regarded as remaining available to be applied against other income in subsequent years, notwithstanding any statutory provisions or other domestic rules of law to the contrary effect. That result is consistent with the treatment of unutilised (lawful) ACT in *Prudential*, para 103.

223.The Taxpayer says that it is clear from these passages that EUFT can arise on the basis of a tax credit at the FNR. We do not read the passages as supporting that proposition. They appear in a section of the judgment which considers the nature of the remedy required by EU law in respect of the set-off of group relief and management expenses. In our view, they are limited to those circumstances.

224.As previously stated, we do not accept the Taxpayer's submission that the conforming interpretation applied to section 790 which gives effect to credit at the FNR also has the effect of deeming tax at the FNR to have been paid for the purposes of section 790, and hence for the purposes of the EUFT provisions.

225.As an alternative argument, the Taxpayer says that it was entitled to credits both for WHT and at the FNR. The FNR credit can be set against UK tax on the dividends to which it relates up to the UK tax on the dividend. It cannot be argued that the WHT does not then create EUFT which can be relieved against tax on other dividend income.

226.HMRC say that credit for WHT would be applied before credit at the FNR. The FTT rejected HMRC's case at [176] of the Decision.

227.In *Prudential Ch* at [96], Henderson J expressly left open the position as to which credit would be applied first:

> 96. I therefore conclude that the UK legislation would have been compliant with EU law if it had provided for the grant of such a 'dual' credit for portfolio dividends. The grant of the further credit for withholding tax is not, in itself, a requirement of EU law, as the decision of the ECJ in Salinen makes clear: see at [54] above. But there can be no doubt, in my judgment, that a credit for withholding tax must also be granted, as a matter of domestic law. I heard no detailed argument about the order in which the credits should be applied, and for the sake of simplicity (but without prejudice to the resolution of any issues which may emerge at a future date) I have treated the withholding tax as the first of the credits to be set against the Case V charge, thereby reducing (and placing a cap on) the amount of the charge available to be set off by the foreign tax credit.

228.The difficulty arises because there is no provision describing the order in which the two credits should be applied. That is because the legislation did not make any provision for credit at the FNR. Further, EU law does not require any credit for WHT. Whether and to what extent such credit was given was a matter for individual member states. In those circumstances it seems to us that the conforming construction to section 790 should be that which has the least impact on the effect of the domestic legislation, whilst being consistent with the EU law obligations recognised in *FII CJEU 2*. It seems to us that this leads to credit for WHT being given in priority to credit for the FNR. Further, the WHT credit is given as part of the computation of the tax charged in the UK. It is logical therefore that the FNR credit must be capped by the amount of UK tax after taking into account the WHT credit.

229.We also agree with HMRC that section 806(2) could not apply to extend the time to make a claim for EUFT. It is only if the Taxpayer is right that the FNR credit is deemed to be foreign tax payable that there would be any adjustment for the purposes of section 806(2). For the reasons given above, that is not the case.

230.We are satisfied therefore that the FTT erred in law in finding that EUFT can be generated by the FNR credit and that section 806(2) can apply to extend the time to make a claim for EUFT.

Issue 9

231.This issue concerns the effect of an amendment to a return which treated as exempt dividend income previously returned as taxable, in circumstances where the amendment was made before the anniversary of the filing date but after an enquiry into the return had been opened. In particular, where the closure notice concluded that the income was taxable, did the amendment give rise to an adjustment to the tax payable which engaged the extended time limit in section 806(2)?

232.The lead appeal is Henderson Emerging Markets Fund. The Taxpayer filed its company tax return for the accounting period ending 31 October 2007 on time. It treated EU dividends as exempt and non-EU dividends as taxable with credit for WHT. HMRC opened an enquiry into the return on 25 July 2008.

233.The Taxpayer amended its return on 28 September 2009. The amendment was made in time, but after the enquiry had been opened, and treated the non-EU dividends as exempt. HMRC acknowledged the amendment on 9 October 2009 and stated that the amendment would be "kept" until the conclusion of the enquiry. A closure notice was issued on 15 April 2020 in which the EU dividends were brought into charge to tax. At the same time HMRC invited the Taxpayer to make a claim for DTR on the EU dividends on the basis that section 806(2) was engaged.

234.Issue 9 arises in relation to the non-EU dividends which were the subject of the in-time amendment. Paragraph 31 Schedule 18 applicable at the time when HMRC issued the closure notices provided in so far as relevant as follows:

> 31(1) This paragraph applies if a company amends its company tax return at a time when an enquiry into the return is in progress in relation to any matter to which the amendment relates or which is affected by the amendment.
>
> (2) The amendment does not restrict the scope of the enquiry but may be taken into account (together with any matters arising) in the enquiry.
>
> (3) So far as the amendment affects —
>
> > (*a*) the amount stated in the company's self-assessment as the amount of tax payable, or
> >
> > (*b*) any amount that affects or may affect—
> >
> > > (i) the tax payable by the company for another accounting period, or
> > >
> > > (ii) the tax liability of another company for any accounting period,
>
> it does not take effect while the enquiry is in progress in relation to any matter to which the amendment relates or which is affected by the amendment…
>
> (4) An amendment whose effect is deferred under sub-paragraph (3) takes effect as follows —
>
> > (a) if the conclusions in [the closure notice] state either —
> >
> > > (i) that the amendment was not taken into account in the enquiry, or
> > > (ii) that no amendment of the return is required arising from the enquiry,
> >
> > the amendment takes effect when [the closure notice] is issued;

> (b) in any other case, the amendment takes effect as part of the amendments made by the closure notice.

235.Prior to 1 April 2010, paragraph 31(4)(b) provided that the taxpayer was required to amend its return in accordance with the conclusions stated in the closure notice, but the parties agreed that nothing turns on this for present purposes.

236.We were referred to HMRC's Enquiry Manual which states as follows in the context of closing an enquiry:

> You must also deal with any amendment the taxpayer has made during the enquiry.
>
> If you did not enquire into the amendment you must say so in your closure notice and you must give effect to the amendment.
>
> If you enquired into the amendment and concluded it is correct you must now give effect to it in your closure notice…
>
> If you enquired into the amendment and concluded it was incorrect your closure notice must include conclusions about the amendment as well as your conclusions about the original self assessment.

237.The FTT held at [179]–[185] that whilst the amendment did "take effect" under paragraph 31(4)(b), it did not result in any adjustment to the amount of tax payable for the purposes of section 806(2). The result was that section 806(2) was not engaged in relation to non-EU dividends, unlike the EU dividends where HMRC's conclusion on the closure notice did increase the amount of tax payable. Having said that, the FTT left open the possibility that the amendment could take effect as a claim for repayment of overpaid tax under paragraph 51.

238.The Taxpayer cross-appeals the FTT's decision that the amendment did not give rise to any adjustment to the amount of tax payable. In short, the Taxpayer says that an in-time amendment made after an enquiry is opened has the same effect as an amendment made before an enquiry is opened.

239.HMRC say that the FTT was right to find that the amendment is deemed to take effect by virtue of paragraph 31(4)(b) as part of the amendments made by the closure notice. Further, it was right to find that because the substance of the amendment was not accepted there was no adjustment to the amount of tax payable. They say that is not surprising because the amendment was wrong and the non-EU dividend income was at all times treated as taxable. The Taxpayer could have made an in-time claim for DTR credits at the FNR within section 806(1), but such a claim would not be within section 806(2) which is aimed at a situation where the taxpayer cannot claim credit until there has been an adjustment to the tax. There was no point in time at which the Taxpayer's self assessment changed the treatment of the income from taxable to exempt and then back to taxable. It remained taxable throughout. This is consistent with the HMRC Enquiry Manual. The closure notice did not change the tax charged under the self-assessment.

240.The Taxpayer says that the effect of paragraph 31 is that the amendment is deferred, not cancelled. There is no room in the provision for the amendment not to take effect. The Taxpayer submitted that "takes effect" means increasing or decreasing the amount of tax payable. It is wrong to say that there was never a moment in time when the tax liability consequential on the amendment changed. The amendment did reduce the tax payable and then HMRC increased it. HMRC are seeking to treat the amendment as having been cancelled, rather than deferred which is the express language in the statute. Mr Bremner described his argument as a *scintilla temporis* argument, in the sense that there was a moment in time when the tax treatment changed. He submitted that there is no principled reason to distinguish between in time amendments made before and after the enquiry was opened.

241.Quite apart from the difficulties often associated with arguments based on *scintilla temporis*, we do not consider that the Taxpayer's analysis is correct. Paragraph 31(4)(b) states that the amendment "*takes effect as part of the amendments made by the closure notice*". In our view this serves to emphasise that whilst the amendment does take effect, it will not necessarily affect the tax payable as a result of the conclusions in the closure notice. The purpose of paragraph 31 is to deal with the effect of an amendment on the tax payable by a taxpayer pending closure of the enquiry. If the amendment is made prior to an enquiry being opened, the effect is to reduce or increase the amount of tax payable by the taxpayer. That is the position whether or not there is subsequently an enquiry into the return. If an enquiry is subsequently opened, the amount payable remains calculated on the basis of the amendment until the enquiry is closed. In these circumstances, the taxpayer will have treated the dividend income as exempt which means that it was unable to claim DTR. It is HMRC's conclusion at the end of the enquiry which increases the tax payable and engages the extended time limit in section 806(2).

242.In the case of an amendment made after an enquiry is opened, Parliament has decided that a taxpayer should not be able to adjust the amount of tax payable prior to closure of the enquiry. At that stage, the enquiry is closed on the basis of the conclusions in the closure notice, which may or may not affect the tax payable under the self-assessment. It is artificial to say that there is a moment in time when the tax is adjusted in line with the amendment, only to be re-adjusted in line with the conclusions in the closure notice. The dividend income in this case was treated as taxable throughout and the Taxpayer had made its claim for DTR, albeit limited to WHT.

243.Mr Bremner also suggested at one stage that HMRC's case leads to the possibility that if HMRC rejects an amendment made after an enquiry is opened so that the taxpayer's original self-assessment was unaltered, then there would be no right of appeal because it is well established that there is no right of appeal against a self-assessment. He did not pursue that argument, in our view rightly. There would be a right of appeal against HMRC's conclusions in the closure notice, which would include their conclusion in relation to the amendment.

244.For the reasons given above, we accept HMRC's submissions on this issue. The FTT was right to find that the amendment did not give rise to any adjustment to the amount of tax payable for the purposes of section 806(2).

245.The FTT also held at [185] that the amendment could amount to a claim under paragraph 51. HMRC say that the FTT's conclusion that the amendment could amount to a claim for repayment pursuant to paragraph 51 was wrong for the reasons given under Issue 2. The Taxpayer also relied in the alternative on the amendment being construed as a claim for DTR (Issue 5). Those points do not fall within Issue 9, and we have nothing to add in this context to what we have said on Issues 2 and 5.

Issue 10

246.This issue arises out of the interaction of management expenses and DTR. It is narrower than when it was first argued before the FTT because of the decision of the Supreme Court in *FII SC 3*. It is common ground that where the application of management expenses means that DTR by way of FNR credit cannot be fully utilised in an accounting period, the unused DTR may be carried forward and used against tax on general income in later periods. The question which remains on Issue 10 is whether it is necessary for the taxpayer to have made a valid claim for DTR before it can be carried forward. Similar arguments arise under Issue 2.

247.The lead appeal is Fidelity UK Index Fund in relation to its accounting periods ending 28 February 2007, 2008, 2009 and 2010. The Taxpayer had surplus management expenses in 2007 and incurred further management expenses in the subsequent accounting periods. The Taxpayer's returns showed EU dividends as exempt and non-EU dividends as taxable with credit for WHT. Enquiries were opened into the returns.

248.The Taxpayer made an alternative protective claim on 31 March 2010 in the event its EU dividends were found to be taxable. The alternative claim was for:

> … the full amount of credit relief available to it in relation to WHT and, in addition, should it be available, the underlying tax suffered on such dividends.

249. HMRC accept that the Taxpayer made claims for DTR in relation to the EU dividends. However, they contend that there were no claims in relation to the non-EU dividends. The Taxpayer's management expenses in 2007 and 2008 were greater than the taxable income brought into account when HMRC issued its closure notices. In consequence, no DTR was allowed for those accounting periods and the management expenses carried forward were significantly reduced. As a result of reduced management expenses in 2009 and 2010, tax fell due on income by way of interest taxable under Schedule D Case III which would not otherwise have fallen due. If DTR had been allowed in 2007 and 2008 there would have been management expenses available to set against the interest in 2009 and 2010. The issue is whether the Taxpayer can carry forward unused FNR credit on non-EU dividends for relief in later years.

250.Where a company receives portfolio dividends which are not treated as exempt, it may have management expenses which are offset against that income in priority to the DTR credit at the FNR. If the DTR credit cannot be carried forward, then the benefit of that credit would be lost in subsequent years. That was recognised as a breach of EU law by the CJEU in *Österreichische Salinen AG v Finanzamt Linz* (C-437/08).

251.The FTT held at [186]–[191] that where full utilisation of DTR was prevented by management expenses, the unused DTR could be carried forward automatically and applied against income generally. It went on to state at [191]:

> I would also add that I am unable to find any support in the judgment in *FII SC 3* for HMRC's argument that a pre-existing and in-time claim for DTR that cannot be fully utilised because of management expenses is necessary in order to carry forward that DTR.

252.The Supreme Court in *FII SC 3* had held that relief for management expenses took priority over relief for DTR credit at the FNR, but that unused DTR credits could be carried forward. As previously noted, it recognised at [140] that there was unequal treatment if DTR credits could not be carried forward:

> 140. In the light of [*Salinen*], it is clear that in so far as UK law prevented the carrying forward of unused DTR credits, prior to the introduction of the EUFT rules (and to the extent, if any, that those rules may themselves have prevented the carrying forward of unused credits in full), it was in breach of art 63 of the TFEU. It is not suggested that the position would be any different under art 43, which is also relevant in the present proceedings, and the same reasoning would appear to apply, mutatis mutandis.

253.The Supreme Court held at [144] and [145] that the solution was to permit the unused DTR credit to be carried forward:

> 144. Focusing instead on the DTR legislation, the problem results from the rule that the DTR credit given in respect of particular income can only be allowed against tax computed by reference to the same income. That rule is contrary to EU law, to the extent that it prevents unused DTR credits from being carried forward and applied against other income in subsequent years. The requirement arising under EU law, that it must be possible to carry forward unused DTR credits for use against tax liabilities arising in subsequent years, was at all material times directly applicable as law in the UK, and had to be given effect in priority to inconsistent domestic law, whether legislative or judicial in origin.
>
> 145. …Looking to the future, therefore, any unused DTR credits (calculated on a FNR basis) must in principle be regarded as remaining available to be applied against other income in subsequent years, notwithstanding any statutory provisions or other domestic rules of law to the contrary effect. That result is consistent with the treatment of unutilised (lawful) ACT in Prudential, para [103].

254.The Taxpayer says that *FII SC 3* is determinative of this issue in its favour. Entitlement to carry forward unused DTR cannot depend on the existence of a claim to DTR. For much of the period considered by *FII SC 3* no claim could be made and in that case no claim was made.

255.We note that in *FII SC 3* at [121], the Supreme Court observed that the relevant facts in that case had not yet been established, and the court was dealing with the issue as a matter of principle and at a high level of generality. The Supreme Court was not invited to address the procedural requirements for carrying forward DTR. We do not consider that the Supreme Court's judgment is determinative of what remains of Issue 10.

256.We accept HMRC's submission that it is still necessary for the Taxpayer to have an in-time claim for DTR in order to carry forward unused DTR credits. The domestic legislation requires a claim and it is implicit in sections 788 and 790 that the claim must be made in relation to the accounting period in which the dividend is taxable. The judgment in *FII SC 3* was in the context of a claim for unjust enrichment. As such it did not have to consider whether a claim to DTR was necessary for the purposes of obtaining statutory relief. In order to obtain statutory relief, there must be a claim for DTR before any unused relief can be carried forward. As discussed in relation to Issue 2(4), it is clear from *Class 8* that it is no answer for the Taxpayer to say that it could not have known that it had to make a claim for DTR credit because no-one contemplated relief for credit at the FNR, or indeed that such relief could be carried forward and offset against general income in future years.

257.We have already found that a claim for DTR in relation to EU dividends does not encompass a claim for non-EU dividends. The protective claim for DTR in relation to EU dividends was a valid in time claim. Unused DTR arising because of management expenses could therefore be carried forward. However, that claim did not cover non-EU dividends. We have also determined under Issue 3 that where a taxpayer has claimed DTR by way of WHT and an enquiry is opened into the return, which appears to be the case here, HMRC must reflect in its closure notice any entitlement to DTR by way of credit at the FNR.

258.For the reasons given above, we are satisfied that the FTT did err in law when it held that no in-time claim for DTR was required to enable the Taxpayer to carry forward unused DTR by way of FNR credit.

Issue 11

259.This issue concerns the situation where a closure notice brings into charge dividend income which had been returned as exempt, but then offsets that income with management expenses. The question is whether section 806(2) is engaged and, if so, in respect of which accounting period.

260.Issue 11 is closely linked with Issue 10, the lead appeal also being Fidelity UK Index Fund. The way in which Issue 11 arises depends on the answer to Issue 10, in particular, whether a claim for DTR was necessary in relation to the year in which the income arose, or whether unused DTR was carried forward automatically. Whilst Mr Bremner produced an illustrative example of the issue during oral submissions, we shall address this issue by reference to a simplified example of the relevant facts adopted by the FTT at [194]:

> (1) There are two relevant tax years (Year 1 and Year 2). In both tax years the fund received relevant dividend income of £100. The fund incurred management expenses of £100 in Year 1. It also received interest income in Year 2 of £200.
>
> (2) In its tax returns the fund showed the dividend income as exempt. If credit had been claimed at the FNR instead of exemption full DTR would have been provided.
>
> (3) Because the dividend income was returned as exempt, the management expenses of £100 from Year 1 were carried forward and set against the interest income in Year 2 leaving a net profit of £100. The fund returned a nil tax liability in Year 1 and in Year 2 paid tax (at 20%) on the net interest income of £100 (i.e. tax of £20). Enquiries were opened into both [years].
>
> (4) Closure notices are issued in May 2020. Under the closure notice for Year 1, dividend income of £100 is now treated as taxable but is then offset with management expenses of £100. The closure notice for Year 2 now shows income of £300 (£100 of dividend income and £200 of interest income) but no management expenses as these were expended in Year 1. No DTR is allowed. Consequently tax is shown as due for Year 2 on £300 or £60 tax.
>
> (5) On receiving the closure notices the fund then claimed DTR at the FNR in Years 1 and 2 but beyond the 4 or 6 year period for doing so in s806(1) ICTA.
>
> (6) Section 806(2) ICTA lifts the time period to make DTR claims on, among other conditions, an adjustment to tax payable. However the Closure Notice for Year 1 did not acknowledge an adjustment to tax payable in Year 1: both the return and the closure notice show nil tax to pay (although on different bases).

261.The FTT appears to have found at [192]–[199] that if a claim to DTR was necessary (contrary to its finding on Issue 10) then section 806(2) was engaged in relation to DTR in Year 2 and a claim could be made for DTR in Year 2 within the extended time limit.

262.The Taxpayer says that there has been an adjustment to the tax payable in Year 2 which has rendered the DTR credit insufficient because:

> (1) The DTR which could not be used in Year 1 as a result of management expenses is automatically carried forward to Year 2, or
>
> (2) Leaving out of account the automatic carry forward, the reallocation of management expenses from Year 2 to Year 1 increases the UK tax payable in Year 2 and the DTR would therefore be rendered insufficient.

263.Either way, it is said that the Taxpayer is entitled to claim DTR in Year 2 pursuant to the extended time limit in section 806(2).

264.We agree with HMRC that section 806(2) is not engaged in Year 2.

265.In Year 1, dividend income previously returned as exempt is brought into charge by the closure notice but fully offset by management expenses. This means that there is no change to the tax payable on that income. As such, there is no adjustment to the tax payable in Year 1 and section 806(2) cannot be engaged in respect of any dividend income received in Year 1.

266.No claim for DTR was made in respect of Year 1 dividends, which means that there is no DTR to be carried forward into Year 2. That is our finding on Issue 10.

267.Even if an amount of FNR credit was available to be carried forward from Year 1 to Year 2, the amount of credit in Year 2 would not have been rendered insufficient by reason of an adjustment to the tax payable in the UK. There is no causal link between the amount of DTR credit in Year 2 and the tax adjustment arising from management expenses being carried back from Year 2 to Year 1. There is a higher level of UK tax in Year 2, but that did not cause the DTR credit in that year to be insufficient.

268.We therefore consider that the FTT erred in law in so far as it found that section 806(2) was engaged in relation to DTR in Year 2 and that a claim could be made for DTR in Year 2 within the extended time limit.

Issue 12

269.This issue concerns the effect of management expenses and reliefs such as group relief on DTR where foreign dividend income was taxable under Schedule D Case I rather than Schedule D Case V. The issue arises in relation to Avon Insurance, on its application for a closure notice. As a general insurance company, the Taxpayer is charged to tax on foreign dividends as trading income under Schedule D case I.

270.The FTT concluded at [200]–[202] that it was not necessary to deal with this issue because its conclusion on Issue 6, that HMRC should issue a closure notice, meant that none of the applications or appeals turned on this issue. The Taxpayer maintains its appeal on Issue 12 and says that the FTT ought to have decided it in its favour. It is said that the answer to Issue 12 should be the same as the answer to Issue 10.

271.Foreign dividends were generally taxed under what was Schedule D Case V ICTA 1988, which applied to income from possessions outside the UK. Schedule D Case I covered income from a trade carried on in the UK or elsewhere. The treatment of reliefs such as group relief and management expenses differ depending upon which case of Schedule D the income arose. In particular, under Schedule D Case I, group relief and management expenses are not separately identified in computing profits. HMRC contend that this different treatment has implications for carrying forward DTR.

272.HMRC also maintain that the FTT had no jurisdiction to determine this issue, its jurisdiction being limited to determining whether HMRC had reasonable grounds for not giving a closure notice within a specified period. They accept that legal issues can be determined on an application for a closure notice, but only if those issues would result in the enquiry becoming “pointless”, for example because HMRC could not impose a tax charge whatever the result of the enquiry.

273.It is clear from *HM Revenue and Customs v Vodafone 2* [2006] EWCA Civ 1132 at [21] and [22] that the FTT has jurisdiction to determine incidental issues in the course of an application for a closure notice pursuant to paragraph 33 Schedule 18. In that case, an issue as to the compatibility of UK provisions with EU law was determined by the Special Commissioners in order to decide whether HMRC should be directed to issue a closure notice:

> 21 Paragraph 33 on its face, however, would seem to confer on the Commissioners a power to do anything that the Commissioners reasonably consider necessary to enable them to be satisfied as to the matters required by that paragraph. That interpretation also promotes the effectiveness of paragraph 33, which it may be presumed Parliament wished to achieve. On that basis it is legitimate to put the question in the following way, that is to ask whether there is anything in the wording of paragraph 33 to suggest that it does not confer jurisdiction to decide incidental points of law, that is points of law that need to be resolved in order to decide whether there are reasonable grounds for not giving a closure notice. If it was a point of law which the Commissioners could decide for themselves, that would not attract the same attention as a point of Community law which may take many years to determine and where there may need to be more than one reference, but the difference is one of scale and not of principle. Once it is concluded that the Commissioners have jurisdiction under paragraph 33 to determine an incidental point of law, no distinction can be drawn between different types of point of law.
>
> 22 It is, however, relevant to ask whether the conclusion thus far that paragraph 33 confers jurisdiction on the Commissioners to decide incidental points of law is in some way inconsistent with the statutory scheme in the provisions of schedule 18 which I have set out above. If it is inconsistent, that may indicate that the conclusion thus far is wrong and that some other interpretation should be adopted. However, I do not consider that the statutory scheme mandates a different conclusion. On the contrary, it is difficult to see why Parliament should wish to limit the protection given to taxpayers by paragraph 33 to situations where the Revenue is pursuing enquiries into the facts which it can be shown are unfounded as a matter of fact, and not wish to extend the same protection to cases where the Revenue is proceeding on the basis of a particular view of the law, to which the taxpayer raises a serious challenge which the Commissioners can conveniently deal with at that stage. It would mean that the taxpayer would have to resort to judicial review if he wished to challenge the Revenue's decision to refuse to give a closure notice. The taxpayer would then have to show it was perverse or irrational for the Revenue to continue with their enquiries. But, more significantly, it would be anomalous for Parliament to have provided a dedicated remedy in paragraph 33 in respect of some only of the grounds on which a taxpayer may seek a direction to the Revenue to issue a closure notice, and leave the taxpayer to pursue a judicial review remedy in respect of other grounds. Moreover, in the former case the application would be to the Commissioners and in the latter case the application would be to the High Court, making the Revenue's proposed interpretation of paragraph 33 yet more unlikely.

274. Vodafone had applied for a closure notice in relation to an enquiry into whether certain profits should be apportioned to the taxpayer company pursuant to the controlled foreign company provisions. The issue in the enquiry was whether the taxpayer was right to contend that an exemption from those provisions was applicable. However, Vodafone raised a more fundamental point that the tax provisions themselves were contrary to EU law. Vodafone applied to the Special Commissioners for a closure notice direction on the ground that because the legislation to which the enquiry related was contrary to EU law, there was no basis for the enquiry to continue. There was no doubt that the issue of compatibility needed to be determined in order to decide whether HMRC should be directed to issue a closure notice. The Court of Appeal held that the Special Commissioners did have jurisdiction to decide an incidental question of law in the course of deciding whether to direct the issue of a closure notice.

275. We were also referred to the Court of Appeal decision in *Eastern Power Networks Plc v HM Revenue and Customs* [2021] EWCA Civ 283, and in particular what was said by Rose LJ as she then was. Having concluded that HMRC's enquiry in that case must continue, she stated:

> [54] The *Vodafone* case was a very particular instance where the legal issue was not simply one among many issues that was raised by the construction of anti-avoidance legislation. It was, as Arden LJ said,

> a point that was so fundamental as to be capable of bringing the enquiry to a halt if decided in a particular way: [26]. In my judgment, the jurisdiction to decide an incidental point of law in an application for a closure notice direction is useful, as the *Vodafone* case shows, but only if the discretion to exercise it is used sparingly…
>
> [55] The issue determined by this application does not resolve the entire dispute between the parties. Even if the Appellants had succeeded … HMRC have other points they can pursue … There seem to be various scenarios possible at the end of the enquiries that will mean that this whole exercise has been pointless.
>
> [56] The approach adopted in this application has also required the tribunals and this court to apply the statutory provision in the absence of any clear findings of fact about the scheme as a whole and without any agreed statement of facts. We raised with the parties at the hearing what would have been the position if the FTT had decided that the arrangements did potentially fall within s 146B and the Appellants had later brought a substantive appeal before the FTT against the amendment of their returns. What would be the status of the FTT's decision on this legal point when the same issue came to be debated in the substantive appeal once all the facts were known? The discussion quickly ran into the choppy waters of legal precedents and issue estoppel.
>
> [57] I would therefore firmly discourage the FTT from embarking on the kind of hearing that occurred here. There is a separate route by which a taxpayer can challenge an information notice served by HMRC if it regards the notice as disproportionate or unfair. The jurisdiction conferred on the tribunal to direct HMRC to issue a closure notice is not generally a suitable vehicle for deciding points of law in the course of an enquiry such as the present.

276.HMRC say that the FTT was right not to determine Issue 12, albeit for different reasons to those it gave. The issue should be left to be determined at a full appeal, following a closure notice, if the Taxpayer's claim is found to be valid.

277.The reason the Taxpayer made an application for a direction to close the enquiry was to test the time limits for claims to DTR and whether the claim was in time. In a letter dated 14 February 2019, HMRC stated their view that the purported claims were out of time so that no valid enquiries could be opened. If the claims were valid then HMRC gave notice of its intention to enquire into the returns. Thus, HMRC conditionally opened an enquiry to protect their position. The only issue between the parties at that stage was whether the claims were in time. HMRC do not oppose being directed to give a closure notice if the claims were in time. They do however object to Issue 12 being determined on the closure notice application rather than on an appeal against a closure notice.

278.HMRC say that it would change the nature of closure notice applications if a taxpayer can raise all sorts of substantive issues of law on a closure notice application. In the circumstances, it is not appropriate to exercise the jurisdiction. The only incidental issue is whether the claim was in time. Further, the Taxpayer has made no attempt to establish why Issue 12 should be determined in its favour.

279.HMRC also suggest that a decision of the FTT or this tribunal on the closure notice application would not necessarily be binding between the parties, as indicated by Rose LJ in *Eastern Power*.

280.The Taxpayer says that the answer to Issue 12 is clear. It follows from *Salinen* and *FII SC 3* that unused DTR arising as a result of group relief or management expenses can be carried forward and offset against other income in future years. In practical terms, it makes no difference whether the company is taxable under Case I or Case V.

281.The FTT did not exercise its discretion pursuant to the *Vodafone* jurisdiction. That was understandable given that the issue was academic because of its finding on Issue 6. It appears that it was reluctant to direct HMRC how it should close the enquiry in relation to this issue. Similarly, it is not necessary for us to determine this issue because we have found that the claims were out of time and there is no valid enquiry in any event. Even if we were wrong on that, in our view the issue can and should be dealt with on an appeal against a closure notice if the matter were to proceed that far.

282.The issue also overlaps with Issue A, which is whether the FTT has jurisdiction to direct HMRC how they should close an enquiry. The Taxpayer's case is that, if we were to direct HMRC to issue a closure notice, we should also direct HMRC to close the enquiry on the basis that it is irrelevant whether the Taxpayer's income fell within Schedule D Case I or V for the purpose of carrying forward DTR and the interaction with group relief and management expenses. We do not consider it appropriate to direct HMRC how they should close an enquiry when we are making no such direction.

283.Further, we do not consider that we have heard sufficient argument on the underlying issue from either party. We would not be confident on the basis of the argument we have heard to say whether the different treatment of group relief and management expenses under Schedule D Cases I and V affects the carry forward of DTR.

284.In the circumstances, we do not consider that the FTT was wrong in law not to determine Issue 12 and we do not consider it appropriate to determine Issue 12 on this appeal.

Issue 13

285.This issue concerns the situation where a closure notice treats as taxable income which had been returned as exempt. In the circumstances of Issue 11, if no DTR was available because of the deduction of management expenses, the question was whether WHT was deductible pursuant to section 811 ICTA 1970. In the event, the FTT noted at [203] and [204] that the parties agreed it was not necessary to consider the issue further. However, when the Decision was released in draft, HMRC appeared to raise it again as Issue C. We shall deal with it under Issue C below.

Issue A

286.This issue concerns the FTT's jurisdiction where it directs HMRC to close an enquiry pursuant to paragraph 33 Schedule 18, in particular, whether the FTT has power to direct how the issues decided will affect the outcome of the enquiry and if so, whether it should make such a direction.

287.The FTT held at [223] that where on an application for a closure notice the FTT determines incidental questions of law or fact and directs HMRC to issue a closure notice, it follows that HMRC is required to give effect to the FTT's determinations when it issues the closure notice.

288.The Taxpayers say that in relation to the applications to close enquiries, HMRC have taken jurisdictional points, such as whether there is an in-time claim to support the protective enquiries that have been opened. There are also issues going to quantification, such as Issue 8 and whether EUFT can be generated by the FNR credit. If the Tribunal decides issues of quantification against HMRC but HMRC issues closure notices on the basis of its rejected arguments, then issues of abuse of process and issue estoppel will arise. It is said that those issues will be avoided if the Tribunal can direct how the enquiry is to be closed. If a point of law has been determined against HMRC, then it should be bound by the outcome, subject to any appeal against the decision directing HMRC to close the enquiry. In *Eastern Power*, a legal issue was presented as an incidental legal issue but it would never have resolved the enquiry. It was a classically bad preliminary issue. The way in which the FTT stated the effect of its determination for the closure of the enquiries was good case management. It avoids the risk of satellite litigation as to the effect of its determination.

289.Given the way we have determined Issues 2–12, this issue does not arise because we are not directing HMRC to issue closure notices. In any event, in the absence of any provision for the FTT to direct how HMRC should close an enquiry, we do not consider that the FTT has such jurisdiction. Once a direction has been made for HMRC to close an enquiry, no further case management of that application is required. The question of whether HMRC is bound to close an enquiry in a particular way can only be tested on an appeal against the conclusions in the closure notice. It is not for the FTT or the Upper Tribunal to pre-empt whether something would, hypothetically, be an abuse of process or give rise to an estoppel.

290.In many cases, the reality will be that HMRC will have to close its enquiry in accordance with the findings of the FTT on a closure notice application. However, we consider that the FTT erred in law when it said at [223] that HMRC's closure notice "is required" to give effect to the FTT's conclusions on the closure notice application.

Issue B

291.This issue concerns DTR credits in excess of the UK corporation tax payable on foreign dividend income. The FTT held at [224] and [225] that excess DTR credits could be set off against corporation tax on other income. It did not agree with HMRC that the DTR credit is always capped at the UK rate of tax applied to the foreign dividend.

292.HMRC say that it is clear from the authorities that the DTR credit is always capped at the UK corporation tax on the foreign dividend less WHT. HMRC accept that, if credits cannot be used because of the effect of management expenses, then a carry forward against other income is permitted. However, there can be no carry forward for credits in excess of the cap.

293.The Taxpayers say that it is not open to HMRC to take this point because there was no challenge before the FTT that DTR credits in excess of the UK corporation tax could not in principle be set off against corporation tax on other income. When the judgment in *FII SC 3* was handed down, HMRC sought to avoid this question under Issue 8 because their position was that it did not arise on the facts. The Taxpayers pointed out in their Reply submissions to the FTT that the issue did arise on the facts, but HMRC did not engage. It was only when the draft decision was distributed that HMRC raised the question again as Issue B. The Taxpayers accept that the FTT did decide Issue B and that HMRC has permission to appeal that aspect of the FTT's decision. However, that does not prevent the Taxpayers from contending that the issue is not open to HMRC.

294.It is clear that the FTT did permit HMRC to raise the issue as Issue B and determined the issue in favour of the Taxpayers. In the absence of any cross-appeal by the Taxpayers challenging that case management decision by the FTT, we consider that HMRC are entitled to pursue their appeal on Issue B.

295.The Taxpayers say that, in any event, the FTT was right to hold that the FNR credit was not capped at the UK tax payable on the dividend. We do not agree. It is clear from *FII CJEU 2* at [50], *FII CJEU 2* at [39] and *FII SC 3* at [216], all quoted above, that the FNR credit is capped at the UK tax applied to the dividend. The point was emphasised by Henderson J in *Prudential Ch* at [123]:

> 123. … I would also again emphasise that the credit granted is in any event capped at the UK nominal rate applicable to the dividend less withholding tax…

296. We are satisfied that the FTT erred in law when it said that the DTR credit is not capped at the UK rate of tax applied to the foreign dividend.

Issue C

297. This issue concerns management expenses which exceed profits, in particular whether the net dividend income is brought into account applying section 811 ICTA 1988, or whether the Schedule D Case V income, grossed up for the foreign tax, is brought into account. The issue arises in respect of the 2007 and 2008 accounting periods of Fidelity UK Index Fund.

298. The FTT held at [226] and [227] that it was the net dividend which should be brought into account. It considered that HMRC's approach of grossing up would be inconsistent with the conclusion it had reached on Issue 11, and also contrary to the parties' agreement that Issue 13 did not require consideration because management expenses could not be applied against WHT.

299. Section 811 broadly provides that where no credit for foreign tax is allowable, the income is treated as being reduced by the foreign tax. Hence, UK corporation tax is paid on the net dividend:

> 811(1) For the purposes of the Tax Acts, the amount of any income arising in any place outside the United Kingdom shall, subject to subsection (2) below, be treated as reduced by any sum which has been paid in respect of tax on that income in the place where the income has arisen (that is to say, tax payable under the law of a territory outside the United Kingdom).
>
> (2) Subsection (1) above —
>
> > …
> >
> > (*d*) shall not require any income to be treated as reduced by an amount of underlying tax which, by virtue of section 799(1B)(*b*), falls to be left out of account for the purposes of section 799;
>
> and this section has effect subject to section 795(2) and to section 111 of the Finance Act 2004 (computation of income subject to special withholding tax).

300. Section 811 has effect subject to section 795(2) ICTA 1988 which applies to income chargeable to tax where tax is not payable by reference to the amount received in the UK (which is the case in relation to dividends) and where credit for foreign tax falls under arrangements to be allowed in respect of that income. In those circumstances, section 795(2) applies as follows:

> 795(2) … in computing the amount of the income or gain for the purposes of income tax or corporation tax —
>
> > (*a*) no deduction shall be made for foreign tax or special withholding tax, whether in respect of the same or any other income or gain; and
> >
> > (*b*) the amount of the income shall, in the case of a dividend, be treated as increased by —
> >
> > > (i) any underlying tax which, under the arrangements, is to be taken into account in considering whether any and if so what credit is to be allowed in respect of the dividend, and
> > >
> > > (ii) any underlying tax which, by virtue of section 799(1)(*b*) or section 799(1B)(*b*), does not fall to be so taken into account.

301. HMRC submitted as follows:

> (1) Where credit for foreign tax does not fall to be allowed in respect of the income, Section 811 may apply. Section 811 applies to the Taxpayer because management expenses exceeded profits in the 2007 and 2008 accounting periods. This meant that no

DTR credit could be utilised in those periods. However, because the FNR credit could be carried forward, it was necessary to calculate the amount of credit that was available.

(2) Applying section 811, the dividend is treated as a "net" amount after a reduction for WHT. The management expenses are then set against that "net" amount.

(3) In those circumstances, HMRC say that one would expect the FNR credit to also be calculated by reference to the "net" amount of the dividend. That makes sense because the management expenses are also set against the "net" dividend and, applying the reasoning in *Salinen,* credit under EU law is only required in respect of that amount.

(4) An alternative approach would be for the dividend income to be grossed up, with the grossed up amount being treated as income, management expenses being set against the grossed up amount and, accordingly, the FNR credit also being calculated by reference to the gross amount.

(5) The Decision creates a mismatch, where taxpayers are not chargeable on the gross dividend and do not need to set management expenses against the gross dividend income, but benefit from FNR credits calculated on the gross dividend.

(6) If the FTT decided that it is the net income that is brought into account, then equally the FNR credit should be calculated on the basis of that net income. At the moment, the FNR credit is calculated on a grossed up basis but is then set off against income which is brought into account on a net basis which cannot be right.

302.The Taxpayer's submissions were as follows:

(1) HMRC's calculations gross up the dividend income for the FNR credit and WHT and the management expenses are applied to that income. Management expenses are then applied against foreign tax.

(2) However, where section 811 applies, the management expenses are set off against the net dividend. Section 811 only applies where there is no claim for DTR. That was the position in the Taxpayer's case because the management expenses exceeded profits and no claim to DTR could be made.

(3) HMRC seem to be saying that claims for DTR in subsequent years amount to claims in the earlier year so as to exclude the operation of section 811.

(4) That approach is irreconcilable with the concession on Issue 13, recorded at [203] and [204] of the Decision, that in no circumstances can management expenses be applied against WHT. HMRC cannot now seek to rely on an argument that was abandoned and apply management expenses against WHT. Further, their case that management expenses can be applied against the FNR credit is inconsistent with *FII SC 3*.

(5) In any event, HMRC's argument is wrong. Bringing the gross dividend into account would waste those management expenses and result in indirect double taxation of the dividend income which is not permissible in light of *FII SC 3*. It is avoided by bringing into account the net dividend.

303.Following the parties' submissions, we have been left unsure as to the real nature of this issue. It appears to be how to give effect to the FNR credit in the light of section 811, section 795(2) and the judgment in *FII SC 3*. HMRC's ground of appeal was to the effect that the income should be grossed up. However, their submissions proceeded on the basis that it was the net dividend which was to be brought into account. The FTT decided that it was indeed the net dividend which should be brought into account and HMRC's submissions do not appear to challenge that conclusion. The issue raised by HMRC in submissions is how the FNR credit is to be calculated in those circumstances. The FTT says nothing about that at [226] and [227], in particular whether income was to be calculated by reference to the net dividend or the gross dividend.

304.The FTT does provide calculations at [231(28)] showing its conclusion as to how the Taxpayer's closure notices fell to be amended. We were not taken to those calculations or how HMRC say that the calculations are based on an error of law.

305.In the circumstances, we are simply not satisfied on the basis of the submissions before us that the FTT made any error of law in determining Issue C.

Issue D

306.This issue concerns the position where taxpayers are successful in an appeal on separate issues and decisions which are put in the alternative. HMRC say that if the appeal against one decision is allowed, the appeal against the other decisions should be dismissed.

307.The FTT held as follows in relation to this issue:

> 228 This issue relates to Henderson. HMRC contend that Henderson's appeal against HMRC's decision on the 2006 Paragraph 51 claim should be allowed to the extent that £313,700.99 tax has been overpaid. As regards 2007, HMRC contend that as there is no tax remaining payable following the determination of the appeal against the closure notice, the appeal should be dismissed on the basis that no unlawful tax remains payable.
>
> 229. However, in my judgment this cannot be right. Not only could it lead to an Appellant having to appeal against a decision in which it had been successful but does not take into account that there are two decisions, an appeal against a closure notice and a Paragraph 51 claim, both of which have succeeded and should therefore be allowed.

308.It appears from [231(35) ff] that Henderson was successful before the FTT in establishing its claim for DTR, in establishing a claim for repayment of overpaid tax pursuant to paragraph 51 and also in an application for a closure notice. Some of its claims were put in the alternative. HMRC submit that it is odd if two inconsistent appeals are allowed at the same time. However, they also acknowledge that it is odd if an appeal is dismissed in circumstances where the Taxpayer was successful on the issue. In that case, the Taxpayer could be left to appeal on an issue where it had been successful.

309.The issue is not significant for practical purposes, at least in relation to the present appeals. In the end, the various issues were decided in a certain way and the FTT allowed all Henderson's appeals or grounds of appeal, including those which were put in the alternative. It is not suggested that the parties are in any doubt as to how the issues were decided or as to the effect of the Decision. In some situations, it may be appropriate to determine appeals which are put in the alternative in principle. It would then be for the unsuccessful party to appeal on any issue where it was unsuccessful and otherwise for the parties to agree between themselves the effect of the determination. In the absence of agreement, the parties could seek directions from the FTT. However, we do not consider that the FTT was wrong to simply allow the appeals having determined the issues in Henderson's favour.

310.The same applies in relation to the appeal to this tribunal, and we shall dispose of the appeals accordingly.

Issue E

311.The FTT held at [230] that EUFT could be claimed for credit at the FNR in the current year, and not just carried forward. This issue follows on from Issue 8, but only if Issue 8 is determined in favour of the Taxpayer. Strictly, it does not arise given our determination on Issue 8.

312.HMRC say that the FTT was wrong in so far as it implied that EUFT can be applied against other income in the current year, not just against dividend income.

313.The Taxpayers say that it is not open to HMRC to take this point because they only raised it after the draft decision was issued. However, it is clear that the FTT permitted HMRC to raise the issue as Issue E and determined the issue in favour of the Taxpayers. In the absence of any cross-appeal by the Taxpayers challenging that case management decision by the FTT, we consider that HMRC are entitled to pursue their appeal on Issue E.

314.Sections 806D(4) and (5) and 806E ICTA 1970 make provision for relief for EUFT by way of carry back, carry forward and in year against specific categories of income. Without embarking on a detailed analysis of those provisions, it is clear that they envisage the carrying back and carrying forward of EUFT which is available for relief. There is no suggestion that relief is available against other forms of income, either in the year or outside the year in which it is available for relief. We do not consider that *FII SC 3* is authority for the proposition that such relief is available. In so far as the FTT implicitly held that such relief was available then we consider it erred in law.

Disposition

315.We have determined the issues in these appeals in principle and as a result we must set aside the Decision of the FTT, which allowed the appeals and directed HMRC to issue closure notices, to the extent that the Decision is inconsistent with this decision. It appears to us that this includes all the FTT's directions requiring HMRC to close enquiries but it will be for the parties to work out the effect of our determinations in relation to specific Taxpayers. In so far as there is any dispute as to what effect our determinations have on closure notices issued by HMRC, on decisions in relation to claims or on the applications for closure notices, then it seems to us that such disputes are best resolved by the FTT in the light of our decision. We therefore remit the appeals to the FTT to apply our findings in accordance with this decision. There is no reason that should not be dealt with by the same judge. Indeed, it is desirable that it should be.

MR JUSTICE RICHARD SMITH
JUDGE JONATHAN CANNAN

RELEASE DATE: 25 January 2024

APPENDIX

Relevant Legislative Provisions

Income and Corporation Taxes Act 1970

208 UK company distributions not generally chargeable to corporation tax

Except as otherwise provided by the Corporation Tax Acts, corporation tax shall not be chargeable on dividends and other distributions of a company resident in the United Kingdom, nor shall any such dividends or distributions be taken into account in computing income for corporation tax.

PART XVIII DOUBLE TAXATION RELIEF

CHAPTER 1 THE PRINCIPAL RELIEFS

788 Relief by agreement with other territories

(1) If Her Majesty by Order in Council declares that arrangements specified in the Order have been [made in relation to any territory][3] outside the United Kingdom with a view to affording relief from double taxation in relation to—

(*a*) income tax,
(*b*) corporation tax in respect of income or chargeable gains, and
(*c*) any taxes of a similar character to those taxes imposed by the laws of that territory,

and that it is expedient that those arrangements should have effect, then those arrangements shall have effect in accordance with subsection (3) below.

(3) Subject to the provisions of this Part, the arrangements shall, notwithstanding anything in any enactment, have effect in relation to income tax and corporation tax in so far as they provide —

(*a*) for relief from income tax, or from corporation tax in respect of income or chargeable gains; or …

(5) For the purposes of this section and, subject to section 795(3), Chapter II of this Part in its application to relief under this section, any amount of tax which would have been payable under the law of a territory outside the United Kingdom but for a relief to which this subsection applies given under the law of that territory shall be treated as having been payable; and references in this section and that Chapter to double taxation, to tax payable or chargeable, or to tax not chargeable directly or by deduction shall be construed accordingly…

(6) Except in the case of a claim for an allowance by way of credit in accordance with Chapter II of this Part, a claim for relief under subsection (3)(*a*) above shall be made to the Board.

(7) Where —

(*a*) under any arrangements which have effect by virtue of this section, relief may be given, either in the United Kingdom or in the territory [in relation to][4] which the arrangements are made, in respect of any income or chargeable gains, and
(*b*) it appears that the assessment to income tax or corporation tax made in respect of the income or chargeable gains is not made in respect of the full amount thereof, or is incorrect having regard to the credit, if any, which falls to be given under the arrangements,

any such assessments may be made as are necessary to ensure that the total amount of the income or chargeable gains is assessed, and the proper credit, if any, is given in respect thereof, and, where the income is, or the chargeable gains are, entrusted to any person in the United Kingdom for payment, any such assessment may be made on the recipient of the income or gains.

790 Unilateral relief

(1) To the extent appearing from the following provisions of this section, relief from income tax and corporation tax in respect of income and chargeable gains shall be given in respect of tax payable under the law of any territory outside the United Kingdom by allowing that tax as a credit against income tax or corporation tax, notwithstanding that there are not for the time being in force any arrangements under section 788 providing for such relief.

(2) Relief under subsection (1) above is referred to in this Part as “unilateral relief”.

(3) Unilateral relief shall be such relief as would fall to be given under Chapter II of this Part if arrangements in relation to the territory in question containing the provisions specified in subsections (4) to (10C) below were in force by virtue of section 788, but subject to any particular provision made with respect to unilateral relief in that Chapter; and any expression in that Chapter which imports a reference to relief under arrangements for the time being having effect by virtue of that section shall be deemed to import also a reference to unilateral relief.

(4) Credit for tax paid under the law of the territory outside the United Kingdom and computed by reference to income arising or any chargeable gain accruing in that territory shall be allowed against any United Kingdom income tax or corporation tax computed by reference to that income or gain (profits from, or remuneration for, personal or professional services performed in that territory being deemed for this purpose to be income arising in that territory).

(5) Subsection (4) above shall have effect subject to the following modifications, that is to say —

(*a*) where the territory is the Isle of Man or any of the Channel Islands, the limitation to income or gains arising in the territory shall not apply;
(*b*) where arrangements in relation to the territory are for the time being in force by virtue of section 788, credit for tax paid under the law of the territory shall not be allowed by virtue of subsection (4) above in the case of any income or gains if any credit for that tax is allowable under those arrangements in respect of that income or those gains; and
(*c*) credit shall not be allowed by virtue of subsection (4) above for overseas tax on a dividend paid by a company resident in the territory unless —

(i) the overseas tax is directly charged on the dividend, whether by charge to tax, deduction of tax at source or otherwise, and the whole of it represents tax which neither the company nor the recipient would have borne if the dividend had not been paid; or
(ii) the dividend is paid to a company within subsection (6) below; or
(iii) the dividend is paid to a company to which section 802(1) applies and is a dividend of the kind described in that subsection.

(6) Where a dividend paid by a company resident in the territory is paid to a company falling within subsection (6A) below which either directly or indirectly controls, or is a subsidiary of a company which directly or indirectly controls —

(*a*) not less than 10 per cent of the voting power in the company paying the dividend; or
(*b*) less than 10 per cent of the voting power in the company paying the dividend if —

(i) it has been reduced below that percentage on or after 1st April 1972; or
(ii) it has been acquired on or after that date in exchange for voting power in another company in respect of which relief under this subsection by virtue of paragraph (*a*) above was due prior to the exchange;

and the company receiving the dividend shows that the conditions specified in subsection (7) below are satisfied;

any tax in respect of its profits paid under the law of the territory by the company paying the dividend shall be taken into account in considering whether any, and if so what, credit is to be allowed in respect of the dividend.

In this subsection references to one company being a subsidiary of another are to be construed in accordance with section 792(2).

(11) Where —

(*a*) unilateral relief may be given in respect of any income or chargeable gain, and
(*b*) it appears that the assessment to income tax or corporation tax made in respect of the income or chargeable gain is not made in respect of the full amount thereof, or is incorrect having regard to the credit, if any, which falls to be given by way of unilateral relief,

any such assessments may be made as are necessary to ensure that the total amount of the income or chargeable gain is assessed, and the proper credit, if any, is given in respect thereof, and, where the income is, or the chargeable gain is, entrusted to any person in the United Kingdom for payment, any such assessment may be made on the recipient of the income or gain.

CHAPTER II RULES GOVERNING RELIEF BY WAY OF CREDIT

GENERAL

792 Interpretation of credit code

(1) In this Chapter, except where the context otherwise requires —

> "arrangements" means any arrangements having effect by virtue of section 788;
> "foreign tax" means, in relation to any territory, arrangements [in relation to][1] which have effect by virtue of section 788, any tax chargeable under the laws of that territory for which credit may be allowed under the arrangements (other than special withholding tax within the meaning of Chapter 7 of Part 3 of the Finance Act 2004);
> "the United Kingdom taxes" means income tax and corporation tax;
> "underlying tax" means, in relation to any dividend, tax which is not chargeable in respect of that dividend directly or by deduction; and
> "unilateral relief" means relief under section 790.

793 Reduction of United Kingdom taxes by amount of credit due

(1) Subject to the provisions of this Chapter, where under any arrangements credit is to be allowed against any of the United Kingdom taxes chargeable in respect of any income or chargeable gain, the amount of the United Kingdom taxes so chargeable shall be reduced by the amount of the credit.

(2) Nothing in subsection (1) above authorises the allowance of credit against any United Kingdom tax against which credit is not allowable under the arrangements.

(3) Credit against income tax is given effect at Step 6 of the calculation in section 23 of ITA 2007.

793A No double relief etc

(1) Where relief in respect of an amount of tax that would otherwise be payable under the law of a territory outside the United Kingdom may be allowed —

> (*a*) under arrangements made in relation to that territory, or
> (*b*) under the law of that territory in consequence of any such arrangements,

credit may not be allowed in respect of that tax, whether the relief has been used or not.

(2) Where, under arrangements having effect by virtue of section 788, credit may be allowed in respect of an amount of tax, credit by way of unilateral relief may not be allowed in respect of that tax.

(3) Where arrangements made in relation to a territory outside the United Kingdom contain express provision to the effect that relief by way of credit shall not be given under the arrangements in cases or circumstances specified or described in the arrangements, then neither shall credit by way of unilateral relief be allowed in those cases or circumstances.

795 Computation of income subject to foreign tax

(1) Where credit for foreign tax falls under any arrangements to be allowed in respect of any income and income tax is payable by reference to the amount received in the United Kingdom, the amount received shall be treated for the purposes of income tax as increased by —

(*a*) the amount of the foreign tax in respect of the income, including in the case of a dividend any underlying tax which under the arrangements is to be taken into account in considering whether any and if so what credit is to be allowed in respect of the dividend, and
(*b*) the amount of any special withholding tax levied in respect of the income.

(2) Where credit for foreign tax falls under any arrangements to be allowed in respect of any income or gain and subsection (1) above does not apply, then, in computing the amount of the income or gain for the purposes of income tax or corporation tax —

(*a*) no deduction shall be made for foreign tax or special withholding tax, whether in respect of the same or any other income or gain; and
(*b*) the amount of the income shall, in the case of a dividend, be treated as increased by —

(i) any underlying tax which, under the arrangements, is to be taken into account in considering whether any and if so what credit is to be allowed in respect of the dividend, and
(ii) any underlying tax which, by virtue of section 799(1)(*b*) or section 799(1B)(*b*), does not fall to be so taken into account.

795A Limits on credit: minimisation of the foreign tax

(1) The amount of credit for foreign tax which, under any arrangements, is to be allowed against tax in respect of any income or chargeable gain shall not exceed the credit which would be allowed had all reasonable steps been taken —

(*a*) under the law of the territory concerned, and
(*b*) under any arrangements made in relation to that territory,

to minimise the amount of tax payable in that territory.

806 Time limit for claims etc

(1) Subject to subsection (2) below and section 804(7), any claim for an allowance under any arrangements by way of credit for foreign tax in respect of any income or chargeable gain —

(*a*) shall, in the case of any income or chargeable gain which falls to be charged to income tax for a year of assessment, be made on or before —

(i) the fifth anniversary of the 31st January next following that year of assessment, or
(ii) if later, the 31st January next following the year of assessment in which the foreign tax is paid;

(*b*) shall, in the case of any income or chargeable gain which falls to be charged to corporation tax for an accounting period, be made not more than —

(i) six years after the end of that accounting period, or
(ii) if later, one year after the end of the accounting period in which the foreign tax is paid.

(2) Where the amount of any credit given under the arrangements is rendered excessive or insufficient by reason of any adjustment of the amount of any tax payable either in the United Kingdom or under the laws of any other territory, nothing in the Tax Acts limiting the time for the making of assessments or claims for relief shall apply to any assessment or claim to which the adjustment gives rise, being an assessment or claim made not later than six years from the time when all such assessments, adjustments and other determinations have been made, whether in the United Kingdom or elsewhere, as are material in determining whether any and if so what credit falls to be given.

(3) Subject to subsection (5) below, where —

(*a*) any credit for foreign tax has been allowed to a person under any arrangements, and
(*b*) the amount of that credit is subsequently rendered excessive by reason of an adjustment of the amount of any tax payable under the laws of a territory outside the United Kingdom,

that person shall give notice in writing to an officer of the Board that an adjustment has been made that has rendered the amount of the credit excessive.

806A Eligible unrelieved foreign tax on dividends: introductory

(1) This section applies where, in any accounting period of a company resident in the United Kingdom, an amount of eligible unrelieved foreign tax arises in respect of a dividend falling within subsection (2) below paid to the company.

(2) …

(3) For the purposes of this section —

(a) the cases where an amount of eligible unrelieved foreign tax arises in respect of a dividend falling within subsection (2) above are the cases set out in subsections (4) and (5) below; and

(b) the amounts of eligible unrelieved foreign tax which arise in any such case are those determined in accordance with section 806B.

(4) Case A is where —

(a) the amount of the credit for foreign tax which under any arrangements would, apart from section 797, be allowable against corporation tax in respect of the dividend, exceeds

(b) the amount of the credit for foreign tax which under the arrangements is allowed against corporation tax in respect of the dividend.

(5) Case B is where the amount of tax which, by virtue of any provision of any arrangements, falls to be taken into account as mentioned in section 799(1) in the case of the dividend (whether or not by virtue of section 801(2) or (3)) is less than it would be apart from the mixer cap. But if that is so in any case by reason only of the mixer cap restricting the amount of underlying tax that is treated as mentioned in subsection (2) or (3) of section 801 in the case of a dividend paid by a company resident in the United Kingdom, the case does not fall within Case B.

806D Utilisation of eligible unrelieved foreign tax

…

(4) The relievable underlying tax arising in an accounting period of the company shall be treated for the purposes of allowing credit relief under this Part as if it were —

(*a*) underlying tax in relation to the single related dividend that arises in the same accounting period,

(*b*) relievable underlying tax arising in the next accounting period (whether or not any related qualifying foreign dividend in fact arises to the company in that accounting period), or

(*c*) underlying tax in relation to the single related dividend that arises in such one or more preceding accounting periods as result from applying the rules in section 806E,

or partly in one of those ways and partly in each or either of the others.

(5) The relievable withholding tax arising in an accounting period of the company shall be treated for the purposes of allowing credit relief under this Part as if it were —

(*a*) foreign tax (other than underlying tax) paid in respect of, and computed by reference to, the single related dividend or the single unrelated dividend that arises in the same accounting period, (*b*) relievable withholding tax arising in the next accounting period (whether or not any qualifying foreign dividend in fact arises to the company in that accounting period), or

(*c*) foreign tax (other than underlying tax) paid in respect of, and computed by reference to, the single related dividend or the single unrelated dividend that arises in such one or more preceding accounting periods as result from applying the rules in section 806E,

or partly in one of those ways and partly in any one or more of the others.

806G Claims for the purposes of section 806D(4) or (5)

(1) The relievable underlying tax or relievable withholding tax arising in any accounting period shall only be treated as mentioned in subsection (4) or (5) of section 806D on a claim.

(2) ...

(3) A claim under subsection (1) above may only be made before the expiration of the period of —

(*a*) six years after the end of the accounting period mentioned in that subsection; or

(*b*) if later, one year after the end of the accounting period in which the foreign tax in question is paid.

811 Deduction for foreign tax where no credit allowable

(1) For the purposes of the Tax Acts, the amount of any income arising in any place outside the United Kingdom shall, subject to subsection (2) below, be treated as reduced by any sum which has been paid in respect of tax on that income in the place where the income has arisen (that is to say, tax payable under the law of a territory outside the United Kingdom).

(2) Subsection (1) above —

…

(*d*) shall not require any income to be treated as reduced by an amount of underlying tax which, by virtue of section 799(1B)(*b*), falls to be left out of account for the purposes of section 799;

and this section has effect subject to section 795(2) and to section 111 of the Finance Act 2004 (computation of income subject to special withholding tax).

Taxes Management Act 1970

42 Procedure for making claims etc

(1) Where any provision of the Taxes Acts provides for relief to be given, or any other thing to be done, on the making of a claim, this section shall, unless otherwise provided, have effect in relation to the claim.

(1A) Subject to subsection (3) below, a claim for a relief, an allowance or a repayment of tax shall be for an amount which is quantified at the time when the claim is made.

(11) Schedule 1A to this Act shall apply as respects any claim or election which —

(*a*) is made otherwise than by being included in a return under section 8, 8A, or 12AA of this Act.

43 Time limit for making claims

(1) Subject to any provision of the Taxes Acts prescribing a longer or shorter period, no claim for relief in respect of income tax or capital gains tax may be made more than 4 years after the end of the year of assessment to which it relates.

114 Want of form or errors not to invalidate assessments, etc

(1) An assessment [or determination][1], warrant or other proceeding which purports to be made in pursuance of any provision of the Taxes Acts shall not be quashed, or deemed to be void or voidable, for want of form, or be affected by reason of a mistake, defect or omission therein, if the same is in substance and effect in conformity with or according to the intent and meaning of the Taxes Acts, and if the person or property charged or intended to be charged or affected thereby is designated therein according to common intent and understanding.

Finance Act 1998

Schedule 18

3 Company tax return

(1) An officer of Revenue and Customs may by notice require a company to deliver a return (a "company tax return") of such information, accounts, statements and reports —

(a) relevant to the tax liability of the company, or

(b) otherwise relevant to the application of the Corporation Tax Acts to the company,

as may reasonably be required by the notice.

(2) Different information, accounts, statements and reports may be required from different descriptions of company.

(3) A company tax return must include a declaration by the person making the return that the return is to the best of his knowledge correct and complete.

15 Amendment of return by company

(1) A company may amend its company tax return by notice to the Inland Revenue.

(2) The notice must be in such form as the Inland Revenue may require.

(3) The notice must contain such information and be accompanied by such statements as the Inland Revenue may reasonably require.

(4) Except as otherwise provided, an amendment may not be made more than twelve months after —

(*a*) the filing date, or
(*b*) in the case of a return for the wrong period, what would be the filing date if the period for which the return was made were an accounting period.

PART IV ENQUIRY INTO COMPANY TAX RETURN

24 Notice of enquiry

(1) The Inland Revenue may enquire into a company tax return if they give notice to the company of their intention to do so ("notice of enquiry") within the time allowed.

31 Amendment of return by company during enquiry

(1) This paragraph applies if a company amends its company tax return at a time when an enquiry into the return is in progress in relation to any matter to which the amendment relates or which is affected by the amendment.

(2) The amendment does not restrict the scope of the enquiry but may be taken into account (together with any matters arising) in the enquiry.

(3) So far as the amendment affects —

(*a*) the amount stated in the company's self-assessment as the amount of tax payable, or

(*b*) any amount that affects or may affect—

(i) the tax payable by the company for another accounting period, or

(ii) the tax liability of another company for any accounting period,

it does not take effect while the enquiry is in progress in relation to any matter to which the amendment relates or which is affected by the amendment…

(4) An amendment whose effect is deferred under sub-paragraph (3) takes effect as follows —

(a) if the conclusions in [the closure notice] state either —

(i) that the amendment was not taken into account in the enquiry, or
(ii) that no amendment of the return is required arising from the enquiry,

the amendment takes effect when [the closure notice] is issued;

(b) in any other case, the amendment takes effect as part of the amendments made by the closure notice.

32 Completion of enquiry

(1) An enquiry is completed when the Inland Revenue by notice (a "closure notice") inform the company they have completed their enquiry and state their conclusions.

The notice takes effect when it is issued.

33 Direction to complete enquiry

(1) The company may apply to the [tribunal][1] for a direction that the Inland Revenue give a closure notice within a specified period.

(2) Any such application is to be subject to the relevant provisions of Part 5 of the Taxes Management Act 1970 (see, in particular, section 48(2)(*b*) of that Act).

(3) The tribunal shall give a direction unless satisfied that the Inland Revenue have reasonable grounds for not giving a closure notice within a specified period.

34 Amendment of return after enquiry

(1) This paragraph applies where a closure notice is given to a company by an officer.

(2) The closure notice must —

(*a*) state that, in the officer's opinion, no amendment is required of the return that was the subject of the enquiry, or
(*b*) make the amendments of that return that are required —

(i) to give effect to the conclusions stated in the notice, and

(ii) in the case of a return for the wrong period, to make it a return appropriate to the designated period.

(2A) The officer may by further notice to the company make any amendments of other company tax returns delivered by the company that are required to give effect to the conclusions stated in the closure notice.

51 Claim for relief for overpaid tax etc [*effective until 31 March 2010*]

(1) A company which believes it has paid tax under an assessment which was excessive by reason of some mistake in a return may make a claim for relief —

(*a*) by notice in writing,
(*b*) given to the Board,
(*c*) not more than six years after the end of the accounting period to which the return relates.

(2) On receiving the claim the Board shall enquire into the matter and give by way of repayment such relief in respect of the mistake as is reasonable and just.

(3) No relief shall be given under this paragraph —

(*a*) in respect of a mistake as to the basis on which the liability of the claimant ought to have been computed when the return was in fact made on the basis or in accordance with the practice generally prevailing at the time when it was made, or
(*b*) in respect of a mistake in a claim or election which is included in the return.

(5) On an appeal against the Board's decision on the claim, the tribunal shall determine the claim in accordance with the same principles as apply to the determination by the Board of claims under this paragraph.

54 Claims must be quantified

A claim under any provision of the Corporation Tax Acts for a relief, an allowance or a repayment of tax must be for an amount which is quantified at the time when the claim is made.

55 General time limit for making claims

Subject to any provision prescribing a longer or shorter period, a claim for relief under any provision of the Corporation Tax Acts must be made within six years from the end of the accounting period to which it relates.

56 Supplementary claim or election

A company which has made a claim or election under any provision of the Corporation Tax Acts (by including it in a return or otherwise) and subsequently discovers that a mistake has been made in it may make a supplementary claim or election within the time allowed for making the original claim or election.

57 Claims or elections affecting a single accounting period

(1) This paragraph applies to a claim or election for tax purposes which affects only one accounting period ("the relevant accounting period").

(2) If notice has been given under paragraph 3 requiring a company to deliver a company tax return for the relevant accounting period, a claim or election by the company which can be made by being included in the return (as originally made or by amendment) must be so made.

(3) If a company has delivered a company tax return for the relevant accounting period, a claim or election made by the company which could be made by amending the return is treated as an amendment of the return.

The provisions of paragraph 15 (amendment of return by company) apply.

(4) Schedule 1A to the Taxes Management Act 1970 (claims and elections not included in returns) applies to a claim or election made by a company which cannot be included in a company tax return for the relevant accounting period.

This applies in particular to a claim or election made —

(*a*) before any notice is given under paragraph 3 requiring a company tax return for the relevant accounting period, or
(*b*) at a time when its return for the relevant accounting period cannot be amended.

58 Claims or elections involving more than one accounting period

(1) This paragraph applies to a claim or election for tax purposes if —

(*a*) the event or occasion giving rise to it occurs in one accounting period (the period to which it "relates"), and
(*b*) it affects one or more other accounting periods (whether or not it also affects the period to which it relates).

(2) If a company makes a claim or election which —

(*a*) relates to an accounting period for which the company has delivered a company tax return and could be made by amendment of the return, or
(*b*) affects an accounting period for which the company has delivered a company tax return and could be given effect by amendment of the return,

the claim or election is treated as an amendment of the return.

The provisions of paragraph 15 (amendment of return by company) apply.

(3) Schedule 1A to the Taxes Management Act 1970 (claims and elections not included in returns) applies to a claim or election made by a company if or to the extent that it is not —

(*a*) made by being included (by amendment or otherwise) in the company tax return for the accounting period to which it relates, and
(*b*) given effect by being included (by amendment or otherwise) in company tax returns for the accounting periods affected by it.

59 Other claims and elections

(1) Schedule 1A to the Taxes Management Act 1970 applies to a claim or election for tax purposes which is not within paragraph 57 or 58, whether or not it is included (by amendment or otherwise) in a company tax return.

(2) The provisions of this Schedule do not apply where or to the extent that the provisions of Schedule 1A apply.