TC03450

Appeal numbers: TC/2012/03044 & TC/2010/03837

VAT – claims under s 80 VATA – VAT groups – Art 4(4), Sixth Directive (Art 11, Principal VAT Directive) – s 43 VATA - entitlement to claim – effect of individual taxable member joining a VAT group on VAT overpayments arising prior to that event – effect of all the members of one VAT group joining a second VAT group on cessation of the first VAT group on VAT overpayments arising during the currency of the first VAT group – effect of company leaving the second VAT group on VAT overpayments arising during the currency of the second VAT group

FIRST-TIER TRIBUNAL
TAX CHAMBER

(1) STANDARD CHARTERED PLC
(2) STANDARD CHARTERED BANK **Appellants**

- and -

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

(1) LLOYDS BANKING GROUP PLC
(2) BLACK HORSE LIMITED **Appellants**

- and -

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

TRIBUNAL: JUDGE ROGER BERNER
MR NIGEL COLLARD

Sitting in public at 45 Bedford Square, London WC1 on 3 – 7 February 2014

For the Standard Chartered Appellants: Roderick Cordara QC, instructed by PricewaterhouseCoopers LLP

For the Lloyds Appellants: David Scorey, instructed by Deloitte LLP

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

DECISION

1. Successive EC and EU VAT Directives have permitted, but not obliged, Member States to treat as a single taxable person, persons established in that state who, while legally independent, are closely bound to one another by financial, economic and organisational links. Member States have taken advantage of this enabling provision in different ways. In the UK, it has been enacted through the grouping provisions contained in what is now s 43 of the Value Added Tax Act 1994 ("VATA"), and subsequent sections, and paragraph 2 of Schedule 1 VATA.

2. Both the European Directives and, in certain respects, the domestic legislation are short on detail. As a consequence questions have arisen as to the effect of the rules in certain cases. This is one such case, where the issue is where the right to make a claim for repayment of VAT under s 80 VATA resides in three instances. The first is where, in relation to a company that was both the company that carried out the relevant transactions and also the representative member of a VAT group, amounts ("the VAT overpayments") were brought into account as output tax that were not output tax during the currency of that VAT group which was dissolved, the members of that group becoming members of a second, existing, VAT group, with a different representative member but within the same overall corporate group, and the relevant company subsequently left that second group and joined a third party group. The second is where, in relation to that same company, the VAT overpayments were made during the currency of the second VAT group. The third is in relation to a separate company that was individually registered at the time of the VAT overpayment, but which later joined the second VAT group before leaving that group and joining the third party group.

3. Were there not to have been a change of ownership of the relevant companies, in this case Chartered Trust plc ("Chartered Trust"), now called Black Horse Limited, and ACL Limited ("ACL"), no issue is likely to have arisen. But Chartered Trust and ACL were sold by the Standard Chartered group to the Lloyds Banking group in September 2000. Claims under s 80 have been made by both groups in relation to the relevant VAT overpayments. In each case HMRC have accepted some claims but refused others. The result is that, whilst these appeals are solely concerned with the decisions of HMRC in relation to each of the appellants, the outcome of each appeal affects both groups.

4. As a consequence, although these appeals have not been joined together, they were directed to be heard consecutively by the same panel. We heard the Standard Chartered appeals first, and then immediately thereafter the Lloyds appeals. By direction of the Tribunal, Lloyds was permitted to make submissions in the Standard Chartered appeal, and Standard Chartered was permitted to make submissions in the Lloyds appeal. Because the appeals share the same factual background, and the legal issues are best addressed together, the parties agreed that we should issue a single decision in relation to both appeals.

5. The Standard Chartered appellants were represented by Roderick Cordara QC, the Lloyds appellants by David Scorey, and HMRC by Peter Mantle. We are grateful to each of them for the clarity and breadth of the arguments and submissions put before us, both in writing and orally, which have been of great assistance.

The facts

6. We had helpful statements of agreed facts in both appeals, which we shall refer to below. We also had witness statements in both appeals, which were not disputed by HMRC. For Standard Chartered we had witness statements of Mr Stephen Crosby, Group Head of Taxation, and for Lloyds we had statements from Mr Andrew Plant, a Senior Manager within Lloyds' Group Tax function, and Mr Anwar Lukmanji, a Treasury Accountant in the Treasury department of Lloyds' Asset Finance division.

7. Although clearly a great deal of effort had gone into the preparation of the witness statements, and much time must have been expended on the historical research into the facts put forward in evidence, we found little of the detailed evidence of assistance in determining these appeals. We shall consider that evidence later when dealing with the individual cases but, for reasons which will become clear, the witness evidence has not proved material to our decision in either case.

Background

8. From the statements of agreed facts, and other material before us, we make the following general findings by way of factual background.

9. Standard Chartered PLC (which we shall refer to as "Standard Chartered") was originally incorporated under the laws of England and Wales on 18 November 1969. It is the ultimate holding company for the Standard Chartered group of companies, and its shares are publicly listed on the London Stock Exchange. Standard Chartered Bank was originally incorporated under the laws of England and Wales by Royal Charter in 1853. At all material times, Standard Chartered Bank was and remains a wholly owned subsidiary of Standard Chartered plc, and a member of the Standard Chartered VAT group. Standard Chartered Bank is the main trading company in the UK for the Standard Chartered group of companies; it holds a banking licence and carries on business providing the full range of banking and other financial services to clients worldwide.

10. Standard Chartered acquired all of Chartered Trust in January 1974 and Chartered Trust then became a wholly-owned subsidiary of Standard Chartered. Standard Chartered acquired ACL in April 1983 whereupon it became a wholly-owned subsidiary of Standard Chartered.

11. Chartered Trust was registered for VAT with effect from 1 April 1973 until 30 June 1990 as the representative member of a VAT group ("the Chartered Trust VAT group").

12. ACL was separately registered for VAT on 1 April 1973.

13. The Chartered Trust VAT group was dissolved and its VAT registration number cancelled on 30 June 1990. Chartered Trust joined the then existing Standard Chartered VAT group on 1 July 1990, together with all of the then members of the Chartered Trust VAT group. Standard Chartered was at all material times the representative member of the Standard Chartered VAT group. The dissolution of the Chartered Trust VAT group and the addition of Chartered Trust to the Standard Chartered VAT group were achieved by means of an application to HMRC by Standard Chartered.

14. ACL's separate VAT registration was cancelled with effect from 31 March 1996. ACL joined the Standard Chartered VAT group on 1 April 1996. The cancellation of that VAT number and the addition of ACL to the Standard Chartered VAT group were achieved by means of an application to HMRC by Standard Chartered.

15. Each of Chartered Trust and ACL was sold by Standard Chartered to Lloyds on 1 September 2000. From that date each of Chartered Trust and ACL became a wholly-owned subsidiary of Lloyds. With effect from that date, each of Chartered Trust and ACL left the Standard Chartered VAT group pursuant to an application by Standard Chartered and were added to the Lloyds VAT group pursuant to an application by Lloyds. Lloyds Banking Group plc has at all material times been the representative member of the Lloyds VAT group.

The Standard Chartered claims

16. The following claims have been made by Standard Chartered under s 80 VATA:

(1) Claim SC1 – A claim in respect of output tax over-declared in relation to supplies then thought to have been made by ACL in the 1988 to 1994 period (when ACL had its own separate VAT registration) in respect of fleet bonus payments received from car manufacturers.

(2) Claim SC2 – A claim in respect of output tax over-declared in relation to activities actually carried out by Chartered Trust during the 1973 to 1990 period (when Chartered Trust was the representative member of its own VAT group), in respect of motor vehicles under hire purchase agreements where the HP arrangements were subject to early termination.

(3) Claim SC3 – A claim in respect of output tax over-declared in relation to services actually carried out by Chartered Trust during the 1973 to 1990 period, in respect of administration fees for the provision of HP arrangement and instalment credit finance.

(4) Claim SC4 – A claim in respect of output tax over-declared in relation to services actually carried out by Chartered Trust during the 1990 to 1996 period (when Chartered Trust was a member of the Standard Chartered VAT group), relating to the supply of motor vehicles under hire purchase arrangements where the arrangements were subject to early termination.

(5) Claim SC5 – A claim in respect of output tax over-declared pursuant to services actually carried out by Chartered Trust during the 1990 to 1996 period, relating to administrative fees and for the provision of HP arrangements and instalment credit finance.

17. HMRC have accepted claims SC4 and SC5, but have rejected claims SC1, SC2 and SC3. HMRC's decisions in respect of those three claims are the subject of Standard Chartered's appeal.

18. Although Standard Chartered Bank is an appellant in these proceedings, there is no need for us to give separate consideration to its position. Accordingly, we shall refer solely to Standard Chartered.

The Lloyds claims

19. The Lloyds claims under s 80 VATA are:

(1) Claim L1 – A claim in respect of output tax over-declared pursuant to supplies made by Chartered Trust from 1 January 1978 to 30 June 1990 (when Chartered Trust was the representative member of its own VAT group) in respect of hire purchase contracts.

(2) Claim L2 – A claim in respect of output tax over-declared pursuant to supplies made by Chartered Trust from 1 April 1973 to 30 June 1990 (when Chartered Trust was the representative member of its own VAT group) in respect of administration fees relating to hire purchase contracts.

(3) Claim L3 – A claim in respect of output tax over-declared pursuant to services carried out by Chartered Trust from 1 July 1990 to 30 September 1996 (when Chartered Trust was a member of the Standard Chartered VAT group) in respect of hire purchase contracts.

(4) Claim L4 – A claim in respect of output tax over-declared pursuant to services carried out by Chartered Trust from 1 July 1990 to 30 September 1996 in respect of administration fees relating to hire purchase contracts.

20. HMRC have agreed claims L1 and L2, but have rejected claims L3 and L4. The Lloyds appeal is against HMRC's decision rejecting those claims.

21. To avoid confusion, we shall refer throughout to the appellant, Black Horse Limited, by the name by which it was known at the material time for the overpayments of VAT giving rise to the claims, namely Chartered Trust. It will not be necessary for us to refer to the other Lloyds appellant in these proceedings, Lloyds Banking Group plc, although we shall describe the claims of the Lloyds appellants as the Lloyds claims.

The overlapping claims

22. From this description of the claims of Standard Chartered and Lloyds it can be seen that there is considerable overlap in the claims made by each. Essentially, HMRC have determined that, in relation to Chartered Trust, the person entitled to

claim in respect of overpayments for the period during which the Chartered Trust VAT group was in existence (1973 to 1990) is Chartered Trust, and not Standard Chartered, even though Chartered Trust, and the members of the Chartered Trust VAT group, became members of the Standard Chartered VAT group in 1990. Accordingly, HMRC have accepted claims L1 and L2, and have rejected claims SC2 and SC3.

23. But for overpayments in relation to Chartered Trust for the period when that company was a member of the Standard Chartered VAT group (1990 to 1996), HMRC have decided that it is Standard Chartered, as representative member of that group, that is entitled to claim, and not Chartered Trust, even though Chartered Trust left the Standard Chartered VAT group and joined the Lloyds group in September 2000. Thus, in this respect, HMRC have accepted claims SC4 and SC5, and have rejected claims L3 and L4.

24. In relation to ACL, HMRC have determined that any s 80 VATA claim for the period 1973 to 1996 when ACL was separately registered rests with ACL, and not with Standard Chartered, even though ACL subsequently became part of the Standard Chartered VAT group. Claim SC1 has accordingly been rejected.

The law

25. As we noted at the outset, the UK's VAT group provisions derive from the European VAT Directives. At the times relevant to these appeals, it was the Sixth VAT Directive (77/388/EEC) that applied, although corresponding provisions are found in the Principal VAT Directive (2006/112/EC)[1]. We shall refer only to the provisions of the Sixth Directive, but our findings are equally applicable to the position under the Principal VAT Directive. Article 4 of the Sixth Directive defined, at Article 4(1), "taxable person" as any person who independently carries out any economic activity specified in paragraph 2, whatever the purpose or results of that activity. Article 4(4) then went on to describe circumstances relevant to groups, where individual persons may be treated as a single taxable person:

> "... each Member State may treat as a single taxable person persons established in the territory of the country who, whilst legally independent, are closely bound to one another by financial, economic and organisational links."

26. The UK availed itself of Article 4(4), by legislation which is now, so far as is material to these appeals, to be found in s 43 VATA, the material part of which provides:

> (1) Where under sections 43A to 43D any bodies corporate are treated as members of a group, any business carried on by a member of the

[1] Although we shall refer to Article 4(4) of the Sixth Directive, the corresponding provision is Article 11 of the Principal VAT Directive.

group shall be treated as carried on by the representative member, and—

(*a*) any supply of goods or services by a member of the group to another member of the group shall be disregarded; and

(*b*) any supply which is a supply to which paragraph (*a*) above does not apply and is a supply of goods or services by or to a member of the group shall be treated as a supply by or to the representative member; and

(*c*) any VAT paid or payable by a member of the group on the acquisition of goods from another member State or on the importation of goods from a place outside the member States shall be treated as paid or payable by the representative member and the goods shall be treated—

(i) in the case of goods acquired from another member State, for the purposes of section 73(7); and

(ii) in the case of goods imported from a place outside the member States, for those purposes and the purposes of section 38,

as acquired or, as the case may be, imported by the representative member;

and all members of the group shall be liable jointly and severally for any VAT due from the representative member.

(1AA) Where—

(*a*) it is material, for the purposes of any provision made by or under this Act ('the relevant provision'), whether the person by or to whom a supply is made, or the person by whom goods are acquired or imported, is a person of a particular description,

(*b*) paragraph (*b*) or (*c*) of subsection (1) above applies to any supply, acquisition or importation, and

(*c*) there is a difference that would be material for the purposes of the relevant provision between—

(i) the description applicable to the representative member, and

(ii) the description applicable to the body which (apart from this section) would be regarded for the purposes of this Act as making the supply, acquisition or importation or, as the case may be, as being the person to whom the supply is made

the relevant provision shall have effect in relation to that supply, acquisition or importation as if the only description applicable to the representative member were the description in fact applicable to that body.

27. Schedule 1 VATA deals with registration for VAT in respect of taxable supplies. Paragraph 3 of that Schedule operates to enable HMRC to forestall cases where activities are carried on concurrently by separate persons which, if all the

relevant taxable supplies were taken together, would result in a person carrying on the business being liable to be registered. In that case, HMRC may direct that those several persons shall be treated as a single taxable person, registered in the name of such one of the persons named in direction as is jointly nominated by those persons.

28. That provision, which is an anti-avoidance provision, is not directly relevant to these appeals, but it is noteworthy in its adoption of a different approach from that in s 43 in requiring the registration of the notional single taxable person, in the name of the nominated person, whereas s 43 deems the business to be carried on by the representative member and the external supplies to and from the group to be made by the representative member.

29. All the claims at issue in this appeal were made under s 80 VATA, and have been accepted by HMRC as having validly been made under that section. So far as is material for the arguments of the parties, s 80 is as follows:

> (1) Where a person—
>
> (*a*) has accounted to the Commissioners for VAT for a prescribed accounting period (whenever ended), and
>
> (*b*) in doing so, has brought into account as output tax an amount that was not output tax due,
>
> the Commissioners shall be liable to credit the person with that amount.
>
> ...
>
> (2) The Commissioners shall only be liable to credit or repay an amount under this section on a claim being made for the purpose.
>
> (2A) Where—
>
> (*a*) as a result of a claim under this section by virtue of subsection (1) or (1A) above an amount falls to be credited to a person, and
>
> (*b*) after setting any sums against it under or by virtue of this Act, some or all of that amount remains to his credit,
>
> the Commissioners shall be liable to pay (or repay) to him so much of that amount as so remains.
>
> (3) It shall be a defence, in relation to a claim under this section by virtue of subsection (1) or (1A) above, that the crediting of an amount would unjustly enrich the claimant.
>
> ...
>
> (7) Except as provided by this section, the Commissioners shall not be liable to credit or repay any amount accounted for or paid to them by way of VAT that was not VAT due to them.

The parties' respective positions

30. All parties agree that these appeals turn on the correct interpretation and application of EU and domestic VAT law and the general principles governing VAT

grouping, in the particular context of s 80 claims for repayment of VAT overpaid, as given effect domestically by s 43.

31. HMRC's position is that, consistently with EU law on repayment of tax wrongly paid, s 80 makes HMRC liable to the person which over-declared, and overpaid, the VAT to HMRC. In the case of ACL, that person is ACL, and it makes no difference that, after the SC1 claim period, ACL joined the Standard Chartered VAT group. The law relating to VAT grouping is, say HMRC, irrelevant to HMRC's liability in respect of VAT over-declared by ACL in the 1988 to 1994 period.

32. In relation to claims SC2 and SC3, HMRC submit that the VAT grouping provisions are relevant, but only to the extent that it was Chartered Trust, as the company whose activities gave rise to the VAT overpayments, or as the representative member of the Chartered Trust VAT group in the relevant period of 1973 to 1990, which over-declared and overpaid the tax for the purpose of s 80.

33. In the case both of ACL and Chartered Trust, Standard Chartered say that the right to claim for the overpayments passed to Standard Chartered when each of ACL and Chartered Trust became members of the Standard Chartered VAT group, in the former case when ACL ceased to be registered in its own right, and in the latter when the group registration of the Chartered Trust group was cancelled, and Chartered Trust and the other former members of the Chartered Trust VAT group became members of the Standard Trust VAT group. Once the rights had, on this analysis, become those of Standard Chartered, as representative member of its VAT group, those rights remain with it, as the Standard Chartered VAT group continues to exist, notwithstanding the fact that ACL and Chartered Trust have left the group, and have become members of the Lloyds VAT group.

34. In relation to claims L3 and L4, HMRC maintain the same position, namely that for the period of those claims Chartered Trust was a member of the Standard Chartered VAT group, and it is therefore Standard Chartered, as the representative member of that group, which remains in existence, that can claim under s 80.

35. Lloyds case is that once a company, in this case Chartered Trust, leaves a VAT group, in this case the Standard Chartered VAT group, it is that company, and not the representative member of the VAT group of which it used to be a member, that is entitled to repayment under s 80 of any VAT overpaid in respect of supplies which the company made when it was a member of the VAT group and in respect of which it paid VAT to HMRC (albeit via the representative member). This is so, it is argued, regardless of whether the VAT group continues to exist. Before us, Mr Scorey took this argument further, submitting that the right to claim for an overpayment belonged at all times to the company whose activities had given rise to the claim, namely Chartered Trust, and that the group provisions did not operate to disturb that position at all.

36. It can thus be seen that we need to examine closely the concept of single taxable person, the way in which the grouping provisions have been adopted, by s 43 VATA, under domestic law and the repayment mechanism afforded by UK law. We need to

consider where a s 80 claim resides where an overpayment arises in a period when a company is not in a group as well as when it is in a group, the effect in either case where a company ceases to be separately registered, or a group is dissolved, and the company or the group members join another group. We need also to determine the effect, if any, on the right to make a s 80 claim if the company whose actual activity has given rise to the claim during the period of that company's membership of a VAT group, leaves the group without the group having ceased to exist.

37. Both Standard Chartered and Lloyds put their cases in the alternative. In each case their primary submissions were on the effect of EU law, and in particular the scope of the concept of the single taxable person, and each submitted that questions of the burden of tax were not relevant to the analysis. But in the alternative, Standard Chartered argued that it should be regarded, as a matter of EU law, as having the right to claim in respect of the claims arising from Chartered Trust's activities in the period when Chartered Trust was not a member of the Standard Chartered VAT group, but was a member of the wider Standard Chartered corporate group, having regard to the financial support provided by Standard Chartered and the way in which profits were distributed to the parent company. Lloyds too argued in the alternative that, so far as such an issue was relevant, it was Chartered Trust, and not Standard Chartered, that had borne the tax during Chartered Trust's membership of the Standard Chartered VAT group.

38. In these respects therefore, as well as considering the scope and effect of the single taxable person, we must examine the EU law from which such rights to repayment emanate, and how those rights are given effect under UK domestic law.

Single taxable person

39. It is a cardinal principle of EU law that, in determining the scope of a provision of such law, its wording, context and objectives must all be taken into account (*NCC Construction Danmark A/S v Skatteministeriet* (Case C-174/08) [2009] STC 532).

40. Article 4(4) of the Sixth Directive does not elaborate on the concept of the single taxable person. Its wording can therefore take one only so far. However, its objective can be discerned from the Explanatory Memorandum which accompanied the Proposal for the Sixth Directive submitted by the European Commission on 29 June 1973 (COM(73) 950). It described the fact that Member States were not to be obliged to treat as taxable persons those whose independence is purely a legal technicality as being, first, in the interests of simplifying administration and, secondly, of combating abuses. Those objectives have been recognised and endorsed consistently by the ECJ; see, for example, *European Commission v Kingdom of Sweden* (Case C-480/10) [2013] All ER (D) 62 (Nov), at para 50, and *European Commission v Ireland* (Case C-85/11) [2013] STC 2336, at para 38 of the opinion of the Advocate General (Jääskinen), where it is noted that the purpose of Article 4(4) is that Member States are not obliged to treat as taxable persons those whose "independence" is purely a legal technicality.

41. The context of Article 4(4) is that it is part of Article 4, which is concerned with identifying the taxable person for VAT purposes. That is a vital concept on which both questions of liability and administration of the tax depend. Thus it is the supply of goods or services for a consideration by a taxable person acting as such that gives rise to the liability to VAT (Article 2), it is a taxable person that has the right to deduct input tax (Article 17) and it is the taxable person who has both the accounting obligations (Article 22) and the liability for payment of the tax (Article 21).

42. The European Court of Justice ("ECJ") has considered the scope of Article 4(4) on a number of occasions. In the well-known case of *Polysar Investments Netherlands BV v Inspecteur der Invoerrechten en Accinjnzen, Arnhem* (Case C-60/90) [1993] STC 222, the question was whether a holding company whose only activity was the holding of shares in subsidiary companies could be regarded as a taxable person. It was held that it could not, and the fact that the holding company belonged to an international group known by a single name was of no consequence in determining whether the company was a taxable person.

43. The Advocate General (Van Gerven), at para 9 of his Opinion, referred to the rule in Article 4(4) as one of simplification, but one which did not derogate from the principle that, in establishing whether there was a liability to tax, it is necessary to focus on the activities of each legal person separately, and that Article 4(4) was not aimed at amending the conditions for liability.

44. That, it seems to us, is a reference, not to any question of accounting for tax or the right to any repayment of tax over-declared, but to the need to examine the activities of individual members of a group to ascertain, first, if an individual member is carrying on an economic activity, and secondly whether the individual transactions give rise to a liability to tax. We observe that this approach is also adopted in s 43(1AA) VATA which, to the extent it is material for determining the liability of a supply, looks to the status of the individual company making the supply.

45. The case of *Ampliscientifica Srl and another v Ministero dell'Economia e delle Finanze and another* (Case C-162/07) [2011] STC 566 concerned whether Italy had adopted a group scheme under Article 4(4) in breach of the procedural requirements of the scheme. The Court, at para 19 of its judgment, described the effect of a Member State implementing a scheme under Article 4(4) as being:

> "... that national legislation adopted on the basis of that provision allows persons, in particular companies, which are bound to one another by financial, economic and organisational links no longer to be treated as separate taxable persons for the purposes of VAT but to be treated as a single taxable person. Thus, where that provision is implemented by a member state, the closely linked person or persons within the meaning of that provision cannot be treated as a taxable person or persons within the meaning of art 4(1) of the Sixth Directive (see, to that effect, *van der Steen v Inspecteur van de Belastingdienst* (Case C-355/06) [2008] STC 2379, [2007] ECR I-8863, para 20). It follows that treatment as a single taxable person precludes persons who are thus closely linked from continuing to submit VAT declarations

> separately and from continuing to be identified, within and outside their group, as individual taxable persons, since the single taxable person alone is authorised to submit such declarations."

46. *European Commission v Ireland*, to which we have referred, considered whether non-taxable persons could be included as members of a VAT group. It was held that they could. The reasoning of the Court was based largely on the fact that Article 4(4) of the Sixth Directive and Article 11 of the Principal VAT Directive did not, as a matter of wording, confine the ability to treat persons as a single taxable person to those who would be taxable persons in their own right. Nor was that conclusion regarded as running counter to the objectives set out in the Explanatory Memorandum (COM(73) 950).

47. The Court, at para 40, rejected an argument of the Commission that Article 11 of the Principal VAT Directive represents an exception to the general rule that each taxable person must be treated as a separate entity, with the result that the article is to be construed restrictively. Similar arguments had been raised, and rejected, earlier in *European Commission v Sweden*. It follows, therefore, that the normal rules of construction should be applied.

48. The UK's grouping provisions have been examined by the domestic courts. In *Customs and Excise Commissioners v Kingfisher plc* [1994] STC 63, in the High Court, Popplewell J, having considered the scheme of the UK legislation in the context of Article 4(4), and the Advocate General's opinion and the judgment of the Court in *Polysar*, found himself in entire agreement with the views expressed by the Chairman of the VAT Tribunal (D. C. Potter QC) whose decision (reported at [1991] VATTR 47) was the subject of the Commissioners' appeal. Before the tribunal it had been argued by the Commissioners that the function of what is now s 43 VATA was to provide a simplified accounting method and no more. Mr Potter rejected that submission and said (at p 52):

> "Had Parliament intended that section 29(1) [of the Value Added Tax Act 1983] did no more than provide simplified accounting, nothing would have been easier than to have stated that in the section itself. In my view section 29(1) clearly affects the substantive liabilities of members of the group for VAT purposes. It is far reaching. It nullifies inter-group supplies of goods and services; it deems all supplies to or from a member of the group from or to an outsider to be treated as supplied by or to the representative member notwithstanding that the representative member may in reality neither make nor receive any supply whatever; it makes all members liable jointly and severally for any tax due from the representative member. It seems to be reasonably clear that the purpose of section 29 is to enable a group to be treated as if it were a single body corporate, the different companies being no more than different departments. Although the phrase 'a single taxable person' introduced into Schedule 1 by Finance Act 1986 is absent, I nevertheless consider that the group is, albeit without prejudice to third parties, treated as a single taxable person."

49. Having referred to consideration of the effect of deeming provisions by Lord Asquith in *East End Dwellings Co Ltd v Finsbury Borough Council* [1952] AC 109,

and by Nourse J in *IRC v Metrolands Ltd* [1981] STC 193, Mr Potter continued (at pp 52-53):

> "There would in my view exist anomaly, if not injustice, if section 29 did not cause a group to be treated as a single taxable entity, through its representative member, not materially distinguishable from a single body having separate trading departments. That is the object of its deeming provisions."

50. The conclusion reached by Popplewell LJ in Kingfisher that the purpose of what is now s 43 was to enable a group to be treated as if it were a single taxable entity was approved by the House of Lords in *Customs and Excise Commissioners v Thorn Materials Supply Limited and another* [1998] STC 725. That case concerned the effect of an agreement under which one VAT group company ("Materials") agreed to sell goods to another ("Home") on terms which provided for 90% of the price to be payable immediately, and 10% on delivery. Materials then ceased to be a member of the VAT group and became separately registered. Subsequently Materials purchased the goods and delivered them to Home. Home paid the remaining 10% of the price. Thorn argued that the advance payment gave rise to a deemed supply which therefore, as to 90%, had to be disregarded, leaving only 10% of the supply to be taxed.

51. In giving the leading opinion in the House of Lords, Lord Nolan examined the effect of the requirement, now in s 43(1), that a supply by one group member to another must be disregarded. He accepted, at p 732h, the submission of counsel for Thorn that it did not mean that the separate existence of the appellants and Home was to be denied or that the sale agreement and the prepayment were not to be treated as having taken place. What it meant was that the 90% supply was to be disregarded.

52. Lord Nolan also accepted that the time of supply rules had to be applied to determine whether, and if so when, a supply between members of the same group took place. He said (at pp 732-733):

> "It is essential to apply the time of supply rules in order to determine whether the supply took place while the group relationship still existed. Unless a supply during the period of the relationship is identified as having taken place there is nothing on which s 29(1) can bite. One can hardly disregard something which did not happen."

53. Lord Nolan went on to consider whether it therefore followed that the supply of goods, to the extent of 90%, was permanently excluded from the charge to VAT. He held that it did not, saying (at p733a-f):

> "My Lords, I can find no warrant in the 1983 Act for any such consequence. I accept Mr Pleming's submission that art 4(4) and s 29(1) are not designed to confer exemption or relief from tax. They are designed to simplify and facilitate the collection of tax by treating the representative member as if it were carrying on all the businesses of the other members as well as its own, and dealing on behalf of them all with non-members. It is entirely consistent with this approach that the 90% supplies effected by Materials and Resources to Home should be disregarded for the purposes of the 1983 Act, because Materials and

> Home were not to be treated as carrying on their own businesses at that time. Popplewell J was in my judgment correct in holding, in the *Kingfisher* case, that the purpose of s 29(1) was to enable a group to be treated as if it were a single taxable entity, even though it is not expressed in those terms. The section may have the effect of deferring the charge to tax upon the added value of goods until they are the subject of a supply outside the group, but it does not prevent that charge.
>
> When Materials and Resources left the Thorn EMI plc group they emerged into the VAT world as separate taxable persons, each carrying on its own business for VAT purposes. The delivery of the goods by them to Home undoubtedly constituted a transfer of the whole property in the goods in the course of business. It constituted a supply of the goods within the meaning of para 1(1) of Sch 2, taxable under s 10(2) upon the amount of the consideration whether already paid or still payable. The appellants' objection that this approach disregards the fact that, to the extent of 90%, the supply was to be treated as having taken place when the advance payment was made must fail because this disregard is precisely what s 29(1) requires. It follows that, in my judgment, the whole value of the supplies in question falls fairly and squarely within the charging provisions of the 1983 Act according to the normal principles of construction which should be applied to a taxing statute."

54. The relationship between the statutory fiction and the real transactions carried out by constituent members of the group has also been considered at tribunal level. In *Canary Wharf Ltd v Customs and Excise Commissioners* [1996] V&DR 323, in the VAT Tribunal, the limits of the statutory hypothesis were explained by the tribunal, at para 50, in the following terms:

> "The section [s 43 VATA] does not go so far as to lay down as a statutory hypothesis that the character of any supply to a non-member of the VAT group is to be determined as if it were part of a single supply by the representative member; the statutory hypothesis is limited to 'any business' carried on by a member of the group. Nor do the statutory consequences have any bearing on the character of the supply; they proceed on the basis that the supplies, characterised on ordinary principles, have taken place and, for example, direct that inter-group supplies are disregarded for tax purposes."

55. The opinion of Lord Nolan in *Thorn Materials* was considered by the First-tier Tribunal in *University of Essex v Revenue and Customs Commissioners* [2010] SFTD 893, a case concerning the effect of the group provisions on the application of the capital goods scheme. The Tribunal said (at [22]):

> "It is clear from this that the purpose of s 43 is to enable a group to be treated as if it were a single taxable entity, and that the representative member is to be treated as carrying on the businesses of the other members as well as its own and dealing on behalf of those members with non-members. Consistently with this, group members (other than the representative member) are not treated as carrying on business on their own account. However, group members are nevertheless treated

> as continuing to have a separate existence, and transactions between group members (as opposed to the VAT supplies those transactions give rise to) are not to be ignored."

56. In considering the effect of this analysis on the operation of the capital goods scheme in that case, the tribunal said (at [27]):

> "Under s 43, it is only the university that can be regarded as the owner for this purpose, as it is only the university that is treated as carrying on the business of the group members, including UAG. But in order that the development can represent a capital item for the university, there must have been a supply of it to the university. In this case the relevant supply of the development was to UAG at a time when UAG was not a member of the group, and s 43 accordingly had no effect with regard to that supply. Although, once UAG was a member of the group, s 43 had the effect that supplies to (and by) UAG were regarded as made to (or by) the university, that effect is not retrospective. The representative member does not stand in the shoes of group members for all purposes, particularly as regards past events."

57. The position is, therefore, that a VAT group will operate only in relation to those matters which, for VAT purposes, either take place or are treated as taking place at the time the group relationship subsists. In respect of matters which, as a matter of VAT law (which may be the same or different from the actual commercial facts and the general law), take place before a company becomes a member of a VAT group, whether it is a new or existing group, the creation of, or accession to, the group leaves those matters undisturbed. Rights and obligations arising out of those matters remain with the taxable person (which can be an individual taxable person or the single taxable person arising as a result of the grouping rules) that carried out the activities, or is regarded as having carried out the activities, which gave rise to those rights and obligations.

58. This principle was applied by the First-tier Tribunal in *Chubb Limited v Revenue and Customs Commissioners* [2013] UKFTT 579 (TC). Chubb was the representative member of a group that had at one time included a company, Y&V Limited ("Y&V"), which had incurred input tax in connection with certain share acquisitions. The tribunal found Y&V had not been a member of the group at the time the relevant supplies had been made to it, and accordingly that the grouping provisions were not in point. Furthermore, as the tribunal made clear, the question was one of actual membership of the group, and not mere eligibility.

Succession by representative member

59. As s 43 proceeds on the basis that the businesses of the group members are carried on by the representative member, and that supplies by and to group members are regarded as made by and to the representative member, it is not surprising that the domestic courts and tribunals have dealt with that concept. That has not, however prevented them from applying, whether expressly or by implication, the EU principle of the single taxable person.

60. One case where the status of the representative member was in issue was *Thorn Plc v Customs and Excise Commissioners* [1998] V&DR 80. The question there concerned the validity of an assessment to VAT which had been made on the current representative member of a group in respect of supplies made in periods when another company had been the representative member. It was argued for Thorn that the assessment ought to have been made on the former representative member.

61. In rejecting these arguments, the tribunal referred, at p 83, to the statutory consequences of a group registration under s 43, noting that these subsisted "for so long as the group is in being". Referring to the role of the representative member as being to enable the group to be taxed as a single entity through the representative member. The tribunal continued (at p84):

> "In essence, therefore, the effect for VAT purposes of a group registration is for the group to exist through its representative member. Consequently, while the group subsists the expression 'representative member' applies to whichever company is currently undertaking that role, disregarding any changes there may have been in the identity of the representative member."

62. The tribunal rejected the alternative argument for the Crown, based on s 73(5) VATA, that the successive representative members simply paid the VAT on behalf of the members of the VAT group that made the supplies. The tribunal found, at p 85, that the representative member is not a representative in the sense of being an agent of or trustee for the other members of the group. The representative member has the statutory role conferred by s 43, which is quite distinct from the legal roles of those "acting in a representative capacity" within s 73(5).

63. *Thorn Plc* concerned the succession by a new representative member of the rights and obligations of the former representative member in relation to an existing group. There is no authority which suggests that a representative member will acquire rights or become subject to obligations of a company in respect of matters occurring while that company is separately registered or is part of a different group registration.

64. Although it concerned a situation where a former unregistered branch joined a group, in our view the case of *Customs and Excise Commissioners v Svenska International plc* [1999] STC 406 provides no support for an argument that there can be any such succession. *Svenska* is merely an example of particular effects of the artifice capable of being created in a VAT world of deemed supplies and groups. In that case, the taxpayer company was a UK subsidiary of a Swedish bank, which at the same time operated a branch in the UK. The taxpayer received goods and services from third parties, and itself provided services to the branch. Before an invoice had been issued for those services or any payment had been made, the branch, which had not previously been registered for VAT, became part of the taxpayer's existing VAT group. Accordingly, having regard to the effect of the group provisions, when the taxpayer subsequently issued an invoice to the branch, no VAT was charged. The branch's supplies to its own customers, which were largely exempt, were regarded as made by the taxpayer.

65. The issue that arose in those circumstances was that of input tax which the taxpayer had recovered on the third party supplies to it on the footing that it was attributed to intended taxable supplies (the taxpayer and the branch not at that time being in a group). The commissioners sought repayment of a proportion of the VAT.

66. It was held that, even though actual supplies of services had been made by the taxpayer to the branch at the relevant time, under the time of supply rules there had been no supply for VAT purposes by the taxpayer to the branch before the branch had joined the group registration. Although the right to recover input tax would not be lost where the taxable person was unable to make a supply for reasons outside his control, the joining of the group by the branch had been with the concurrence of the taxpayer. Once the branch had joined the taxpayer's VAT group, the services received by the taxpayer prior to the group relationship with the branch were to be treated as used by the taxpayer in making supplies to the customers of the branch, which supplies were partly exempt.

67. In our view *Svenska* is an example of the analysis required when the artificial world of supplies and groups collides with the real commercial world. In *Svenska* there were two factors: the first was the effect of the time of supply rules to treat no third party supply as having taken place until the group relationship came into being, and the second the effect, at the time of supply of the third party goods and services to the taxpayer, of the grouping provisions treating the branch's supplies to its customers as having been made by the taxpayer. It says nothing concerning any possible succession by the representative member of a new group to the rights and obligations of a company joining the group, whether formerly registered in its own right or as the representative member or part of another group.

68. Nor have we found of any assistance in this regard two further cases cited to us: *Kopalnia Odkrywkowa Polski Trawertyn P Grantowicz, M Wąsiewicz, spółka jawna v Dyrektor Izby Skarbowej w Poznaniu* (Case C-280/10) [2012] STC 1085; and *Finanzamt Offenbach am Main-Land v Faxworld Vorgrundungsgesellschaft Peter Hünninhausen und Wolfgang Klein GbR* (Case C-137/02) [2005] STC 1192. Neither was a case concerning groups. The former related to expenses incurred for the purpose of an economic activity to be carried on by an entity that had not yet been created; the latter concerned specific provisions under German domestic law for the transfer of a business as a going concern.

Our analysis of the single taxable person

69. It is we think, at this stage, convenient to summarise the principles in relation to the single taxable person we consider can be derived from the EU law, the domestic legislation and the authorities. The first is that the single taxable person is a fiction; it is something that the Member States can treat as being in place instead of the legally independent persons with the necessary links. However, it is a fiction that has real consequences in terms of the effect on intra-group supplies, and the treatment of the single taxable person as a taxable person for all relevant purposes. Furthermore, whilst the objective of the single taxable person fiction may be administrative

convenience and simplicity, its effect is not so limited. It is a concept that should not be construed restrictively.

70. That is not to say that the single taxable person concept is all-encompassing. It operates only at the level of the VAT consequences of the transactions carried out by the group members, and does not coalesce the group members for all purposes. Those group members remain individual entities as a matter of law. Regard must be had to the real transactions they carry out. It is only the VAT effect of those transactions, once identified by reference to the real facts, that is governed by the single taxable person construct. The single taxable person fiction does not alter the character of the actual transactions, or combine what would otherwise be separate supplies into a single supply.

71. The single taxable person construct operates only as regards matters that take place, for VAT purposes, in respect of the constituent members of the group at a time when those persons are members of the group. It has no effect in relation to supplies made, or anything done, by persons at a time when they are not included in the group registration. It cannot have retrospective effect, although if, contrary to the real commercial position, the law deems something done at a time prior to the group relationship to be done for VAT purposes when the group exists, the grouping provisions will have present effect in relation to that deemed state of affairs.

72. Rights and obligations arising in respect of activities taking place, for VAT purposes, in relation to constituent members during the period of the group registration, that would, absent the grouping provision, be those of individual taxable persons within the group, are not the rights and obligations of those individual members but are, according to EU law, rights and obligations of the single taxable person. But, absent an assignment, there is no basis on which the single taxable person fiction can extend to the assumption by another person, including the representative member of a group, of any rights and obligations of a person which have arisen before the time when that person joins the group, nor is there any succession principle that can have that result.

73. Under UK law, as set out in s 43 VATA, the concept of the single taxable person is properly implemented through the representative member. The representative member is a necessary construct, because the single taxable person is a mere fiction, and to be effective there must, under domestic law, be a legal person to undertake the obligations which, under EU law, are those of the single taxable person, and likewise to exercise the EU law rights attaching to the single taxable person. The representative member is the means to this end. The representative member is not the agent or trustee of the constituent members of the group. It is, by being treated for VAT purposes as carrying on the businesses of those members, and as making and receiving all the external supplies of the group, the domestic law embodiment of the single taxable person.

74. It follows that, in relation to supplies made by members of the group during the currency of their group membership (which are treated as made by the representative member, representing or embodying the single taxable person), the representative

member will have all the relevant obligations under the VAT legislation. The representative member will likewise acquire all the relevant rights under that legislation, including rights in respect of overpayments of VAT arising as a consequence of activities of a constituent member of the group which, for VAT purposes, take place at a time when that person is a member of the group.

75. While the group exists, which according to UK law refers to the particular group registration subsisting, the single taxable person endures, despite changes in the composition of the group by constituent members leaving or joining the group. The rights and obligations arising during the currency of the group, which are the EU law rights and obligations of the single taxable person, remain those of the representative member from time to time. The rights and obligations are those of the representative member as such, and not the rights and obligations of the particular company that happens to be the representative member. Accordingly, where there is a change in the representative member of a continuing group registration, the rights and obligations of the representative member as such will devolve, as a matter of UK law, upon the successor representative member.

Company ceasing to be part of a group: introduction

76. Thus far we have considered the concept of the single taxable person in the context of a continuing group, and where a company joins a continuing group. We need to consider the position where a group registration ceases, and where a company leaves the group, which nevertheless continues its existing group registration. But before doing so, because we take the view that it has a material impact on the analysis, we turn to consider the *San Giorgio* principle.

The *San Giorgio* principle

77. The *San Giorgio* principle, derived from the ECJ judgment in *Amministrazione delle Finanze dello Stato v SpA San Giorgio* (Case 199/82) [1983] ECR 3595, is that entitlement to the repayment of charges levied by a Member State in breach of Community law is a consequence of, and an adjunct to, the rights conferred on individuals by the Community provisions preventing such charges. The Member State is therefore in principle required to repay charges levied in breach of Community law (see *Société Comateb v Directeur general des douanes et droits indirects and related references* [1997] STC 1006).

78. There is, however, an exception to this rule, where the burden of the charge has been passed on by the taxable person. In *Comateb*, the Court expressed the position in the following way (at paras 21 – 24):

> "21. There is, however, an exception to that principle. As the court stated in *Just*[2], *Denkavit*[3] and *San Giorgio*, the protection of the rights

[2] *Hans Just I/S v Danish Ministry for Fiscal Affairs* (Case 68/79) [1980] ECR 501.

[3] *Amministrazione delle Finanze dello Stato v Denkavit Italiana Srl* (Case 61/79) [1980] ECR 1205.

> so guaranteed by the Community legal order does not require repayment of taxes, charges and duties levied in breach of Community law where it is established that the person required to pay such charges has actually passed them on to other persons (see, in particular, para 13 of the judgment in *San Giorgio* (at 3612–3613)).
>
> 22. In such circumstances, the burden of the charge levied but not due has been borne not by the trader, but by the purchaser to whom the cost has been passed on. Therefore, to repay the trader the amount of the charge already received from the purchaser would be tantamount to paying him twice over, which may be described as unjust enrichment, whilst in no way remedying the consequences for the purchaser of the illegality of the charge.
>
> 23. It is accordingly for the national courts to determine, in the light of the facts in each case, whether the burden of the charge has been transferred in whole or in part by the trader to other persons and, if so, whether reimbursement to the trader would amount to unjust enrichment.
>
> 24. In this respect it should be made clear, first, that if the final consumer is able to obtain reimbursement through the trader of the amount of the charge passed on to him, that trader must in turn be able to obtain reimbursement from the national authorities. On the other hand, if the final consumer can obtain repayment directly from the national authorities of the amount of the charge which he has paid but which was not due, the question of reimbursing the trader does not, as such, arise."

79. The references made by the Court to the burden of the tax were not directed at finding some general principle that the right to reimbursement should be determined according to where the economic burden lay. They were focused on whether the trader who had passed on the burden should be able to make such a claim. The search which the national courts are directed to make is not to discover where the burden has been ultimately borne, and thus to ascertain where the right to claim has vested, but to determine whether the supplier would be unjustly enriched by being reimbursed.

80. In *Comateb*, furthermore, the fact that a final consumer might recover directly from the tax authority was described merely in terms of a factor that might, on the basis of unjust enrichment, disqualify the trader from himself claiming reimbursement. The trader would not be disqualified from claiming, even in a case where the burden had been passed to the final consumer, if the final consumer would be able to obtain reimbursement through the trader. On the other hand, if under national law the final consumer was able to obtain reimbursement directly from the national tax authority, there would be no question of the trader being reimbursed. The reason is an obvious one: in those circumstances the parties, that is to say the supplier, the final consumer and the tax authority, would have been placed back in the positions they would each have been but for the wrongful levy of the tax.

81. In *Reemtsma Cigarettenfabriken GmbH v Ministero delle Finanze* (Case C-35/05) [2008] STC 3448, the Court was asked to consider whether legislation of a Member State which did not entitle a recipient of services who had borne the tax

wrongly levied to claim reimbursement from the tax authority was precluded by EU law. Having decided, at para 33, that as a general matter it was only the supplier that could be considered liable for payment of VAT for the purposes of the tax authorities of the Member State where the services were supplied, the Court went on to address the question of entitlement to reimbursement. The Court set out its conclusions at paras 39 to 42:

> "39. ... it must be conceded that, in principle, a system such as the one at issue in the main proceedings in which, first, the supplier who has paid the VAT to the tax authorities in error may seek to be reimbursed and, second, the recipient of the services may bring a civil law action against that supplier for recovery of the sums paid but not due observes the principles of neutrality and effectiveness. Such a system enables the recipient who bore the tax invoiced in error to obtain reimbursement of the sums unduly paid.
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> 40. It must also be borne in mind that, according to settled case law, in the absence of relevant Community rules, the detailed procedural rules designed to ensure the protection of the rights which individuals acquire under Community law are a matter for the domestic legal order of each member state, under the principle of the procedural autonomy of the member states (see, inter alia, *Preston v Wolverhampton Healthcare NHS Trust* (Case C-78/98) [2001] 2 AC 415, [2000] ECR I-3201, para 31, and *i-21 Germany GmbH v Bundesrepublik Deutschland* (Joined Cases C-392/04 and C-422/04) [2007] 1 CMLR 305, para 57).
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> 41. In that regard, as rightly submitted by the Commission, if reimbursement of the VAT becomes impossible or excessively difficult, in particular in the case of the insolvency of the supplier, those principles may require that the recipient of the services to be able to address his application for reimbursement to the tax authorities directly. Thus, the member states must provide for the instruments and the detailed procedural rules necessary to enable the recipient of the services to recover the unduly invoiced tax in order to respect the principle of effectiveness.
>
> 42. The answer to the second part of the second question must therefore be that the principles of neutrality, effectiveness and non-discrimination do not preclude national legislation, such as that at issue in the main proceedings, according to which only the supplier may seek reimbursement of the sums unduly paid as VAT to the tax authorities and the recipient of the services may bring a civil law action against that supplier for recovery of the sums paid but not due. However, where reimbursement of the VAT would become impossible or excessively difficult, the member states must provide for the instruments necessary to enable that recipient to recover the unduly invoiced tax in order to respect the principle of effectiveness."

82. The Court in *Reemtsma* thus re-affirmed that it is in principle the supplier, that is to say the taxable person who makes the supplies, who is entitled to reimbursement of VAT that has been wrongly levied. Member States have procedural autonomy in this respect, and there is nothing wrong with a domestic system that proceeds on the

basis that it is the supplier who has that right, coupled with a civil law right for a recipient who has borne the tax wrongly-levied to recover from the supplier. It is only if the principle of effectiveness would otherwise be offended, such as in the case of insolvency of the supplier, that the recipient of the services must, under domestic law, be furnished with a right to claim reimbursement directly from the tax authority.

83. The same limitation on the right of a final consumer to whom the burden of the tax has been passed on can be found in the case of *Danfoss A/S and another v Skatteministeriet* (Case C-94/10) [2013] STC 1651. In that case, which concerned Danish duty on mineral oils, certain consumers in a supply chain to whom the sellers of the oil had passed on the duty they had paid to the tax authority, claimed reimbursement from the tax authority. The Danish authority refused the claims, in part on the basis that the right to claim accrued only to the person directly taxable.

84. It was held that a Member State could in principle oppose a claim made by a final consumer to whom the duty had been passed on, on the ground that it was not the consumer who had paid the duty to the tax authority. However, since it was the final consumer who had borne the burden of the duty, this was subject to the final consumer being able, under national law, to bring a civil action against the taxable person for recovery of the sums unduly paid. If, however, reimbursement by the taxable person were to prove impossible or excessively difficult, in particular in the case of the insolvency of the taxable person, the principle of effectiveness required that the final consumer be able to bring his claim for reimbursement against the tax authority directly. To that end, the Member State had to provide the necessary instruments and detailed procedural rules.

85. *Danfoss* takes matters no further than that. In particular, it does not come close to establishing a general right to claim repayment from the tax authority in favour of a person who is "economically burdened" or "commercially affected". The use by the Advocate General (Kokott) of those terms was merely descriptive of the position of the final consumer to whom the burden of the tax has been passed. It did not signal a need to make any more wide-ranging economic enquiry to ascertain the person who could be said to have borne the economic cost of the tax.

86. That was the view also of Henderson J in *Investment Trust Companies (in liquidation) v Revenue and Customs Commissioners* [2012] STC 1150 when, at [118], having described the purpose of the *San Giorgio* principle as being to help to neutralise the *economic burden* (his emphasis) which an unlawful tax has imposed on the person who, in the final analysis, has actually borne it, described the principle in terms of the principle of effectiveness:

> "The governing principle is that national rules of classification of actions and procedure must respect the principle of effectiveness, and must therefore afford a remedy against the member state itself to a final consumer who has borne the economic burden of an unlawful tax, in circumstances where recovery from the taxable person proves impossible or excessively difficult."

This serves to emphasis the significance of the taxable person in identifying the primary right of recovery. It is only if the principle of effectiveness would be breached by it being impossible or excessively difficult for the final consumer, having borne the economic burden, to recover the overpaid tax from the taxable person, that the final consumer must have a direct right against the tax authority.

87. Thus far in this analysis, the cases have concerned the position where the supplier, by charging VAT to its customer, has passed on the burden of the unlawful tax. Member States may, in those circumstances, provide a direct right of reimbursement from the national tax authority to the final consumer. But they need not do so in a case where the final consumer would have an effective right of recovery against the supplier. In relation to a claim for reimbursement by the supplier that may give rise to a defence, for the Member State concerned, of unjust enrichment, and to the extent that the final consumer is unable, or finds it excessively difficult, to recover from the supplier the unlawful tax it has economically borne, a *San Giorgio* right against the Member State arises in favour of the final consumer, and national law must then provide the final consumer with a direct remedy against the tax authority.

88. The case of *Alakor Gabonatermelő és Formagalmazó Kft v Nemzeti Adó-és Vámhivatal Észak-alföldi Regionális Adó Főigazgatósága* (Case C-191/12) [2013] All ER (D) 265 (May) concerned a different situation from that of the supply chain. The questions referred to the Court concerned the extent to which a claim by a taxable person for reimbursement of input tax wrongly denied a deduction could be reduced by funding obtained by the taxable person for the irrecoverable VAT by means of state aid.

89. The Court referred, at para 24, to *Danfoss* as illustrating that the right to the recovery of sums unduly paid helps to offset the consequences of the incompatibility of a tax with EU law by neutralising the economic burden which that tax has unduly imposed on the operator who, in the final analysis, has actually borne it. It referred, at para 25, to the exception to the right of repayment in the case of unjust enrichment. It made clear that there is an absence of EU rules governing claims for repayment of taxes, and that it is for the Member State to lay down those rules, subject to observance of the principles of equivalence and effectiveness (para 26).

90. The reference in *Alakor* to the neutralisation of the economic burden does not extend the principle as explained by *Danfoss*. In *Alakor*, there was no final consumer or other person to whom the burden of the tax had been passed. The Court was concerned solely with the question whether repayment to the taxpayer in question would, on the one hand neutralise the economic burden of the tax unduly paid or, on the other hand, could lead to unjust enrichment of the taxpayer. Referring, at para 30, to *Weber's Wine World Handels GmbH and others v Abgabenberufungskommission* (Case C-147/01) [2005] All ER (EC) 224, at para 100, the Court determined that this was a question of fact that could only be established by economic analysis in which all the relevant circumstances are taken into account. Accordingly, in *Alakor*, the Court found that economic neutrality could be achieved by setting the relevant part of the aid granted to *Alakor* against the amount of VAT which *Alakor* was entitled to be repaid.

91. This – unsurprising – result in *Alakor* does not, therefore, impinge upon the general principle to be derived from *Danfoss* and the other authorities that, in determining who has a claim for overpaid tax against the tax authority, it is not necessary in all cases for there to be a direct remedy against the tax authority for the person who, in economic terms, might be considered to be the operator who has ultimately borne the tax. National law must provide an effective remedy which neutralises the economic burden. The means of achieving that is a matter for national law. The economic burden may, on the one hand, be neutralised by repayment to the supplier, so long as there is, under national law, an effective right of recovery from the supplier for a final consumer who has borne the economic burden of the wrongly-levied tax. If there is no such effective remedy, which may arise, for example, where a Member State has refused reimbursement to the supplier on the ground that the supplier would be unjustly enriched, or because of the circumstances of the supplier, such as insolvency, the economic burden must be neutralised by providing a direct right of reimbursement against the tax authority in favour of the final consumer.

92. The exception to the right of repayment in the case of unjust enrichment is a limitation of a subjective right afforded by EU law, and as such it must be interpreted narrowly. The ECJ so held in *Lady & Kid A/S and others v Skatteministeriet* (Case C-398/09) [2012] STC 854, in determining that a concomitant abolition of a lawful duty could not be offset against a right of repayment of an unlawful tax, calculated on the same basis as VAT. In so determining, the Court held, at para 20, that the sole exception to a right of reimbursement is the direct passing on of the tax wrongly levied.

93. Although a narrow interpretation of the unjust enrichment exception is clearly required, we do not consider that the case law indicates that the existence of a *San Giorgio* right in favour of a person who has borne the economic burden of the wrongly-levied tax should be so confined. Indeed, it is clear that, in principle, it should not be. *San Giorgio* is concerned with the exercise of a right conferred by EU law, albeit subject to conditions, and not an exception to such a right. On the other hand, the authorities make clear that a right to repayment can arise in favour of the recipient of a supply only where the rights of recovery under national law would otherwise not satisfy the principle of effectiveness, in that it would be impossible or excessively difficult for the final consumer to whom the economic burden has passed to recover the tax. EU law requires, first, that a taxable person has a right to recover, subject only to the limited exception where the economic burden of the tax has been passed on, and the taxable person would be unjustly enriched, and secondly that where the economic burden has been passed on to a final consumer, and it is either impossible or excessively difficult for the final consumer to recover from the taxable person, the final consumer must have a right to recover against the tax authority. No other economic enquiry is mandated or necessary as a matter of EU law.

94. We consider that the scope of the *San Giorgio* right, as identified by the ECJ, has been defined by the essential characteristic of the common system of VAT in ensuring complete neutrality of taxation of all economic activities, whatever their purpose or results, provided that they are themselves subject in principle to VAT (see *Investrand BV v Staatssecretaris van Financiën* (Case C-435/05) [2008] STC 518, at

para 22, and the cases cited there). Accordingly, as noted by the Court in *Fiscale eenheid Koninklijke Ahold BV v Staatssecretaris van Financiën* (Case C-484/06) [2009] STC 45, at para 33, VAT must burden the final consumer and not the various traders and service providers who have contributed to the final product or through whose hands it has passed. The extension to a final consumer of a right to claim repayment from the tax authority, in cases where it would otherwise be impossible or excessively difficult for the final consumer to recover, is a natural concomitant to the essential characteristic of the VAT system in ensuring neutrality through a supply chain of taxable transactions, with the burden falling on the final consumer.

95. The relationship between the VAT system itself and the right to make such a claim is, we consider, key to understanding the boundaries of the right to make a claim. There can, in our view, be no principled basis for an extension of the right to claim to a person other than one, such as the final consumer, on whom the burden of the tax has fallen as a consequence of the VAT system itself. It is not a consequence of the VAT system that taxable persons, whether individually or as a group, may choose to fund the payment of VAT in a particular way, or may elect that the burden should be borne or shared in a manner specified by private agreement. That is not what the ECJ is referring to when it describes the burden of the tax.

96. On the other hand, where the VAT system itself, whether by direct application of EU law or through national legislation implementing EU law, imposes liability to tax vis á vis the domestic tax authority on a person other than the taxable person, and that person in fact bears the tax, it would in our view be a breach of the principle of effectiveness if such a person were unable to recover from the tax authority tax found to have been overpaid. In the case of a VAT group, s 43(1) VATA provides for joint and several liability of all group members in respect of VAT due from the representative member. If a group member bears the overpaid tax on account of its joint and several liability in that respect, then we consider that in principle such a member, who has been burdened by the tax as a matter of VAT law, will have a right to recover directly from the tax authority. That, we observe, was the view of the Advocate General (Sharpston) in *Reemtsma*, where, at para 78 of her opinion, the Advocate General referred to the exceptional case of another person being liable "by virtue of Community or authorised national provisions", and consequently being enabled to seek reimbursement, from the tax authority to which he was liable, of any tax paid in error by him.

97. That analysis, we consider, has some resonance with the decision of the VAT Tribunal in *J & W Waste Management Ltd and another v Customs and Excise Commissioners* (20 March 2003; No 018069), where the representative member which had been assessed to VAT as such was in liquidation, and the commissioners sought to apply joint and several liability on two of the constituent members of the group. It was held by the tribunal that the two members of the group had a right of appeal against the assessment on the representative member, whilst at the same time recognising the position of the representative member, acting through its liquidator as a possible appellant.

98. Section 80(1A) VATA, by referring to the relevant claimant as the person who has been assessed to VAT, brings such exceptional cases within the scope of the direct right of reimbursement. To the extent that any other rights to reimbursement from HMRC arise as a consequence of Community law, we are satisfied that s 80 VATA may be given a conforming construction so as to render that right an effective right. Whether that would strictly be an application of the *Marleasing*[4] principle, or the construction of s 80 against the background of a Community law purpose, such as the giving effect to a *San Giorgio* right to repayment, a distinction suggested by the Upper Tribunal in *John Wilkins (Motor Engineers) Ltd v Revenue and Customs Commissioners and other appeals* [2009] STC 2485, at [104], in this case it appears to us to be a distinction without a difference. We note that, in a subsequent Upper Tribunal case, *GMAC UK plc v Revenue and Customs Commissioners; British Telecommunications plc v Revenue and Customs Commissioners* [2012] STC 2349, at [185], the tribunal took the view that s 80 could be "moulded or adapted" to give effect to directly enforceable Community rights.

Company ceasing to be part of a group

99. With our analysis of the *San Giorgio* principle in mind, we turn back to the question of which company has the right to make a s 80 claim where a company ceases to be a member of the group, which includes the case both where the group itself ceases to exist, and the case where a member leaves a group which continues to exist.

100. This issue has been considered at the level of the VAT Tribunal and, more recently, the First-tier Tribunal. The case of *Triad Timber Components Ltd v Customs and Excise Commissioners* (VAT Tribunal, 23 June 1993, No 10694) concerned a claim for bad debt relief. At the time the relevant supplies had been made Triad had been a member of a group of companies of which the representative member was a company called Albrighton Plc. Albrighton had subsequently sold its controlling interest in Triad. Triad's business had continued, but outside the Albrighton group. Triad's claim was refused on the basis that Albrighton as representative member had been treated as the supplier for VAT purposes, and had paid the tax. Albrighton had made no claim for bad debt relief, nor was it likely to have had any incentive to do so, as it had sold Triad at a valuation which treated the outstanding debts as good.

101. It is not clear from the decision in *Triad* whether the Albrighton group had continued in being following the sale of Triad, or whether the group registration had ceased. In any event, the tribunal found that, for the purpose of the bad debt provisions, Triad could be regarded, after it had left the group, as a person who had made supplies for which payment had not been received. That was so even though those supplies had taken place while Triad had been a member of the group. This was the factual reality, and there was no longer any reason, once Triad had left the group, for the statutory fiction to be applied.

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[4] *Marleasing SA v La Comercial Internacional de Alimentacion SA* (Case C-106/89) [1990] ECR I-4135.

102. There was a second condition to be satisfied before Triad could claim bad debt relief. It was that Triad had to establish that it had accounted for and paid tax on the relevant supply. Again the tribunal refused to press the representative member fiction too far. However, it based its conclusion on its view that, while the group registration is in force, the representative member pays the tax on behalf of the member who has made the supplies. It found that in paying and reclaiming tax the representative member acts as the members' agent.

103. *Triad* was followed by the VAT Tribunal in *Proto Glazing Ltd v Customs and Excise Commissioners* (29 June 1995, No 13410). In that case, which also concerned a claim for bad debt relief, the supplies in question were made at a time when the appellant ("Glazing") was part of a group, the representative member of which was a company called P Proto Glass Ltd ("Glass"). Glass had gone into administrative receivership on 6 August 1992, and with effect from the same date Glazing had been separately registered for VAT.

104. Distinguishing *Kingfisher* on the basis that it was dealing with questions of liability during the subsistence of a group, whereas the question before it concerned rights and liabilities of a member of a group after the group had ceased to exist, the tribunal found that Glazing had, by contributing its share of the group tax to Glass, paid the tax that had been lost, and that the fiction created by the group provisions should not be applied after the group relationship had come to an end. The tribunal also commented that it was unclear whether, if the liquidator or administrator of Glass could be persuaded to submit the claim, it would enure to the benefit of Glazing instead of that of Glass's creditors. The appeal of Glazing was accordingly allowed.

105. The third case in this triumvirate is more recent in origin, and was decided by the First-tier Tribunal, although we were informed that it is the subject of an appeal to the Upper Tribunal. The case in question is *Taylor Clark Leisure plc v Revenue and Customs Commissioners* [2013] SFTD 381. In that case, claims were made for overpaid VAT in respect of two periods. The first period was from 1973 to 1990, during which the appellant ("Taylor") was the representative member of the Taylor VAT group, and also carried on the activities that gave rise to the claims, thus being described as the "generating taxpayer". In 1990, Taylor transferred its business to another company, Carlton Clubs Ltd ("Carlton") and made an assignation, under Scots law, of Taylor's claim against HMRC for overpaid VAT. The second period was from 1990 to 1998, during which, while Taylor remained the representative member of the group of which Carlton had become a member, it was Carlton that carried out the relevant activities. Carlton ceased to be a member of the Taylor group in 1998.

106. One problem for Taylor was that it had made no claim, and any claim made by it would be time-barred. It argued therefore that, as Carlton had made a claim in time, Taylor, being the person truly entitled to the VAT repayments, could recover them. The tribunal held that liability under s 80 VATA depends on a claim having been made and that Taylor could not rely on Carlton's claim because that claim had not been made on Taylor's behalf.

107. That was enough to dispose of Taylor's appeals in respect of both periods. However, the tribunal went on to consider a further issue, described as the entitlement issue. For the first period, the tribunal accepted that it was Taylor that would have been entitled to make a claim for repayment, on the basis both that it was Taylor who was the representative member and the generating taxpayer. Although the tribunal considered that the assignation of the right to repayment of overpaid VAT in the first period could have had no effect whilst Carlton was a member of the group, it found that it would have effect on the group being disbanded or when Carlton left the group. The basis for this conclusion was that whilst a company is a member of a group its affairs are represented by the representative member, but that this relationship ceases once the company leaves the group

108. For the second period there was no question of any assignation. It was Carlton that was the generating taxpayer. The tribunal held, at [102], that from the time when Carlton left the group in 1998 Taylor could no longer represent Carlton. That meant, according to the tribunal, that as from 1998 Taylor had no right to claim repayment of over-declared ouput tax generated by Carlton.

109. We are not of course bound by *Taylor Clark*. We are conscious that it is the subject of an appeal to the Upper Tribunal. But we are bound to say that we do not agree with the reasoning of the tribunal on the issues that fall to be determined in these appeals. We consider that reliance by the tribunal on a concept of the affairs of individual members of the group being represented by the representative member is wrong in principle. We share the view of the tribunal in *Thorn Plc* that the role of the representative member is not one of agency. The authorities are in our view clear that the effect of s 43 VATA is to create the single taxable person envisaged by Article 4(4) of the Sixth Directive, and that the representative member does not represent the individual members of the group, but represents or embodies the single taxable person.

110. Accordingly, a change in composition of the group, whether by a member joining the group, or a member leaving it, can in our view have no effect in itself on the entitlement of a representative member to claim for overpayments of VAT made by the single taxable person during the currency of the group registration. One has to look at the single taxable person as if it were a legal person with its own VAT registration. If, on that analysis, the single taxable person would, if it had legal capacity, be entitled to claim, then that is the entitlement of the representative member for the time being. In consequence, not only can those entitlements only relate to overpayments made by the single taxable person as constituted at any particular time, and not prior overpayments made by a company or other group before the relevant company or companies join the group and become companies that are, with others, regarded as the single taxable person, those entitlements that do arise to the single taxable person remain as such, and accordingly it is the representative member of the group that has that entitlement, and not the member leaving the group, even if that member was the generating member.

111. That is the position under s 80 VATA, which looks to the person who has accounted for the tax to HMRC, or who has been assessed. That is apt, in normal

circumstances, to relate to the representative member or, exceptionally, to a group member that has been assessed to tax under the joint and several liability provisions in s 43(1). In a continuing group, there is no basis for holding that such a provision of national law does not accord with the principle of effectiveness.

112. In our judgment the position is essentially the same in the case of a group that has ceased to exist. The single taxable person fiction ceases to apply, but it ceases to apply for the future only. There is no retrospective unravelling of the effect of the single taxable person fiction; in particular, intra-group supplies continue to be ignored, and supplies made by or to the group during the currency of the group continue to be treated as having been made to or by the representative member. The position of the single taxable person, and consequently of the representative member that is the embodiment of that fiction, is that it has simply ceased to be a taxable person. Although the statutory fiction has ended, its historical effect, as regards the accounting and payment of the tax, endures. Respecting the fiction for the past, the position is no different from the VAT perspective to that of an individual taxable person who has ceased to be such. In such a case, there would be no argument but that the individual would be entitled to make a claim under s 80 for any tax wrongly levied on him while he was a taxable person. The position of the single taxable person is the same. Section 80 gives a right to claim to the person who has accounted for the tax, namely the single taxable person through the representative member for the time being, or to the person who has paid the tax to HMRC by reason of joint and several liability. In ordinary circumstances, therefore, the s 80 right is that of the representative member of the group immediately before the group registration came to an end. That right under national law cannot, as a matter of principle, be regarded as in breach of the principle of effectiveness.

113. The position is different, however, if the right of the representative member does not, in given circumstances, provide an effective remedy. This applies both to the case of a continuing group, and one that has ceased to exist. In those circumstances, if it is impossible or excessively difficult for the representative member to obtain reimbursement from the tax authority, so that the burden of the tax on the group has not been economically neutralised, a *San Giorgio* right will arise in favour of another person. However, such an enquiry does not encompass ascertaining where the burden of the tax has fallen, otherwise than through the operation of the VAT system itself. Questions of internal funding, whether they are general intra-group funding arrangements or arrangements for the contribution of a group member's share of the VAT to the representative member, are not relevant in identifying the person with the right to claim.

114. Such an issue is likely to arise only in a case where either the group has ceased to exist, or a company that was formerly in the group has left in circumstances where a claim by the representative member of the continuing group does not provide an effective remedy. In the former case, the group itself has ceased to be subject to the statutory fiction, and in the latter it is the individual company that has so ceased. In each of those circumstances, that factor in our view dictates that, in determining where the claim should lie, regard should be had to the real transactions that have been undertaken. On that basis, such a right would, in our view, fall on the company

that, had the single taxable person fiction not applied, would have been the taxable person in relation to the activity giving rise to the tax.

115. That, we consider, is the principled basis on which *Triad* and *Proto Glazing* can be analysed. In the former, although it is not clear whether it was a case of a continuing group, the fact was that the representative member, who might otherwise have had the right to make the claim, had made no claim and that, having regard to its own economic position following the sale of Triad (there is no reference to any possible contractual liability), it was unlikely to make a claim. In the latter, the representative member was in administrative receivership and the appellant, Glazing, had carried out the transactions that had given rise to the bad debt. In each case, crucially, the rights of the representative member to make the relevant claim were regarded as ineffective.

116. We decline to follow the reasoning of *Taylor Clark* on the effect of a company leaving an existing group. In our view, the right to repayment of VAT overpaid in the period when a company was a member of that group is that of the single taxable person, represented and embodied by the representative member. That right does not leave the group with the departing member. It is only if reimbursement to the representative member (or, alternatively, to the person who has borne the tax by virtue of the joint and several liability under s 43(1)) is impossible or excessively difficult would there be any question of the company that has left the group being entitled to be reimbursed.

The Standard Chartered appeal

117. It will be apparent from our analysis of the EU and domestic law principles that Standard Chartered's appeal fails. It fails as a matter of principle, irrespective of the undisputed factual evidence we had before us.

118. As HMRC did not dispute the evidence provided in the witness statements of Mr Crosby, we can take those statements as read. But nothing turns on the detailed facts described in those statements, and we need make no specific findings in relation to those facts. The most we need to say is that it was accepted for the purposes of this appeal, that is to say as between Standard Chartered and HMRC, that Standard Chartered, as the parent company of the group, financed Chartered Trust and ACL, and that the financial policy of the Standard Chartered group, which operated for Chartered Trust and ACL, was that all profits would be distributed by the subsidiaries through to the parent company.

119. None of this is, however, material. The existence of a *San Giorgio* right in favour of Standard Chartered was very much a secondary argument for Mr Cordara. For the reasons we have stated, it cannot succeed. There is, as we have found, no basis on which Standard Chartered can have acquired a right to claim that is otherwise in Chartered Trust or ACL by reason either of it having funded those companies, or by reason of it having borne the burden of reduced dividends from either of those companies on account of the overpayment of tax in the relevant years.

120. Mr Cordara's primary case was that the accession of, on the one hand, the former individual taxable person, ACL, and on the other the whole of the former Chartered Trust group, to the Standard Chartered VAT group, had the result that claims which ACL and Chartered Trust had in relation to the period of those separate VAT registrations were effectively transferred to Standard Chartered as the representative member of the VAT group those companies had joined.

121. Mr Cordara argued that this result most fully respected the single taxable person required to be treated as existing under Article 4(4) of the Sixth Directive. In our view it seeks to take that fiction further than in principle it can be taken. It fails, as Mr Mantle submitted, to recognise the distinct and separate taxable persons in the form of ACL and, through the effect of s 43 VATA, the Chartered Trust group of companies. It is therefore respecting only one part of the single taxable person analysis. It was said against Mr Cordara that he was seeking to give the Standard Chartered group retrospective effect. Although he argued that this was not the case, and that the unravelling of the Chartered Trust group that would otherwise be necessary was an exercise in greater retrospection, we consider that his submission necessarily involves Standard Chartered assuming, without any assignment, rights that have arisen out of supplies (or matters treated, wrongly, as supplies) by other taxable persons at a time when the relevant companies were not part of the Standard Chartered VAT group. That, in our view, is to endow Standard Chartered retrospectively with attributes of ACL and Chartered Trust which is not permissible.

122. It is nothing to the point that ACL and the companies in the Chartered Trust group were at all times, until the sale to Lloyds, under the control of Standard Chartered. As we have seen, what matters is the VAT group registration itself, and not eligibility for group registration. Nor does it matter, in the case of Chartered Trust, that all the companies in the former Chartered Trust Group joined the Standard Chartered VAT group immediately on the cancellation of the Chartered Trust group registration.

123. The position in the case of ACL is, as Mr Mantle submitted, very straightforward. ACL was the taxable person in the relevant period in which it undertook the transactions which were treated as taxable supplies, but were not supplies at all. It is ACL, therefore, that has the claim for overpayment of VAT for the relevant periods. The fact that ACL joined the Standard Chartered group, thereby ceasing to be a taxable person, did not result in ACL's rights derived from its period as a separate taxable person being transferred to, or otherwise devolving upon, Standard Chartered.

124. The position is not quite as straightforward in the case of Chartered Trust, but the result is equally clear. The Chartered Trust VAT group ceased to exist. There was no longer a single taxable person. However, the company that had formerly been the representative member must, as we have described, be regarded as continuing, with respect to the period during which the single taxable person fiction subsisted, to represent and embody the former single taxable person. On the facts of this case, that company is Chartered Trust. There is no question of any other company having been assessed to tax by HMRC under the joint and several liability provisions. It is,

accordingly, Chartered Trust that has the right to claim under s 80 VATA for overpayments of VAT related to the currency of the Chartered Trust VAT group.

125. We should add that our conclusion that it is the representative member immediately before the cessation of a VAT group that continues to be entitled to claim under s 80 does not accord with Mr Mantle's submission, for HMRC, that in those circumstances (in contrast to the position he adopted in relation to a company leaving an existing group) HMRC is liable to the company which carried out the activities which led to the overpayment of VAT. Mr Mantle submitted in this respect that the single taxable person had ceased to exist and that none of its individual members could be equated or identified with that single taxable person. For the reasons we have given, we do not agree. We do not consider that the rights acquired by the single taxable person, and embodied in the representative member, disappear in this way. Nor is that what s 80 provides, when it refers to the person who has accounted for or been assessed to the tax.

126. In this case, in any event the distinction is immaterial, as Chartered Trust was, for the relevant period, both the representative member of its VAT group and the company whose activities in that period gave rise to the VAT overpayments. But the distinction will in principle be material in other cases.

127. The claim of Chartered Trust in these respects fully observes the principle of effectiveness. Applying the *San Giorgio* principle, it is Chartered Trust that is, on its VAT group ceasing to exist, the person entitled to claim. The fact that Chartered Trusts and all the members of the Chartered Trust group joined another VAT group, even though that took place immediately on the cessation of the Chartered Trust group immediately, does not result in the claims passing to the representative member of that group. On the facts of this case, we find that it is Chartered Trust, as the representative member of its VAT group immediately before cessation of the group, that is the company entitled to make the s 80 claim.

128. Mr Cordara argued that the objective of Article 4(4) in terms of simplicity could best be realised by an analysis that simply recognised the rights of ACL and Chartered Trust effectively being transferred to Standard Chartered as the representative member of the group both had joined. This he contrasted with the difficulties that might arise where transactions within a group had to be unravelled where the group had ceased to exist. He referred us in this connection to *Customs and Excise Commissioners v Madgett and Baldwin (trading as Howden Court Hotel)* (Joined cases C-308/96 and C-94/97) [1998] STC 1189, where, in connection with the tour operators' margin scheme, an issue arose as to the method of identifying that part of a package price that related to certain in-house services. The ECJ decided, in a case where the calculation on an actual cost and a market value basis produced the same VAT result, that a trader may not be required to use the actual cost method where it was possible to identify the part of the package corresponding to the in-house services using the simpler market value method.

129. We do not regard *Madgett and Baldwin* as establishing any principle that VAT law derived from an article in a Directive that has as one of its objectives simplifying

administration must be construed so as to give the simplest result from an administrative point of view. Administrative simplicity is an aim of Article 4(4), but the mechanism chosen is that of the deemed single taxable person. That concept must be observed, but it has the limitations in its effect for periods prior to members joining that we have described. Those limitations, which we consider are fundamental to the concept of the single taxable person, and are thus inherent in the way Article 4(4) achieves its objective of simpler administration, cannot be put to one side purely because, in dealing with the effect of a dissolution of a VAT group, some areas of complexity might arise.

130. Accordingly, we find that neither Standard Chartered nor Standard Chartered Bank has a right to claim for overpaid tax, under s 80 VATA or otherwise, in respect of any of claims SC1, SC2 or SC3 .

Decision on the Standard Chartered appeal

131. The Standard Chartered appeal is dismissed

The Lloyds appeal

132. Our conclusion that, whilst the VAT group is continuing, the right of repayment of VAT overpaid in the period when the company was a member of the group is that of the single taxable person, represented and embodied in the representative member, means that Lloyds' appeal too must fail. The claims that arose in respect of activities of Chartered Trust while it was a member of the Standard Chartered VAT group are properly those of Standard Chartered. There is no question of any other company having been assessed to the relevant VAT under the joint and several liability provisions. The exercise of those rights by Standard Chartered fully accords with the principle of effectiveness. Accordingly, Chartered Trust has no directly effective right to repayment from HMRC in those respects.

133. In relation to the factual evidence provided by Lloyds, we again find it unnecessary to make detailed findings of fact. The evidence was not challenged by HMRC, although the conclusion reached in Mr Lukmanji's witness statement, to the effect that it was Chartered Trust, at the relevant time, that had borne the tax in question, was the subject of dispute. What we find is that there was, at the material time, within the Standard Chartered group, a process whereby a sub-group, headed by Chartered Trust, prepared its own VAT calculations, which would then be incorporated into the overall group VAT return generated at the level of the representative member, Standard Chartered. Chartered Trust would account to Standard Chartered for the VAT payable by reference to the sub-group calculations. Those, we consider, are the only findings of fact material to this appeal, as between the Lloyds appellants and HMRC, that we need to make.

134. Whilst we accept, as we have described, that the single taxable person fiction has limitations, and that it operates in the context of, and fully recognising, the continuing real identity of the constituent members of the group, and the actual transactions those individual members undertake, we do not accept that its effect is

confined to administrative convenience, in the sense of the representative member being a mere conduit for the members of the group. That, in our view, fails to give full effect to the single taxable person construct under the Directive. It would be to construe Article 4(4) restrictively.

135. Nor do we accept that, when a company leaves a continuing group, the purpose of administrative simplicity ceases to be of relevance, and that accordingly that the legal fiction ceases to govern the relationship between that company and the representative member, so that it then becomes necessary to identify the company that has left the group as the company that generated the overpaid tax, made the overpayment and suffered the loss of the overpayment. As we have described, the issue is not the relationship between the representative member and the individual company, but the existence, deemed for VAT purposes, of the single taxable person as the person having, for VAT purposes, the rights and obligations which would, while the individual company was a member of the group, otherwise have accrued to that company. When a company leaves a continuing group, the effect is that once more, in relation to rights and obligations created after that time, it may be treated as a taxable person. By contrast, for the period when it is a member of the group, it is ignored as a taxable person, even if it otherwise would be one, and does not have (except to the extent provided by law, such as the joint and several liability provision in s 43(1)) rights and obligations as such. Those are the rights and obligations of the single taxable person, embodied under s 43 by the representative member. There is a dividing line when a company leaves a continuing group, but it is between the activities of the single taxable person, including the departing member, before departure, and those of the departing member following departure. The rights and obligations fall according to that dividing line.

136. Mr Scorey placed reliance on *Taylor Clark*, and in particular the finding by the tribunal, at [102], that after Carlton had left the Taylor group, Taylor could no longer represent Carlton, and accordingly that Taylor had no right to claim repayment of over-declared output tax generated by Carlton whilst it had been a member of the Carlton group. For the reasons we have explained earlier, we do not agree with the reasoning of the tribunal in this respect.

137. Mr Scorey also asked us to consider the view taken by the European Commission on the matter of companies leaving groups. His submission in this respect was, we think, primarily addressed to the question whether we ought ourselves to make a reference to the Court of Justice, but it was also argued in support of Mr Scorey's case before us. The view is to be found in a Communication from the European Commission to the Council and the European Parliament on the VAT group option provided for in Article 11 of the Principal VAT Directive (2 July 2009; COM(2009) 325 final), at para 3.4.4:

> "*Rights and obligations when a VAT group is formed or dissolved*
>
> At the same time as the VAT group becomes a single taxable person, the VAT rights and obligations of the individual members are automatically transferred to the VAT group. The same applies when a taxable person joins an already existing VAT group.

…

> Since the VAT group is regarded as a single taxable person, which has assumed the members' rights and obligations regarding VAT, it follows that when a VAT group ceases to exist the rights and obligations assumed by the group revert to the individual members from the moment the VAT group ceases to exist. Simultaneously, the former members of the group return to the status of individual taxable persons. The same applies in a situation where a member leaves the group."

138. We derive no assistance from this material. It merely expresses a view, however respectable its source. It is not in the nature of an authoritative academic text. It cites no authority for the assertions that are made. We respectfully disagree with those assertions, for the reasons we have given.

139. Mr Scorey's argument did not, however, rest solely on the proposition that the right to claim in respect of an overpayment of VAT, would pass to the departing member. He submitted that the right to make such a claim was at all times the right of the individual member actually carrying out the activity, and that the VAT grouping did no more than corral the rights and obligations of the individual, independent, members of the group, in order to ease the management and simplify the tax affairs of the constituent members of the group. In this way, it would not be necessary to rely on any principle of transfer or reversion; the rights would remain with the individual group members, who on leaving the group would simply be able to enforce those rights and make claims in their own right. References to reversion might be understood as referring simply to the removal of the corralling effect.

140. The basis for Mr Scorey's submission was in the nature of the right to claim for repayment of overpaid VAT. It is clear, from *Midland Co-operative Society Ltd v Revenue and Customs Commissioners* [2008] STC 1803, in the Court of Appeal, that the right to repayment is a chose in action, capable of assignment. Mr Scorey argued that such rights could only accrue to legal persons, and that since the single taxable person had not been afforded legal personality under UK law, it was only the constituent members to whom those rights could accrue, and to whom those rights could belong. Otherwise, argued Mr Scorey, it would be impossible for the right to be assigned.

141. Mr Scorey submitted that, although the representative member was clearly a legal person, it could not be the owner of the right to repayment because it acted merely as a conduit. He argued that, in the absence of legal personality for the single taxable person, the representative member merely represents vis á vis the Crown the rights, interests and obligations of the constituent members. It is necessary, despite the statutory hypothesis, to have regard to the real world, albeit one over which there is a fiscal overlay. Mr Scorey submitted that it was not possible to deny the existence of the constituent members; that accordingly, on his analysis, is where the rights reside.

142. We do not accept Mr Scorey's submissions. The right in question, as Mr Scorey acknowledged, must be a *San Giorgio* right, that is one that is conferred as a

consequence of, and an adjunct to, the rights conferred on individuals by the Community law provisions preventing charges levied by a member State in breach of Community law. As the ECJ made clear in *Reemtsma*, it is the taxable person making the supplies who is, in principle, entitled to be reimbursed. The effect of the grouping provisions is that the otherwise independent persons who are members of the group are regarded, for VAT purposes, as no longer being independent taxable persons. Accordingly, as a matter of EU law, it is the deemed single taxable person that has the *San Giorgio* right.

143. The *San Giorgio* right is not fully-fledged at the level of EU law, although it is a directly effective right. It is the Member States, through their domestic systems, that are obliged to provide an effective remedy. EU law does not provide for that machinery. It is not necessary, therefore, in order to comply with EU law, that the *San Giorgio* right should accrue to a legal person. It is sufficient that it accrues, as a matter of EU law, to a fictional person created under EU law, so long as the domestic law provides an effective means for the right to be exercised and the repayment recovered.

144. That, in our view, is what s 43 VATA has achieved. By making the representative member the embodiment of the single taxable person, it has provided the necessary legal person by whom the right to repayment, which remains a right of the single taxable person under EU law, may be enforced. The representative member is also able to assign the right. It is the representative member which, under UK law, has the right, because that is the way in which, domestically, the principle of effectiveness is observed in the context of the single person fiction.

145. That analysis does not therefore depend on the representative member being the agent of, or representative of, the constituent members. Although Mr Scorey fairly recognised that the representative member was not strictly an agent (we would say, not an agent at all) his analysis of the right to repayment having accrued and remaining with the constituent members necessarily involved the representative member acting on behalf of the constituent members, possibly through some form of implied consent when a company joined the group. Indeed, he submitted that, in considering dealings by the representative member with the Crown, through the instrumentality of the representative member, the obvious analysis was that the representative member was an agent on behalf of the constituent members. That, for the reasons we have explained, is an analysis that must be rejected.

146. It is in our view the wrong approach to seek to identify the person entitled to an EU law right to claim a repayment of overpaid VAT by reference to the nature of the legal right to claim that has been provided under domestic law. The EU law right follows from the application of EU law. It is only once that EU law right has been established that the domestic law machinery becomes relevant. Under UK law, according to our analysis, there is at all times a legal person entitled to make the relevant claim.

147. Nor do we consider it is helpful to regard the right as a single indivisible right that requires a transfer or reversion in particular circumstances. Our analysis is that

the existence of a *San Giorgio* right must be determined on each occasion when circumstances require. An overpayment does not give rise to a single right, which may then require to be transferred (or to revert) if it enures for the benefit of another person. The *San Giorgio* right which we find arises, within a group, to the single taxable person, and which UK law makes effective through the representative member, is a separate right to the *San Giorgio* right which could arise, in certain circumstances, if the burden of the tax on a supply by the group had been passed on to a final consumer, and it is a separate right to the *San Giorgio* right which we consider may arise to a member or former member of a group only if it is impossible or excessively difficult for recovery to be obtained through the representative member. Nor is there any transfer when one representative member succeeds another; the right falls to the new representative member in that capacity by operation of the statute.

148. This is not a case where it is impossible or excessively difficult for Standard Chartered, as the representative member of the continuing VAT group, to recover the overpaid VAT. The internal arrangements under which Chartered Trust accounted to Standard Chartered for the VAT payable in respect of its transactions do not give rise to a burden of tax imposed by the VAT system itself. There is therefore no question of Chartered Trust having obtained EU law rights to reimbursement.

149. No question of unjust enrichment arises. Although Mr Scorey, in his skeleton argument, sought to argue that Standard Chartered would be unjustly enriched, that concept does not operate, as a matter of VAT law, as between competing claimants; it is available only as a defence, under s 80(3), available to HMRC. If no such defence is raised – and there is no such defence to any of the claims at issue in these appeals – there is no basis on which this tribunal can, as Mr Scorey argued it could, reject Standard Chartered's claims for repayment by reason of unjust enrichment. We also in this respect accept Mr Mantle's submission that there is nothing in the authorities that would extend an unjust enrichment defence to an internal arrangement for the funding of the tax, which is what the accounting by Chartered Trust to Standard Chartered amounted to.

150. For these reasons, we conclude that neither Black Horse Limited (Chartered Trust) nor Lloyds Banking Group plc has any right to claim for overpaid VAT, under s 80 VATA or otherwise, in respect of either claim L3 or claim L4.

Decision on the Lloyds appeal

151. The Lloyds appeal is dismissed.

Reference to Court of Justice

152. We do not consider it necessary to make any reference to the Court of Justice. Mr Scorey urged that we should do so, were we minded to find in favour of HMRC on the Lloyds appeal. However, his primary position, without considering the outcome, was that the case turned on the proper interpretation of the UK legislation in conformity with the principles of EU law. We agree, and we consider that those

principles are both well-established and clear and do not require a reference to the Court of Justice.

153. We are, of course, conscious that our findings in relation to the position where a company leaves a continuing group do not appear to coincide with the views expressed by the EC Commission. However, that does not give rise to doubt in our minds as to the proper analysis according to EU law. In terms of the test set out by Sir Thomas Bingham in *R v International Stock Exchange ex parte Else (1982) Ltd* [1993] QB 534 (at p 545), we consider that we have been able with complete confidence to resolve the issues in these appeals. It is, accordingly, not appropriate for us to make a reference.

Costs

154. Any application for costs should be made not later than 28 days after the date of release of this decision. As any order for costs is likely to include a direction for detailed assessment, if not agreed by the parties, the Tribunal dispenses with the requirement, under rule 10(3)(b) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009, for a schedule of costs.

Application for permission to appeal

155. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

ROGER BERNER
TRIBUNAL JUDGE

RELEASE DATE: 31 March 2014