TC03461

Appeal number: TC/2010/05220

VAT – group registration – claim for overpaid output tax – company which made the sales in respect of which VAT overpaid leaving VAT group - whether claim rests with that company or with the representative member for the time being of the group - the former is correct answer for UK law – EU law does not need to be considered although is likely to give same result – appellant succeeds on preliminary issue

FIRST-TIER TRIBUNAL
TAX CHAMBER

MG ROVER GROUP LIMITED (in creditors' voluntary liquidation)	**Appellant**
- and -	
THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS	**First Respondents**
- and -	
BMW (UK) HOLDINGS LIMITED	**Second Respondent**
- and -	
ROVER COMPANY LIMITED	**Third Respondent**

TRIBUNAL: JUDGE BARBARA MOSEDALE

Sitting in public at Bedford Square, London on 20 – 23 January 2014

Mr R Codara QC, and Mr J Bremner, Counsel, instructed by Eversheds , for the Appellant

Mr A Macnab, Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the First Respondents

Mr I Glick QC and Mr D Spitz, Counsel, instructed by Norton Rose Fulbright for the Second Respondent

The Third Respondent was unrepresented.

DECISION

Introduction

1. MG Rover Group Ltd ("MGR") submitted a claim to HMRC on 31 March 2009 under s 80 Value Added Tax Act 1984 for overpaid VAT of just over £56 million. HMRC refused the claim by letter dated 9 April 2010. This decision was upheld by review on 21 May 2010. MGR lodged an appeal with the Tribunal on 17 June 2010.

2. The date of the appellant's claim was of course the last day on which a claim could be made without the three year cap applying to it: see s 121 FA 2008.

3. MGR's claim was for VAT overpaid on the sale of fleet cars in the period 1973 to 4 December 1996. The reason for the claimed overpayment was that VAT was accounted for on the sale of fleet cars built by MGR or its predecessor in the business without any reduction when bonuses were later paid by MGR or its predecessor to the fleet purchasers. The appellant's contention is that a repayment of output tax was due in accordance with the decision of the CJEU in *Elida Gibbs Ltd* (C-317/94) [1996] STC 1387.

4. HMRC rejected the claim on the grounds that MGR had not accounted for the VAT which was (if at all) overpaid. At the time of the claimed overpayments, MGR was a member of a VAT group and any overpayments to HMRC would have been made by the representative member of the VAT group.

Agreed Facts

5. The Tribunal heard no evidence, and, with the exception of the terms of an assignment which took place in 1989 and which I deal with at §207-220, the Tribunal makes no findings of fact. It was agreed by the parties that (apart from the 1989 assignment) there was no need for the Tribunal to make findings of fact at what was a preliminary hearing to determine certain legal issues. So far as is relevant the parties agreed certain facts for the preliminary hearing and the respondents agreed certain assumptions (but without prejudice to their right to challenge the assumptions in the main hearing.)

6. VAT was introduced on 1 April 1973. With effect from that date a VAT group was registered under number 239 3549 38. I will refer to this VAT group as the Rover VAT Group or the VAT Group. The Rover Company Limited ("RCL"), third respondent in this hearing, was a member of the VAT Group, although at this point in time the company had a different name. The constituent members of the VAT Group changed over the period. (For instance, I was shown a list of some 26 companies which were included in the VAT Group in 2000 and another list from 5 years earlier which included some 33 companies: going by the names there was only an overlap of some 6 or so companies from the composition of the VAT Group in 1995 to 2000 but of course some of the differences may have merely reflected name changes.)

7. The representative member of the VAT Group from 1 April 1973 to 11 August 1975 was British Leyland Corporation Limited ("BLMC"). BMW (UK) Holdings Ltd ("BMW") the second respondent was incorporated on 20 May 1975 and acquired the shares in BLMC on 11 August 1975 thus becoming the ultimate parent company in the Rover VAT Group. At this point it was known by the name British Leyland Limited but for the sake of simplicity I refer to it as 'BMW' which reflects its current name and ownership. On the same day in 1975, BMW also replaced BLMC as representative member of the Rover VAT Group.

8. MGR (under the name Austin Rover Limited) was incorporated on 3 November 1981 and on 1 December 1981 became a member of the Rover VAT group.

9. British Aerospace PLC ("BA") bought virtually all of the shares in BMW on 12 August 1988 but BMW remained the representative member of the Rover VAT Group although it was now part of a much larger corporate group. On 19 December 1989, MGR bought RCL's business with effect from 1 January 1990. I will refer to this as the '1989 Assignment'.

10. BA sold BMW and therefore the Rover group on 31 January 1994 to Bayerische Motoren Werke Aktiengesellschaft ("BMW AG") and the Rover VAT Group became part of a different corporate group.

11. BMW remained as representative member until 22 December 1995. It was replaced by the appellant, MGR, which was representative member from 22 December 1995 to 26 March 2000. As at that date BMW again became the representative member and remains the representative member today.

12. On 9 May 2000 both MGR and RCL were sold to Techtronic 2000 Ltd. On the same day both MGR and RCL left the Rover VAT group as their application to cease being group members was accepted by HMRC. On that date, MGR became a member of a separate VAT group (747 7275 91). It left that group and continued under a separate registration on 8 April 2005 shortly after entering into administration.

13. MGR did not at any time enter in to any assignment or agreement to assign with the representative member of the VAT group purporting to assign or agreeing to assign the entitlement to make any claim under s 80 VATA for any period ending before 4 December 1996

14. Those were the agreed facts; the assumptions were that the sales which gave rise to the overpayment of output tax were made by RCL from the day VAT was introduced until the end of 1989. At that point (which is not in dispute) RCL assigned its business to MGR. MGR's case is that from 1 January 1990 until 23 November 1995 it made the sales in respect of which VAT was overpaid. The respondents accept that for the purpose of the preliminary hearing but reserve the right to challenge it in the main hearing.

15. From 24 November 1995, MGR accepts that the sales outside the VAT group in respect of which VAT was overpaid were made by Wholesale Limited ("Wholesale").

Wholesale left the VAT Group on the same day with MGR. It is MGR's case that Wholesale ceased trading on 30-6-01 and that it transferred all its assets to MGR, including its business.

16. The first and second respondents do not accept that RCL, MGR or Wholesale actually made the sales which comprised the supplies at issue in this appeal or that all the VAT due on those sales made by them was actually funded by them (by putting the representative member in funds to pay HMRC), but it is prepared for the Tribunal to proceed on that assumption for the purpose of dealing with the preliminary question.

17. In this decision, I will refer to the entity which made (or was assumed to make) the sales on which the VAT was overpaid as the 'RWS', which stands for 'real world supplier' which was the phrase used in the hearing. In this case, that means I am therefore designating the company which sold the cars to the independent fleet purchasers as the "RWS". I am also proceeding on the assumption that the RWS bore the economic burden of the overpayment of the tax.

18. Proceeding on these assumptions, the position diagrammatically is as follows:

<table>
<tr><th></th><th>RWS
'real world supplier'</th><th>Representative member of the VAT Group</th><th>Ultimate controlling shareholder of RWS</th></tr>
<tr><td>1-4-73 to10-8-75</td><td rowspan="3">RCL</td><td>BLMC</td><td>BLMC</td></tr>
<tr><td>11-8-75 to 11-8-88**</td><td rowspan="4">BMW</td><td>BMW</td></tr>
<tr><td>12-8-88 to 31-12-89</td><td rowspan="2">BA</td></tr>
<tr><td>1-1-90 to 30-1-1994</td><td rowspan="2">MGR</td></tr>
<tr><td>31-1-1994 to 23-11-95</td><td rowspan="3">BMW AG</td></tr>
<tr><td>24-11-95 to 21-12-95</td><td rowspan="3">Wholesale</td></tr>
<tr><td>22-12-95 to 25-3-00*</td><td>MGR</td></tr>
<tr><td>26-3-00 to 8-5-00</td><td rowspan="2">BMW</td></tr>
<tr><td>9-5-00 onwards</td><td>RCL, Wholesale and MGR leave VAT Group</td><td></td></tr>
<tr><td colspan="4">* MGRs claim is for period 1-4-73 to 4 December 1996
** BMW's claim is for period 1-1-78 to 30 June 1988</td></tr>
</table>

19. MGR's claim is, as I have said, on the basis VAT was overpaid on sale of fleet cars where, after the sale, the purchasers were paid cash discounts. Such cash bonuses were considered retrospective discounts in *Elida Gibbs Ltd.* MGR claims to be entitled to repayment of VAT paid on the original purchase price of the cars. HMRC dispute whether VAT is repayable, how much is repayable, and in particular whether it is repayable to MGR.

20. BMW has a separate appeal in which it has claimed effectively the same VAT on the same basis (although only for the period 1 January 1978 to 30 June 1988). It is therefore the second respondent to this appeal as it considers that it is entitled to the repayment of the overpaid VAT and not MGR. RCL is the third respondent as (at least in respect of some of the VAT claimed to be overpaid) as it considers it has the right to repayment rather than MGR or BMW. The preliminary hearing is to settle whether MGR is entitled to the repayment (if any).

21. In so far as the last year of the claim period is concerned, MGR contend that Wholesale was the person entitled to recover the overpaid VAT but that it has stepped into its shoes by virtue of an assignment dated 30 June 2001 and a further assignment dated 13 January 2014.

22. The issues for determination by this Tribunal were agreed by the parties to be:

> (a) whether, on the true construction of VATA, and any other applicable legal principles, MGR rather than BMW is entitled to make and maintain a claim pursuant and/or having regard to sections 43 and 80 VATA for the re-crediting and/or repayment of VAT over-declared and overpaid to HMRC in tax periods from 1 April 1973 to 4 December 1996 by the Rover VAT Group.
>
> (b) In addition
>
> > (i) whether the answer to question (a) would be different, and if so how, if MGR were to establish that in any tax period between 1 April 1973 and 31 December 1989 RCL made all or some of the supplies of motor vehicles to fleet customers in respect of which VAT was incorrectly accounted for by the then representative member of the Rover VAT Group and/or that RCL funded any part of the supposed liability for VAT of the then representative member
> >
> > (ii) Whether the answer to question (a) would be different, and if so how, if MGR were to establish that in any tax period between 1 January 1990 and 4 December 1996 it made all or some of the supplies of motor vehicles to fleet customers in respect of which VAT was incorrectly accounted for by the then representative member of the VAT group, and/or that it funded any part of the supposed liability for VAT of the then representative member.
>
> (c) If the answer to question b(i) above were that RCL would have the right to make a claim in the circumstances mooted, whether on the true construction of an agreement in writing dated 19 December 1989 between RCL and MGR, RCL assigned to MGR the right to make any claim under section 80 VATA (or its predecessor section 24 of the Finance Act 1989) which had accrued up to 31 December 1989.

23. I mention in passing that MGR has lodged a claim against BMW in the High Court, seeking a payment to it of any VAT which BMW successfully recovers from HMRC. That claim is necessarily stayed pending the Tribunal proceedings.

24. I also mention in passing that all the parties appeared to make the assumption that (if liable at all) HMRC are only liable to repay the same VAT once, and that therefore determining the preliminary issue in favour of one claimant would necessarily decide it against the other claimants. But in my view that is not necessarily the case. It is well-established that HMRC can not rely on the UK government's failure to implement EU law. Therefore, a taxpayer can rely on its rights under UK law if they differ to its rights under EU law while another taxpayer can rely on its EU law rights. This may raise the theoretical possibility that HMRC could find itself liable to repay the same amount of VAT twice.

Submissions

25. Mr Macnab made submissions on behalf of HMRC. Largely, he adopted those made by Mr Glick on behalf of the second respondents but differed in a few places (HMRC's position is that *Triad* is wrongly decided, *ITC* completely irrelevant and *Danfoss* can only be relied on by a trader in the position of a customer.) I had no submissions on behalf of RCL. It seems obvious that, while HMRC and BMW's submissions were largely the same, RCL's self interest would dictate that it adopted a position similar to MGR's save that it would no doubt differ on the interpretation of the 1989 Assignment. In any event, where below I refer to submissions by the respondents I am referring to submissions only on behalf of the first and second respondents. I had none from the third respondent and would not assume that their submissions would have been the same in any event.

The law

26. S 80 Value Added Tax Act 1984 ("VATA") currently provides

> "(1) where a person –
>
> has accounted to the Commissioners for VAT for a prescribed accounting period (whenever ended), and
>
> 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."

The form of s 80 has changed over time although it was not suggested that the changes had any significance to this appeal; in any event it is the current version which matters as Finance (no 3) Act 2005 s 3 which substituted it for earlier versions provided it has effect for all claims made on or after 26 May 2005 irrespective of the date of overpayment.

27. The respondents' case appears to be based on the simple application of s 80. BMW was the representative member of the VAT Group. As such, BMW accounted

for too much VAT, so HMRC should repay the tax to BMW. In other words BMW is the "person" who 'accounted to the Commissioners for VAT' and in doing so 'brought into account as output tax an amount that was not output tax due'.

28. Actually, their position is more complex than this. A simple application of s 80 would suggest (referring to the chart at §18) that BLMC is entitled to recover the VAT overpaid up to 19 August 1975 and MGR for the period it was representative member (roughly the last year of the claim period), leaving the rest to BMW.

29. The respondents do not agree that this is the right analysis (although in practice BMW was the representative member during the entire period covered by BMW's claim). The respondents consider that 'the person' in s 80, in the context of a VAT group, must be seen as the representative member of the VAT group for the time being. The respondents see the representative member as representing the VAT group: it is the VAT group (by its current representative member) which is entitled to recover the overpaid tax. Therefore, says the respondents, the current representative member (BMW) would have the right to reclaim all the VAT overpaid by previous representative members (including MGR and BLMC), assuming that they lodged a claim in time, and previous representative members, as they no longer represent the VAT group, have no rights of recovery under s 80.

30. Of course, on the facts of this particular case, as BMW was the representative member for the entire period of its claim, if 'the person' for s 80 is either the current or then representative member, BMW's claim would succeed. But of course, if the respondents are right and the claim must be made by the current representative member, MGR's claim, covering a larger period, would fail even for the period it was representative member.

31. The respondents' case of necessity sees the VAT group as an entity distinct from its members. Its case is that it does not matter if the representative member changes. It does not matter if companies leave or join the VAT group. BMW's case is that the VAT group continues as long as it is identifiable by its unique VAT registration number and that the current representative member of that VAT group is the one entitled to recover any VAT overpaid under that VAT number at any time in its history (subject to time limits if any).

32. MGR does not agree. It considers that (at least for the periods after 1 January 1990) it was the entity which bore the economic burden of the overpaid tax and is therefore 'the person' which 'accounted' to HMRC for the overpaid tax. Its claim for the period before 1 January 1990 rests on the claim that, for that period, RCL was the entity which bore the economic burden of the overpaid tax and was the 'person' who 'accounted' to HMRC for the overpaid tax but that RCL assigned its claim to MGR in the 1989 Assignment.

33. A taxpayer can rely on national law or it can rely on any directly effective rights under EU law. I look at the UK law position first.

Trust

34. One view is that the representative member merely accounts to HMRC for the tax on supplies made by the various members of a VAT group. On this view the tax 'belongs' to the RWS and the representative member merely acts as a postbox without any equitable interest in the money. As I have said the assumption in this hearing is that the RWS has put the representative member in funds to pay the VAT. On this view, it is the RWS who is the 'person' who actually accounted for the money to HMRC, as the representative member had no equitable interest in the money.

35. The difficulty with this interpretation is the provisions on VAT grouping. S 43 VATA currently provides:

> "Where…any bodies corporate are treated as members of a group, any business carried on by a member of the group shall be treated as carried on by the representative member, and –
>
> (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) ….
>
> and all members of the group shall be liable jointly and severally for any VAT due from the representative member."

While this provision is slightly different to its earlier incarnations, it is not materially different for the purpose of this case and I will continue to refer to s 43 albeit for a large part of the period of the claim the provision was (effectively) the same provision in another and earlier statute.

36. For the purposes of VATA, therefore, the representative member is deemed to make the supply on which the VAT is due. This is incompatible with it merely being a trustee of the funds: it is deemed to make the supply and it follows it must be deemed (for VAT purposes) to be entitled to receive the consideration, as well deemed to be liable to pay the VAT.

37. It was not suggested that the deeming effect of s 43 extended beyond VATA. It seems to me that the deeming effect of s 43 might well be limited to provisions of VATA. So, for instance, if there was a dispute between a RWS and its erstwhile representative member over VAT monies paid to the representative member but not handed over to HMRC, it is possible that the monies would be found to be imprinted with a trust.

38. In the hearing I was referred to the FTT and Upper Tribunal decisions in the case of *Shop Direct Group, Littlewoods Retail Ltd & Others v HMRC.* More recently, the Court of Appeal has issued its decision: [2014] EWCA Civ 255. I do not have the benefit of the parties submissions on the Court of Appeal's decision but as that

Court upheld the decisions of the tribunals, I have chosen to proceed without asking for them. Nevertheless, I refer to the reasoning of Lord Justice Briggs.

39. Simplifying the facts, in *Shop Direct* an erstwhile representative member received a very substantial repayment of overpaid VAT from HMRC which it passed on to the RWS. HMRC claimed that these monies were subject to corporation tax in the hands of the RWS as a trading receipt. One of the arguments put by the RWS in an unsuccessful attempt to defeat the assessment was that the payment was (or had not been shown not to be) a gift. The FTT held ([2012] SFTD 723) that it was not a gift and this finding was upheld in the Upper Tribunal and Court of Appeal.

40. The FTT said:

> "[27] …. We accept.... that the statutory regime imposed by s 43 does not inhibit the relationship as between the representative member and other group members regarding contributions from one to another, or as regards amounts recovered by the representative member and then accounted for to the members of the group. What rights in this respect exist between the representative member and other group companies is a question to be determined in the circumstances and on the available evidence in each case."

41. In other words, s 43 did not define the relationship between the RWS and representative member outside the VATA. The Court of Appeal similarly considered the provisions of s 43 irrelevant to the question it had to determine (see §34) which was whether the RWS was entitled to the repayment against the representative member.

42. The conclusion was that the RWS was entitled to the repayment as against the representative member. That entitlement could have been under a trust, the law of restitution, statutory or contractual (see §52-53 of CA judgment). The Court of Appeal concluded it was contractual on the particular facts of the case (§54-56). (And, as I have already mentioned, in this case MGR has already lodged a claim against BMW for monies (if any) BMW is repaid by HMRC under its *Elida Gibbs* claim.)

43. However, whatever rights under general law that the RWS might have against a current or erstwhile representative member, and as recognised in *Shop Direct*, it seems clear to me that so far as VATA is concerned, and in particular s 80 VATA, the representative member is deemed to have the primary liability to pay the VAT and is deemed therefore, when it pays the VAT, to pay it on its own account. So, for as long as the deeming effect of s 43 applies, for the purposes of s 80 VATA, the representative member is "the person" who "accounted" for the VAT because for VAT purposes it is deemed to have paid it on its own account to settle its own liability.

Agency

44. Another argument is that the representative member is merely an agent as between the RWS (the principal) and HMRC. If this legal analysis is correct, RWS would be the 'the person' who accounted for the overpaid VAT, as the representative member would merely be passing over to HMRC VAT owed by the RWS. Is the representative member an agent for the RWS?

45. At least one VAT Tribunal decided that the representative member was an agent of the RWS: see *Triad Timber Components Ltd* [1993] VATTR 384, which I discuss in more detail at §144-151 below. The agency analysis was rejected in the later VAT Tribunal case of *Thorn Plc* [1998] V&DR 80 ('*Thorn'*) by Sir Stephen Oliver. See §§113-122 below. Sir Stephen said:

> "….The representative member is not a representative in the sense of being an agent of or trustee for the other members of the group. 'He' has the statutory role conferred by s 43; that role is quite distinct form the legal roles contemplated by section 73(5)."

46. I agree that the representative member of a VAT group is not a mere agent (and in this sense the word 'representative' is a misnomer). That would involve ignoring the provisions of s 43 which state that the representative member is *deemed* to be the supplier. Unlike civil law, there is nothing in English common law which deems an agent to be the principal, albeit that an undisclosed agent may be jointly liable with the principal. To be an agent of the RWS, the representative member would have to have power to bring about a legal relationship between the group member making the sales and HMRC. Instead, the effect of s 43 is remove a legal relationship: for VAT purposes the RWS ceases to be the supplier once it joins the group. I agree with Sir Stephen that the representative member is not an agent of the RWS.

Interpretation of s 80

47. Rejecting a trust and agency analysis of the position of representative member under s 43 does not end MGR's case. The deeming effect of s 43 ousts, in so far as VATA is concerned, a trust or agency analysis, but the deeming effect of s 43, contends MGR, is limited.

48. As I understand it, its primary case is that the deeming effect never actually ousts the RWS as "the person" who "accounted" for the overpaid VAT. Its secondary position is that if s 43 deeming effect does make the representative member "the person" who "accounted" for the VAT then that deeming effect lasts only as long as the RWS and representative member remain members of the same VAT group.

49. The assumption MGR makes, is that but for s 43, the RWS would be "the person" who accounted for VAT and I agree that this is right. But for s 43 the RWS would be the supplier and primarily liable to pay the VAT. Even if it passed the funds to another person to hand over to HMRC, it would be "the person" who accounted for VAT as it would have the beneficial interest in the funds and it would have the liability which was being discharged by paying those funds to HMRC. So *if* s 43 has

a limited effect, it seems to me that where s 43 does not apply, the RWS would be "the person" for the purposes of s 80. So is s 43's deeming effect of limited application?

50. BMW and HMRC accept that s 43's deeming effect does have some limits: they consider that the deeming effect lasts up until the VAT Group (identified by its VAT number) ceases to exist. And once that happens, they agree that a s 80 claim to recover VAT overpaid by the representative member can be made by the RWS, and can no longer be made by any erstwhile representative member.

51. Mr Glick relied on *Cresta Holiday [2001] STC 386* as supporting the analysis that the RWS has no rights under s 80 (at least until the VAT group ends). This was a case on insurance premium tax, but it had a statutory provision virtually identical to s 80 VATA for repayment of overpaid IPT.

52. The facts of the case were that insurers had to account for IPT on travel insurance sold. The rate of IPT was higher if the insurance was sold via travel agents. The insurers contracted with tour operators to sell travel insurance as agents, under which contracts the tour operators would account to the insurance companies for the higher rate IPT collected from the customers.

53. Higher rate IPT was found to be unlawful. The tour operators brought a claim against HMRC for repayment of the overpaid IPT. Their claim failed as they were not the taxable person entitled to repayment but merely the persons who had put the taxable person (the insurance companies) in funds to pay the tax. The judgment of the Court of Appeal was:

> "[16] ….Both the language and the scheme of the legislation make it perfectly clear that any repayment is to be channelled through the taxpayer...who must himself initiate the claim in the manner prescribed...."

54. There was no question of 'IPT grouping', but the respondents draw a parallel with this case. RWS, says the respondents, are like the tour operators in *Cresta.* They are merely the persons who put the taxpayer (the representative member) in funds to pay the tax to HMRC.

55. However, I consider that there is a clear distinction between *Cresta* and this case. In this case, the RWS would have been the taxpayer under VATA but for the deeming provision of s 43. This factor was considered in the recent case of *Shop Direct* in the Upper Tribunal [2013] STC 1709 (mentioned above) by Mrs Justice Asplin:

> "[64] Repayments under section 80 arise as a result of the statutory fiction contained in section 43 VATA which applies to VAT groups. By virtue of section 43, the original supplies were treated as if they were a supply by or to the representative member, although the members of the group remain jointly and severally liable for any VAT due from the representative member. It is the representative member

> which makes the initial overpayment and under section 80 is entitled to the repayment….."

56. This analysis is that the representative member is the person who accounted for VAT under s 80 *because* they were the deemed supplier under s 43. But for the statutory fiction of s 43, the actual supplier would have been the RWS. So if it were not for s 43, the "representative member" (in this case BMW) would have been nothing more than a mere representative, paying to HMRC VAT owed by the RWS.

57. So BMW's position as "a person" who "accounted" for VAT rests entirely on the statutory fiction of s 43. So to interpret s 80, the Tribunal must consider its interaction with s 43. The Tribunal must consider if the statutory fiction of s 43 applies for all times and all purposes. If it does not, BMW may not be the "person" who "accounted" for the overpaid VAT.

A question of statutory interpretation

58. Does the deeming effect of s 43 apply for all times and all purposes or does it have a limit? I was referred to the Supreme Court decision in *DCC Holdings (UK) Ltd* [2010] UKSC 58. The facts of this case are irrelevant. Lord Walker gave the only judgment of the court. He referred to and approved various dicta about how to interpret deeming provisions. Firstly he refered to Nourse J in *Inland Revenue Comrs v Metrolands (Property Finance) Ltd* [1981] 1 WLR 637, 646:

> "When considering the extent to which a deeming provision should be applied, the court is entitled and bound to ascertain for what purposes and between what persons the statutory fiction is to be resorted to. It will not always be clear what those purposes are. If the application of the provision would lead to an unjust, anomalous or absurd result then, unless its application would clearly be within the purposes of the fiction, it should not be applied. If, on the other hand, its application would not lead to any such result then, unless that would clearly be outside the purposes of the fiction, it should be applied."

59. Peter Gibson J (with whom Balcombe and Simon Brown LJJ agreed) in the Court of Appeal in *Marshall v Kerr* then said at 67 TC 56, 79:

> "For my part, I take the correct approach in construing a deeming provision to be to give the words used their ordinary and natural meaning, consistent so far as possible with the policy of the Act and the purposes of the provisions so far as such policy and purposes can be ascertained; but if such construction would lead to injustice or absurdity, the application of the statutory fiction should be limited to the extent needed to avoid such injustice or absurdity, unless such application would clearly be within the purposes of the fiction. I further bear in mind that, because one must treat as real that which is only deemed to be so, one must treat as real the consequences and incidents inevitably flowing from or accompanying that deemed state of affairs, unless prohibited from doing so."

60. And in the House of Lords in the same case, Lord Browne-Wilkinson approved this passage as the correct approach: [1995] 1 AC 148, 164. Lord Walker also approved what Mr Justice Neuberger said in *Jenks v Dickinson* [1997] STC 853, 878:

> "It appears to me that the observations of Peter Gibson J, approved by Lord Browne-Wilkinson, in *Marshall* indicate that, when considering the extent to which one can 'do some violence to the words' and whether one can 'discard the ordinary meaning', one can, indeed one should, take into account the fact that one is construing a deeming provision. This is not to say that normal principles of construction somehow cease to apply when one is concerned with interpreting a deeming provision; there is no basis in principle or authority for such a proposition. It is more that, by its very nature, a deeming provision involves artificial assumptions. It will frequently be difficult or unrealistic to expect the legislature to be able satisfactorily to [prescribe] the precise limit to the circumstances in which, or the extent to which, the artificial assumptions are to be made."

61. In other words, the Supreme Court approved these various dicta on how to interpret deeming provisions. In summary, I find they say as follows:

(1) a deeming provision should be given its natural and ordinary meaning in so far as consistent with Parliament's ascertained purpose, which includes treating as real the consequences which would have ensued had the deemed state of affairs been a real state of affairs;

(2) a deeming provision should not be interpreted so as to lead to unjust, anomalous or absurd consequences unless that was clearly Parliament's intention;

(3) and in considering point 2, the court needs to remember that Parliament would not be in a position to anticipate (and therefore intend) all possible outcomes from deeming something to be true which is not.

62. Under (2), to decide whether the consequences of s 43 deeming for claims under s 80 are absurd, unjust or anomalous necessitate consideration of the reason why s 43 exists at all. What was Parliament's purpose in permitting companies to VAT group?

Purpose of grouping

63. The Tribunal should consider the purpose of grouping, because if the deeming provision could be read as leading to a result contrary to the purpose of grouping then the result is anomalous and the deeming effect restricted.

64. So what is the purpose of the UK's grouping provisions? Section 43 enacted an option provided for in the Sixth VAT Directive 77/388/EEC ('6VD') and re-enacted in the Principle VAT Directive ('PVD'). So consideration of Parliament's intention when enacting s 43 involves consideration of what was the purpose of art 4(4) of the 6VD:

> "…each Member State may treat as a single taxable person persons …who, while legally independent, are closely bound to one another by financial, economic and organisational links."

65. The purpose is not stated in the directive. It is assumed that it must be intended at least in part for administrative simplification. It enables a single return from a group rather than individual returns from group members. It also means that supplies between group members are ignored for VAT purposes.

66. The CJEU considered the purpose of VAT grouping rules in *Ampliscientifica Srl* C-162/07 [2011] STC 566. The case concerned Italian legislation which allowed companies where one had held at least 50% of the share capital of the other from at least the beginning of the previous calendar year to submit effectively consolidated VAT returns, but retain their individual VAT numbers and single taxable person status. The CJEU distinguished that kind of rule from the VAT grouping rules Member States are permitted under the Directive under Art 4(4).

67. The CJEU said that the effect of Art 4(4) was that the companies within a group…

> "[19]....were no longer to be treated as separate taxable persons for the purposes of VAT but to be treated as a single taxable person....It follows that treatment as a single taxable person precludes persons who are thus closely linked form 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....
>
> [20] ...art 4(4) ….therefore necessarily requires...the national implementing legislation to provide that the taxable person is a single taxable person and that a single VAT number be allocated to the group....the use of such a number is dictated by the need, both for the economic operators and the tax authorities of the member states, to identify with a degree of certainty those effecting transactions subject to VAT."

68. The CJEU's comments were directed to the case in front of it, which concerned a situation very different to the one in this case. What the CJEU does emphasise, which is not surprising bearing in mind the terms of Art 4(4), is that the effect of VAT grouping relates to persons who are "closely linked". The single VAT number and single VAT identification is for persons who are "closely linked".

69. In so far as it is Mr Cordara's case that VAT grouping is merely for accounting purposes I am unable to agree. *Ampliscientifica* indicates that accounting simplification was one of the purposes of VAT grouping: it does not provide support for the proposition that that was the only purpose. For instance, it is clear from *Ampliscientifica* (§19) that Art 4(4) alters the identity of the taxable person.

70. Further, the CJEU's decision in *Ireland* (C-85/11) [2013] STC 2336 (see §47) and *United Kingdom* (C-86/11) indicates that to an extent its purpose was anti-tax avoidance by allowing member states to prevent businesses being artificially split to duck under the registration threshold . The UK has enacted provisions on this basis: see Paragraph 1A of Schedule 1 of VATA. Unlike these provisions, however, the grouping provisions of s 43 are nevertheless clearly not anti-avoidance provisions as they apply at the option of the taxpayer. (There are of course provisions to prevent s 43 itself being used tax avoidance purposes).

71. But VAT grouping goes beyond administrative simplification and anti-avoidance as indicated by the High Court decision in the *Kingfisher plc* [1991] VATTR 47 case where, what would have been separate supplies made by individual group members became single supplies made by the representative member. This can change the amount of VAT due to the exchequer.

72. I think that the purpose of Art 4(4) and therefore s 43 could fairly be said to be to reflect the economic reality when legally separate entities are so closely linked that their supplies should be seen as joined, even if the overall effect of that is that more or less tax owing to the exchequer.

Is it wrong to consider the loss of economic link significant?

73. Mr Glick referred me to *Barclays Bank plc* [2001] STC 1558. The question in that case was whether a company ceased to be a member of a group when it ceased to meet the eligibility requirements or only after it made an application which was granted by HMRC. The Court of Appeal ruled (Buxton LJ at [23]):

> "I mention first the view of high authority expressed by Lord Nolan in [*Thorn Materials Supply*] that art 4(4) is intended to simplify and facilitate the collection of the tax, rather than introducing any fundamental change in liability to the tax itself. In that context, therefore, it is understandable, and indeed to be expected, that member states will be afforded latitude in the detailed collection arrangements that they make. Those arrangements must, however, conform with both the letter and the spirit of the arrangements for enforcing the obligation to tax that the Sixth Directive does impose."

The Lord Justice went on to conclude there is nothing incompatible with Art4(4) in UK law in treating VAT group membership starting or ending only on an application being made, and irrespective if entitlement for group membership has ceased. Arden LJ said:

> "[30] In my judgment art 4(4) of the Sixth Directive does not deal with cesser of group status at all and there is no reason to conclude that it is inconsistent with the 6VD for a member state to require an application to be made to determine single taxable person status at the behest of its members any more than it is inconsistent with it to impose a requirement for an application to be made to cause the status to begin."

74. Mr Cordara's take on the case is that VAT grouping is primarily about simplification of VAT accounting and that this was why a company had to apply to leave as well as to join a group. And, certainly, it is not inconsistent with the thesis that leaving the group triggers an end to the deeming provisions as it is within the power of a group member to apply to leave the group at any time. I certainly do not consider it authority that the tribunal should not use the requirement for a close economic link between companies which are members of a VAT group as a guide in interpreting s 43 and Art 4(4). It is clear that the *purpose* of Art 4(4) relates to simplification of their VAT affairs for entities with close economic links and no others.

The limits of deeming?

75. The respondents' view is that the purpose of s 43 is realised by giving effect to the deeming of s 43 in all circumstances. They relied in support of this view on the *Kingfisher* case.

76. In *Kingfisher* the VAT group comprised retail companies and a finance company. The retail companies made sales, and some of those sales were financed by consumers with credit from the group's finance company (via a credit card). The question was how the retail scheme operated. Should the group be treated as making a supply of goods (VAT on price due at time of purchase) and separate supply of credit (no VAT) or as single supply of a self-financed sale on credit so that it only had to account for VAT as and when the customer paid its credit card bill? In other words, should the law look at the sales made by individual RWSs or treat the representative member as making all the supplies as a single supply?

77. Mr Justice Popplewell held that the effect of s 43 was that there was a single supply by the representative member. Mr Cordara casts doubt on the decision by saying that that Mr Justice Popplewell relied for his reasoning on what Advoate General Van Gerven said at [9] in *Polysar* [1993] STC 222 at 234 that non-taxable persons could not be members of VAT groups (a statement now known to be wrong – see *Ireland*) and that "it is necessary to focus on the activities of each legal person separately, and not on the activities of the concern as a whole." While Mr Justice Popplewell reported what AG Van Gerven said it was in the context (at page 72d) of support for HMRC's contention that VAT grouping was a simplified accounting system. Mr Justice Popplewell's conclusion was (page 72g-h) that VAT grouping might well provide a simplified accounting system but in addition it meant that the group must be treated as a single taxable person in the sense of a single business organised into divisions and that this could affect the nature of the supplies.

78. Mr Cordara also said *Kingfisher* was reversed by legislation because Parliament introduced S 43(1AA) which provides that a particular description of supplier or customer will be treated as applying to representative member. This relief is important because otherwise certain supplies would lose their character. For instance, supplies deemed to be made by representative member might otherwise be standard rated even if the RWS is an eligible body for the purposes of exemption.

79. Moreover, two decisions of the VAT Tribunal appear to conflict with *Kingfisher*. In *Thorn EMI Plc and Granada PLC* (1992) VTD 9782 (‘*Thorn and Granada’)* one company within the group supplied TVs on hire and another company supplied insurance (which was compulsory with the TV rental). The Tribunal said that the insurance was not part of a single supply with the TVs. The supply of the insurance by the representative member was therefore exempt and not standard rated;

> “[VAT grouping] cannot have the effect of altering the character of a supply made to a person outside the group.” (page 20)

80. That case predated *Kingfisher*. The case of *Canary* Wharf *Ltd* VTD (1996) 14513 postdated it but agreed with the extract from *Thorn and Granada* cited above. The chairman said that statutory hypotheses of (what is now) s43 should not be taken too far. In that case one VAT group company supplied an interest in land as landlord and another supplied management services over the leased properties. The Tribunal distinguished *Kingfisher* at §56 saying it must be seen as confined to its particular facts. The Tribunal held the management services were not part of a single supply with the land. However, even when separate services or goods are supplied by the same supplier, the question of whether that is a single or multiple supply depends on the rules set out in *Levob, CPP* etc and (perhaps) the decision of the Tribunal can be justified on the basis that the supplies were separate in any event irrespective that s 43 deemed the same person to supply them. If the Tribunal in *Thorn and Granada* was right, it would mean that s 43(1AA) was otiose.

81. Whether by deeming the supplies to be made by the representative member actually alters the character of them is not the question before me. Nevertheless, I note that Mr Justice Popplewell’s decision in *Kingfisher* was not only binding on this Tribunal but the reasoning in it approved by the House of Lords in the third Thorn case to which I was refered, *Thorn Materials Supply Ltd and Thorn Resources Ltd* [1998] STC 725, which I shall refer to as ‘*Thorn Materials’:*

> “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.” (page 733c per Lord Nolan)

Therefore, while the outcome of *Canary Wharf* may have been correct in that the supplies may have been ‘multiple’ rather than ‘single’ based on the rules in *Levob* and *CPP*, the reasoning appears inconsistent with the binding decision in *Kingfisher.*

82. Nevertheless, I accept Mr Cordara’s basic premise that the deeming provisions of s 43 have a limited effect. The question is where the line should be drawn. *Thorn and Granada* and *Canary Wharf* may have drawn it in the wrong place. But as in all those cases the RWS and the representative member were grouped at the time the supplies were made, and did not concern claims for repayment of overpaid VAT made after the group relationship ended, they contribute little to the discussion in this case, other than showing that deeming provisions have limits. But even the respondents accept that s 43 has its limits. They do not agree with MGR over where the limits are.

83. *Thorn Materials* involved an avoidance scheme, to reduce irrecoverable input tax incurred by a partly VAT exempt group. A company within this group contracted with another group member to make certain supplies to it. Ninety of the price was paid upfront. The suppliers (the appellants) then left the VAT group. The appellants then purchased the goods in order to make the supply. Actual performance of contract took place and the customer (still within the group) paid the remaining 10% of the price.

84. The appellants' case was that only 10% of purchase price was subject to VAT but that nevertheless they were entitled to fully recover input tax on the purchasers made to fulfil the contract. It was, as I have said, a tax avoidance scheme.

85. The appellants lost. The House of Lords ruled that VAT on the entire consideration fell to be charged when the 10% supply took place. As they said, under s 43, the supply reflected by the 90% consideration had to be ignored as it took place while the supplier and customer were both members of the same VAT group. So the House of Lords did ignore it: that meant the only supply took place when the 10% consideration was paid after the supplier had left the group. But as the full consideration for this supply was 100% of the price, that was the figure on which tax was due. Lord Nolan said (732h-733d):

> "that leaves open the question of what is mean by the requirement in s 29(1) that a supply by one member of a group to another must be disregarded. ….it does not mean that the separate existence of the appellants and [the customer] is to be denied or that the sale agreement and the prepayment are to be treated as not having taken place. What it does mean is that the 90% supply to which these facts gave rise must be disregarded....One can hardly disregard something which did not happen.
>
> Does it then follow that the supply of the goods, to the extent of 90% is permanently excluded from the charge to VAT? ...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. It is entirely consistent with this approach that the 90% supplies effected by [appellants] to [their customer] should be disregarded ...because [the appellants and their customer] were not to be treated as carrying on their own businesses at that time....the purpose of s 29(1) was to enable a group to be treated as if it were a single taxable entity...The section may have the effect of deferring the charge to tax upon the added value of the goods until they are the subject of a supply outside the group, but it does not prevent that charge.
>
> When [the suppliers] left [the VAT group] they emerged into the VAT world as separate taxable persons, each carrying on its own business for VAT purposes...."

And at page 733e-f:

> "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) [now s 43(1)] requires...."

86. The respondents' case is that this supports their position because the Lords gave effect to a deeming provision *after* a company had left the VAT group. A supply took place between current group members and fell to be disregarded: the Lords' decision was that it should still be disregarded even after one party to the supply left the group.

87. However, as it clear from the result of that case, ignoring the 90% supply and giving effect to the deeming provision, led the Lords to give effect to what the Lords considered to be Parliament's intention: accounting simplification and not tax exemption.

88. It is clear that deeming should be given full effect up and until it produces absurd or anomalous results. *Thorn Materials* therefore does not compel a decision in favour of the respondents unless the deeming provision in this instant does not give rise to absurd or anomalous results.

89. What was ignored by the House of Lords? In *Thorn Materials*, the appellants' case was that both the supply and payment should be ignored under s 43(1)(a). The House of Lords ignored the supply but not the payment. In other words, they limited the effect of the deeming provision in order to avoid an anomalous result contrary to the purpose of Parliament. And in that sense, the case supports MGR's position.

90. This case is about the limits of the deeming of supplies by and to the group under s 43(1)(b); *Thorn Materials* was about the limits of deeming between group members under s 43(1)(a). *Thorn Materials* decided that (at least to an extent) that the deeming effect of s 43(1)(a) which ignores intra-VAT group supplies should continue even after the supplier left the VAT group; it does not mean that the deeming effect of s 43(1)(b) which causes the representative member to be seen as the maker of supplies outside the group should necessarily continue even after the RWS and/or the representative member has left the group.

91. I can see nothing in the purpose of the VAT grouping rules which suggests that there was any intention for the effect of s 43(1)(b) to continue after the close economic link has ceased to exist; and indeed, as I have said, the House of Lords concluded that the deeming of s 43(1)(a) was not absolute after the grouping ceased.

92. It is obvious from consideration of the UK rules alone, that entitlement to grouping depends upon the companies being closely linked: in UK legislation that close link is defined by reference to joint control (s 43A). Companies can be grouped when the same entity controls all of them or one controls the others. The point is even clearer if Art 4(4) is considered as it provides the independent entities must be "closely bound to one another by financial, economic and organisational links." Therefore, for the *effect* of grouping to continue *after* eligibility for grouping has ceased appears contrary to both the intention behind the UK legislation and the EU legislation it was intended to implement. And the *Thorn Materials* case involved an

interpretation of s 43(1)(a) which prevented companies taking the benefit of grouping at a time when they had ceased to be grouped.

93. Yet the respondents' case is that the effect of grouping (and in particular that the representative member is deemed to make the supplies made by the RWS) continues until the group (as identified by its VAT number) ceases to exist. There is no logic to this view when considered next to the purpose of the VAT grouping provisions. The respondents accept that the deeming effect of s 43 will not last for ever: but instead of it terminating when the close economic link terminates, they consider it terminates when the VAT number ceases to exist. I cannot see the logic in this view.

94. Even their secondary case, that BMW can claim because it was the representative member at the time the suppliers were made, fails to tie in with the purpose of VAT grouping: while the respondents recognise that the effect of grouping (the deeming) does not continue for ever they consider it can survive the cessation of close economic link with the RWS.

95. My conclusion is that there is nothing contrary to the purpose of s 43 (and therefore nothing absurd, anomalous or unjust) in the deeming provisions of s 43 having effect for the duration of the close economic links between RWS and representative members, such that during the subsistence of that relationship the identity of the person having the liability to account for VAT and the right to reclaim overpaid VAT should be the representative member (the appointment of whom the RWS – or the entity owning it - has necessarily agreed to by applying to be a group member).

96. Such a conclusion is consistent with the Lords' conclusion in *Thorn Materials* that while the group subsisted, the supplies under s 43(1)(a) must be ignored. So while the RWS and representative member are grouped, under s 43(1)(b) the representative member is deemed to make the supplies.

97. The issue is important to MGR because it claims repayment of tax overpaid in respect of sales made by RCL. RCL assigned rights to MGR but it assigned them while it was still part of the Rover VAT Group. If it assigned only the rights in existence at the date of the assignment then, for this reason, I consider that as a matter of UK law the deeming effect of s 43 means that at that point in time RCL had no right to make a claim for VAT overpaid by the representative member in respect of sales made by RCL and therefore nothing to assign.

98. In other words I am unable to accept MGR's primary case that the RWS is always the "person" who "accounted" for the overpaid VAT and always the person who has the right to recover it from HMRC. This is because the clear intention of s 43 was that the representative member would be deemed to make the supplies actually made by the RWS and while the RWS and representative member are part of the same VAT group there is nothing absurd, unjust or anomalous in that being the position.

99. The respondents' primary case is that, as I have said, the deeming effect is that it is the representative member for the time being of the VAT group which is "the

person" who "accounted" for the overpaid VAT even if the representative member at the time of the claim (and therefore the taxpayer who makes the claim) is not the same representative member who was actually deemed by s 43 to make the supplies the subject of the claim. I turn to consider this.

The significance of the VAT group number

100. The respondents' case is that the VAT group number identifies the group. The current representative member of a VAT group, identified by number, is (in their view) entitled to recover VAT overpaid by the then current representative of the same VAT group (by number). On their case, it is irrelevant that the RWS is no longer a part of the VAT group; it is irrelevant that the representative member which overpaid the VAT is no longer a member of the VAT group; it is irrelevant if no companies which were members of the VAT group at the time the money was overpaid are still members of it now.

101. If the respondents' submission is right, even the VAT overpaid by MGR and BLMC as representative member could only be recovered by BMW, because it is the *current* representative member of a VAT group identified by the same number as the group to which the RWSs belonged when the VAT was overpaid, even though the membership of that group no longer includes the RWS and at least one of the erstwhile representative members which made the overpayment. (In practice, BMW is out of time to lodge such a claim now).

102. It is difficult to understand how the respondents arrive at this position. It is clear that as a matter of practice, a VAT group is identified by its number and the same number is used even when the members of a VAT group join or leave. This gives rise to HMRC's view that, as it has the same number, it is the same VAT group. This must be administratively simpler but has little else to recommend it.

103. There appears to be no grounds for such view in the legislation. The legislation has virtually no mention of VAT numbers. The VAT Regulations clearly contemplate that unique identifying numbers will be issued to taxable persons and the PVD requires this. The VAT registration number must be shown on invoices and credit notes. But nowhere is there any authority to say that a VAT group is the same VAT group where the number is unchanged irrespective of changes in membership.

104. The respondents point to what the CJEU said in *Ampliscientifica* at §19:

> "From the treatment of a VAT group as a single taxable person, it follows logically that the group can only be identified for VAT purposes by a single VAT number...to the exclusion of any other individual VAT number. The use of just one number is dictated by the need for both economic operators and the tax authorities of the Member States to identify with a degree of certainty those who are effecting transactions subject to VAT...."

105. Yet, the CJEU were not dealing with a situation where companies had left or joined a VAT group, let alone a situation where the RWS had left the VAT group. It

was merely saying that VAT groups need to have a unique identifying number as the companies which comprise them comprise a single taxable person. *Ampliscientifica* is no authority whatsoever for the respondents' proposition that the VAT group is the same VAT group irrespective of the companies which comprise it.

106. It is easy to think of anomalous even absurd situations if the effect of s 43 was found to be as proposed by the respondents. For instance, a VAT group could comprise 6 companies, 3 of which deal with the sale of gadgets and 3 of which deal with the sale of widgets. One of the widget companies is the representative member. The holding company could sell off the widget companies to a competitor. The widget companies could join the competitor's VAT group with a different VAT number. One of the remaining gadgets companies could become the new representative member of the old VAT group using the same number as before. But what if one of the widget companies overpaid VAT when part of the first group? The respondents' case is that the claim for recovery would lie with the new group identified by the old VAT number, even though the RWS and representative member originally deemed to make the supply under s 43 are now part of a different VAT group and have no current economic relationship with the old VAT group. Other unjust and absurd scenarios can be suggested.

107. There is nothing in s 43 which supports the respondents' position on this. That section deems that any business carried on by a member "shall be treated as carried on by the representative member". While s 43B(2)(c) permits the substitution of a new representative member, it does not provide that the new representative member will be deemed always to have been the representative member. Indeed s 43B(4) indicates that the default rule is that the change in representative member takes effect on the day the application is received, as there is provision for the date to be retrospective or prospective. While far from conclusive, this does not support the respondents' case that s 43 means "the representative member for the time being" because, if that were the case, there would be little point in retrospective or prospective appointments.

108. Assuming the respondents' view of the effect of s 43 deeming is right, what would happen if the VAT group ceases to exist but not the individual members of it? Then there is no current representative member to make the s 80 claim. It is clearly unjust and anomalous if that means the claim falls into abeyance, despite the companies which made or were deemed to make the supplies still existing. Parliament cannot be supposed to have intended that. To avoid this, my understanding of the respondents' position is that, where the VAT group ceases to exist, they consider the deeming effect of s 43 comes to an end and at that point in time it is as if there never had been any deeming effect at all and the RWS becomes the "person" who "accounted" for VAT as if it had never been a member of a VAT group.

109. But even accepting (as the respondents' do) that the deeming provision has its limits, the limits suggested by the respondents do not prevent absurdity. Absurdities can arise even where the VAT group is not disbanded. What if RWS leaves the VAT group because it no longer has the close links with the other members? The respondents' view is that there is nothing absurd or unjust in the deeming provisions while the VAT group remains in existence. Yet in this scenario, the RWS who made

the supply and collected the VAT from its customers or paid it out of its own monies, is unable to recover it when it discovers it overpaid. It no longer part of the corporate group with the representative member and the representative member will be looking after its own interests and not those of its ex-group member, which may now be owned by a competitor.

110. Such an interpretation of s 43 does lead to absurd, unjust and anomalous results and I do not think that Parliament would have intended them.

111. However, the absurdities which result from the respondents' interpretation only exist, it seems to me, to the extent they take the s 43 fiction as applying after a date from which the RWS leaves the VAT group. It is worth at this point considering the case of *Thorn plc* (mentioned above at§45). This case was said by the respondents to support their case on this point as an assessment on the *current* representative member was held to be correctly issued rather than on the representative member at the time the VAT was under-declared.

Assessments

112. There is little authority on which company is liable to pay an assessment after the RWS has left a group. Mr Glick accepted that it was necessarily a part of his case that, if it were the case that VAT had been underpaid rather than overpaid in respect of MGR's supplies, and were effluxion of time no bar to an assessment, BMW as current representative member would be primarily liable to pay the assessment.

113. In practice, the lack of authority on this point is not surprising as there are provisions for joint and several liability (see s 43(1)) so HMRC may not be called on to identify which company has primary liability, although technically they ought to do so because unless they can show a valid assessment they would be unable to enforce it against those with secondary liability. This point was taken in *Thorn.*

114. Thorn UK Ltd was the RWS. It made sales in 1994 and 1995 while it was a member of a VAT group. Thorn EMI Plc was representative member and therefore the company deemed to make the supplies actually made by the RWS. In 1996 a new company, Thorn plc, was incorporated and became the representative member of the VAT group. Thorn EMI Plc left the VAT group and became representative member of a different VAT group.

115. In September 1996, HMRC assessed Thorn Plc (the new representative member) for the VAT under-accounted for by the group in 1994 and 1995 in respect of sales made by the RWS. Thorn PLC objected to the assessment on the grounds it was not the correct person to assess. The Tribunal (Sir Stephen Oliver QC) held – page 84A-

> "...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...."
>
> "[HMRC] could not in law have assessed [Thorn EMI plc] in September 1996; it no longer had any of the statutory functions or obligations of representative member of the VAT group that included Thorn UK at the time when Thorn UK made the alleged supplies.....

116. Sir Stephen's analysis appears to support the respondents' analysis that the deeming effect of s 43 applies to the representative member for the time being. He seems to be saying that, while Thorn EMI was deemed to make the relevant supplies while it was representative member, when it retired and Thorn PLC took over, Thorn PLC was then deemed to have made the supplies which Thorn EMI was previously deemed to have made.

117. But in this case the RWS was still a member of the group at the time of the assessment. Contrary to the respondents' position, it does not support their contention that the right to repayment (and liability for underpayments) is held by the representative member for the time being irrespective of the composition of the group at the time. It is, in my view, only authority for the proposition that, while the RWS is a member of the group, the rights and liabilities it would have if separately VAT registered are held by the current representative member.

118. Any other view would give s 43 deeming an absurd outcome. For instance, what if Thorn UK had left the group before Thorn PLC took over. It would be absurd for Thorn PLC to have primary liability for the VAT underpaid by Thorn UK a company with which, on this view, it might never have shared a close economic link.

119. I reject the respondents' interpretation of UK law that the effect of s 43 is that even after the RWS has left the group, the representative member for the time being is treated as the "person" who "accounted" for VAT that was not due under s 80 when the overpayment was made by an earlier representative member of a VAT group identified by the same VAT number.

120. Mr Cordara suggested that *Thorn* should be understood in the context of s 73(5) which requires assessments to be in the name of the person acting in a representative capacity. So in *Thorn*, the assessment was on the representative member; joint and liability would have rested on the RWS and any other company which was a member of the group with RWS at the time the tax underpayment occurred. Mr Macnab did not agree that assessments can be raised on representative members under s 73(5). He considers that "representative" in s 73(5) has a different meaning to "representative" in s 43. His explanation of the *Thorn* decision is that "representative member" in s 43 means representative member for the time being.

121. I agree with Mr Macnab that the use in s 73(5) of " representative" in the context of

> "personal representative, trustee in bankruptcy, interim or permanent trustee, receiver, liquidator or person otherwise acting in a representative capacity in relation to another person"

is not apt to cover "representative member" in s 43 where the representative member is actually deemed to be the taxpayer. Nevertheless, while I consider that *Thorn* was rightly decided on the basis that Thorn PLC was deemed to be the taxpayer in respect of the sales actually made by Thorn UK, that does not mean that the deeming effect of s 43 lasts for ever, and in particular does not mean that it lasts beyond the point at which the RWS and representative member are VAT grouped together.

122. *Thorn*, it seems to me was rightly decided, but because the deeming effect of s 43 applies to the current representative member of the VAT group to which the RWS belongs. Any other interpretation gives rise to unjust, absurd and anomalous results, either allowing the right of recovery to be bestowed upon, or imposing a liability to pay tax upon, a company which might never have had a close economic link with the RWS.

123. I understand the respondents' reply to this is that any injustice or absurdity is avoided by the RWS's right to reimbursement. I consider this below at §§165-183 and reject it for the reasons given at §184-192. Such a right in any event would not solve the problem in so far as VAT assessments are concerned.

Is the claim with the representative member which made the overpayment?

124. A literal reading of s 43 is that, as it is the representative member at the time of the sales by the RWS which is deemed to have made the supplies, it is that representative member who is the "person" who accounted for the overpaid VAT and the person entitled to the repayment under s 80. As I have said, if anything, this is only BMW's secondary case.

125. However, even this view gives rise to anomalous results if it applies after the RWS and representative member cease to be VAT grouped together. For instance, what if the original representative member left the group, and a different entity was incorporated to take over the role of representative member after the RWS had made the supplies in respect of which VAT was overpaid by the original representative member? If it is the original representative member that is entitled to make the s 80 claim, then the outcome seems unjust and anomalous. The VAT repayment will go to a company with no connection to the VAT group. Yet the RWS who actually collected the overpaid VAT is still a part of that VAT group.

126. So far as I understand it, BMW and HMRC's response to this is, as already stated, there is no injustice as the RWS and/or the customer of RWS could make a claim for monies paid by mistake against the representative member and/or HMRC. I deal with this at §§165-192 below.

127. I have touched upon the question of assessments, on the assumption that the deeming effect of s 43 is the same for all provisions of VATA. Therefore, I also go on to consider the question of which group companies have joint and several liability,

which company can claim for input tax, which company is entitled to make a bad debt claim, and which company entitled to make assignments.

Assessments and joint and several liability

128. The implications for joint and several liability of VAT group members was not really addressed at the hearing. It seems that Parliament's intention was that all VAT group members would be jointly and severally liable for the VAT owed in respect of supplies made by the group but the primary liability would be with the representative member.

129. If I am right, the deeming effect of s 43 should be limited to avoid anomalous results, with the effect that the representative member's primary liability for prior underpayments follows the RWS so that when the RWS leaves the group, the primary liability of the representative member ceases. Does it then follow that all group member's joint and several liability cease at that moment too? It seems unlikely that Parliament could have intended that. And I do not see it necessary to read s 43 in that way. It seems to me that irrespective of how the deeming provisions work to imprint any particular entity with primary liability, the 'joint and several' part of s 43 is not a deeming provision. It gives joint and several liability to any company which was a member of the group at the time the tax was overpaid irrespective of the operation of the deeming provisions and irrespective of which companies later leave the VAT group.

Claims for underpaid input tax

130. My attention was drawn to the case of *Chubb Ltd* [2013] UKFTT 579(TC). In that case a representative member claimed under Regulation 29 of the VAT Regulations for repayment of under-reclaimed input tax. The basis of its claim was that another company (the RWS) had in 1987 failed to reclaim all the input tax to which it was entitled. In 1992 the RWS joined the Chubb VAT Group. It left in 2005 and was dissolved. It had passed the point when the RWS could be restored to the companies' register, so it was unable to claim. The current representative member of the Chubb VAT group made a claim for repayment of the input tax in 2009.

131. The Tribunal refused the claim (§106). It held that s 43 did not apply, it seems, because the RWS was not a member of the group when the supplies were made. The deeming provision of s 43 only deems supplies by the RWS to be made by the representative member where a group subsists. Supplies made by the RWS before joining the group were never deemed to be supplies by the representative member.

132. This might appear inconsistent with *Thorn*. Thorn PLC was held liable for supplies made by the RWS *before* it was part of a VAT group with Thorn PLC. However, the significant difference is that in *Thorn* the RWS was grouped with the representative member at the time of the claim, while in *Chubb*, the RWS had ceased to exist before the claim was made.

133. The cases can be reconciled if the deeming effect of s 43 only subsists for as long as the RWS is a part of a VAT group and then only if it is understood as applying to the current representative member of the group to which the RWS currently belongs. As I have said, I see nothing unjust, absurd or anomalous with such an interpretation.

134. Had the RWS in *Chubb* still existed and been a part of the Chubb VAT group, in my view the decision of the Tribunal would have been the reverse of the decision it reached.

135. The *Thorn* case is entirely consistent with the view that the rights and obligations, which the RWS would have held if individually registered, revert to the RWS when the RWS leaves the VAT group. This is because the obligation in this case was owed by the RWS' current representative member: it suggests (but does not decide) that if RWS had left the group and joined another, it would have been the representative member of that new group which should have been assessed.

136. The *Thorn* case does not deal with the situation where the RWS had left the group. The respondents' view of the case is that it did not matter whether the RWS was still a member of the group. This view clearly would give rise to potential injustice and absurdity if RWS had left the group yet the new representative member was liable to be assessed for the underpaid VAT. It would mean an entity was liable to tax in respect of sales made by another entity with which it might never had had an economic connection, while the RWS was able to benefit from underpaying the VAT (subject to its joint and several liability). I reject the respondents' view.

Bad debt claims

137. An analogy can be made between bad debt claims and s 80 claims, but the provisions are far from identical. Both claims involve overpayments of VAT: however, in s80 claims the VAT is overpaid from the moment it is paid albeit the parties are unlikely to be aware of the overpayment. In BDR claims, the VAT is only repayable when the debt has been unpaid for a stated period of time.

138. Tribunals have been faced with the situation of BDR claims arising after a VAT group has ceased to exist or after the RWS has left the VAT group. This is because the supply could have taken place during the existence of the group but the debt only become bad later.

139. Mr Glick's interpretation of the cases on BDR and VAT groups are that the tribunals have stretched the rules of interpretation in order to avoid the absurd result of a good BDR claim vanishing into thin air. Of course, this is the point of what was said in *DCC* and the other cases on the construction of deeming provisions: the deeming effect should be limited to avoid unintended absurdities.

140. The BDR provisions are now contained in s 36 VATA. While they have changed over the years, in so far as relevant to this hearing, the provisions establish two preconditions to a BDR claim:

(1) firstly that a "person" has both made the supply and "accounted" for the VAT on the supply (s 36(1)(a)); and

(2) the consideration for the supply has been written off "in his accounts" as a bad debt (s 36(1)(b)).

141. The UK's BDR provisions undoubtedly require purposive construction if *any* BDR claim can be made at all in respect of sales by a company within a VAT group. This is because s 36 VATA requires at (1) "a person" to have supplied goods and accounted for VAT on the supply and (2) that person to have written off the consideration in "his accounts".

142. While a VAT group exists it will be the representative member who makes the supply and accounts for the VAT, but it will be the RWS which made the sale and which writes the debt off in its books.

143. This is a clear example of where the statutory fiction of s 43 leads to an absurd result. A literal interpretation of s 43 and s 36 would mean that merely joining a VAT group would prevent the trader ever making a BDR claim. So far as I am aware, HMRC have never taken this view. HMRC must read "his accounts" in s 36(1)(b) as a reference to the accounts of the RWS on the basis that the s 43 statutory fiction cannot be taken too far. Logically, while the group exists, this is a sensible reading which avoids absurdity and inconsistency: it enables the representative member to make the claim for BDR.

144. However, how far should the deeming effect of s 43 be taken when RWS is no longer a member of the group of which it was a member when it made the sales now the subject of a bad debt write off? This was considered in the case of *Triad Timber Components Ltd [1993] VATTR 384.*

145. Triad Timber Components Ltd ("Triad") had been a member of a VAT group. The representative member (a company which owned Triad) accounted for VAT on sales actually made by Triad but deemed under what is now s 43 VAT to have been supplies made by it. In respect of some of these sales, Triad was not paid by its customer.

146. Triad left the VAT group and ceased to be controlled by the erstwhile representative member of the group. It continued its business under a separate VAT registration number. After leaving the group, it wrote off the bad debts in its books and claimed BDR.

147. HMRC (as it now is) refused the claim. The problem for Triad was that it had written off the debt but it was the representative member which had accounted to HMRC for the VAT. As stated above, a literal reading of s 36 and s 43 would bar the claim as the same person who accounted for the VAT must also write off the debt. As with this appeal, therefore, the case raised the question of the identity of the "person" who "accounted" for the VAT.

148. The Tribunal allowed Triad's appeal. The basis of the Tribunal's decision was as follows (page 387 C-D & 387 G-H)

> "I see much force in [the] contention that the legal fiction embodied [in the UK's VAT grouping provision], that Triad's business was carried on by [the representative member], should not be extended beyond its proper and necessary scope into circumstances for which it is not appropriate. To require a company to act through the representative member after it has left the group must be at least inconvenient and, in cases such as this, is likely to produce injustice. It is by no means clear to me that [the representative member] could present a valid claim [for BDR] once it has ceased to be the representative member...nor that it could be compelled to make a claim if it was unwilling to do so..."
>
> "Here again it seems to me that the fiction can be pressed too far. The fact that [the representative member] was treated as carrying on Triad's business for VAT purposes required it to pay to [HMRC] the output tax relating to Triad's supplies, but it does not follow that it paid that tax on its own account. It discharged obligations which would otherwise have fallen on the group members and for which they remained liable in the event of its default….
>
> In paying and reclaiming tax it acts as the members' agent.....And once the group registration ceases to have effect the members should act for themselves, since there is no longer a representative member to act on their behalf." (page 388B)

149. In summary, the Tribunal's conclusion was that money was paid by representative member as agent for RWS and so the RWS had indeed accounted to HMRC for the VAT. As it had also written off the debt in its books, it was able to make the BDR claim.

150. HMRC's public position, as reflected in their public guidance, is that *Triad* was correctly decided. Mr Macnab's position (representing HMRC) at the hearing, however, was that it was wrongly decided but led to a just outcome. HMRC now put forward the position that the BDR provisions require some imaginative purposive interpretation so that the representative member is treated as writing off the bad debts in *its* books so that it can make the claim on behalf of the company which made the sales. In other words, Mr Macnab's view, consistent with the one he expresses in respect of MGR, is that a BDR claim as well as a s 80 claim must be made by the current representative member of the VAT group, irrespective of whether either the RWS or the representative member which was deemed to be the supplier were still members of that group.

151. I agree with Mr Macnab that, in so far as the basis of decision in *Triad* was that the representative member was the agent for the RWS when it accounted for VAT, it is wrong for the reasons already given (see §§44-46). But that does not mean *Triad* was wrongly decided. It may have been rightly decided but on the wrong grounds. And in so far as the decision was that the statutory fiction of s 43 is limited (as to which see the first two paragraphs cited above), I think it was rightly decided for the right reasons.

152. The issue arose again in the case of *Proto Glazing Ltd* (1995) VTN 13410. Proto was the RWS in a VAT group. Proto accounted to the representative member for the VAT that would be due on its actual sales, the supply of which the representative member was deemed to make. The representative member duly accounted for this VAT to HMRC. The VAT paid to HMRC included VAT on a particular sale in 1991 for which Proto was never paid.

153. Up to this point the facts are in essentials the same as those in *Triad.* Then they differ. Proto's customer on that sale ceased trading and Proto wrote off the debt in its accounts in the year to end 1991. About six months *later* Proto left the VAT group and carried on trading under a separate VAT number. In this the facts differ from *Triad* as the write off in that case was *after* the RWS had left the group. At the time the law was that the BDR claim could not be made until after a year had elapsed from the sale, and this explains why the representative member did not make the claim while Proto was still a member of the group.

154. Proto's representative member went into administrative receivership at the same time as Proto left the group, and the group ceased to exist. Proto brought the claim for BDR at the expiry of the year. It relied on the decision in *Triad.*

155. HMRC defended the claim on the basis (they said) that following *Kingfisher* it was clear *Triad* was bad law. The VAT Tribunal did not agree. It distinguished *Kingfisher* (and another similar case) as follows:

> "Those, however, were cases about liability during the subsistence of the VAT group and whether VAT group treatment, because of the effect of these deeming provisions, could change the substantive tax liabilities of members of the group. (page 5 line 45)
>
> The question here concerns rights and liabilities of a member of a group after that VAT group ceased to exist….. (page 6 line 5)
>
> ….To apply the fiction literally in the circumstances of this case after the group relationship has come to an end would, in my judgment, lead to an anomaly and injustice and thus I consider that I should follow [*Triad*]" (Page 6 line 30)

156. The Tribunal pointed out that it would be unfair if an ex-representative member, now insolvent, should be one to claim because, even if the RWS had entitlement to sue the representative member, it would have to prove in its erstwhile representative member's insolvency and would be unlikely to recover very much of the overpaid VAT.

157. The tribunal followed the result in *Triad* but not necessarily its analysis that the representative member was an agent of the company making the supply. It seems more likely that the true basis of this decision was statutory interpretation: a fiction should not lead to an anomalous result.

158. The respondents' position appears to be that *Proto* was correctly decided because the VAT group had come to an end. They distinguish *Triad* and this case because in *Triad* the VAT group – identified by its number – had not come to an end.

159. However, to me that is a distinction without merit. The anomalous result exists whenever the company making the supply leaves the group, irrespective of whether a group identified by the same VAT number continues to exist.

S 80 claims

160. The last case in a trio of cases relied on by the appellant was *Taylor Clark Leisure Plc* [2013] UKFTT 792 (TC). Taylor Clark was both the representative member and RWS in a VAT group. In 1990 it created a subsidiary company (Carlton) and transferred its business to it. Carlton left the VAT group in 1998. One of the issues was the recovery of the overpaid VAT in the period 1990 to 1998 as the Tribunal held Taylor Clark unable to make a s 80 claim for the pre-1990 overpayments because it was out of time and had in any event assigned its rights to Carlton.

161. In respect of the claim 1990-1998 when the RWS was Carlton but the representative member was Taylor Clark, the Tribunal's view was that Carlton would have had the right to make the s 80 claim either from the date when it left the group or when later the VAT group disbanded. The decision is as follows:

> "[90]If Taylor , in 1990, validly assigned its right to repayment of overpaid output tax between 1973 and 1990 to Carlton, as HMRC contend, then Taylor would still have been entitled to make the claim for repayment as Group representative and receive repayment if the right to receive repayment was well founded, until Carlton left the VAT Group, which they did, in 1998. We do not see how HMRC's relationship with the Group representative can be affected by an assignation (whether or not intimated to HMRC) by the Group representative in favour of a Group member. <u>The statutory provisions (ss43 and 29) require that, as long as companies are treated as members of a Group, the business carried on by a member is to be treated as carried on by the representative member. When the Group is disbanded or a member leaves, the position changes. The member's VAT affairs can no longer be represented by the representative of the Group.</u>
>
> [91] Thus, in *Proto Glazing* 1/5/95 No 13410 (Chairman RK Miller CB), …. This decision can be justified on the view that the representative member acted as the Group member's agent in a question between member and Group representative (in a question with the Commissioners, the Group representative is regarded as the single taxable person; the business and supplies of the members are treated as the business and supplies of the Group representative); agency ceased when the member left the Group or on disbandment, and any outstanding claims could be pursued by the former Group member. The legislation then in force does not exclude this analysis and the result achieves the purpose that the loss arising from such bad debts

> should be shared between the taxpayer and the Commissioners. Recovery by the administrator or liquidator of the Group representative would not necessarily enure for the benefit of the Group member taxpayer; it may go into the pot available for the general body of creditors. Moreover, it may be questionable on what basis the administrator or liquidator might claim the refund if the VAT Group was disbanded at the time or as a consequence of his appointment….
>
> "[102] Accordingly, when Carlton left the VAT Group in 1998, they became entitled to make a claim for repayment and receive such payment. They were the generating taxpayer throughout that period. From 1998, Carlton was no longer part of the VAT group and so Taylor could no longer represent them. As from 1998, Taylor had no right to claim repayment of over-declared output tax generated by Carlton. Taylor, as we have already noted, have made no s80 claim. HMRC have, however, conceded that the fact, that Carlton left Taylor's Group in 1998, did not remove the section 80 claim for the period from 1st April 1990 to 1998 from the appellant. That concession is in accordance with HMRC's published guidance but it does not necessarily represent a correct statement of the law.
>
> 103. If our analysis is wrong, and applying HMRC's concession, then Carlton became entitled to make a claim for repayment and receive such payment when the VAT Group was effectively disbanded on 28 February 2009. They, in fact, made s80 claims in 2006, 2007 and January 2009. It is not necessary for us to decide their validity, but it seems to us that their right to claim insofar as relating to the second period would be perfected by the consequential effect of disbandment of the VAT Group on 28 February 2009. From that point if not before, Taylor had no right to make a claim for repayment or receive such payment. They could not claim in a representative capacity, and they were not the generating taxpayer. They did not, as we have already noted, make a s80 claim.

162. In so far as the basis of the decision was agency (the first part of §91) I would agree with Mr Glick that the representative member is not an agent of the RWS, for the reasons given at §§44-46. However, the real basis of the decision (the second half of §91) appears to be that the deeming effect of s 43 must have a limited effect in order to avoid absurd or unjust results, and in that it is consistent with *Proto Glazing* and the appellant's case.

163. To summarise the position so far, whether one looks at primary liability to an assessment, repayment of overpaid VAT, repayment of under-reclaimed input tax, reclaiming VAT on bad debts, unless *the deeming effect of s 43 is seen as ending, retrospectively, when RWS leaves the VAT group, anomalous and unjust results will follow.* These results cannot have been intended by Parliament, when the purpose of VAT grouping was to provide for a state of affairs to subsist while the companies are VAT grouped. The *purpose* of VAT grouping is not served by deeming the erstwhile representative member to have made the supplies after the RWS is no longer grouped with it. It seems to me that anomalous results are avoided, while the purpose of s 43 is still given effect, if when the RWS leaves the VAT group it takes with it accrued

VAT overpayments or underpayments (although its ex-group members will retain joint and several liability for accrued underpayments). If it joins a new VAT group, then while a member of that group its rights and obligations are enforceable by or against the representative member of that new group.

164. But as I have said the respondents' answer to this is that there is no absurdity because of the RWS right to reimbursement.

The reimbursement point

165. Put simply, my understanding of the respondents' case was that there was no unfairness in the deeming effect of s 43, even after RWS had left the VAT group, because the RWS could rely on rights to recover the tax, primarily from the representative member of its old VAT group, but in addition, to the extent it could not recover from the representative member, from HMRC.

166. The respondents' position was that the representative member was not an agent or trustee for the RWS. Their position was that the cases show that the RWS would have a claim against the erstwhile representative member under the law of restitution. The respondents' position is that such claims are not limited to claims against persons to whom the claimant (RWS) actually paid money, so the claims could be made against a new representative member and/or HMRC.

167. The FTT, Upper Tribunal and Court of Appeal considered the nature of the RWS's claim against the representative member in the case of *Shop Direct* to which I have already referred. The FTT said:

> "In our view, within a group, when payments are made there may be no clarity as to the legal status of those payments at a particular time, or whether they are made by reference to specific legal rights. But that does not mean that, as between members of a group, payments that are made in the absence of an identifiable right are necessarily in the nature of gifts. ….. Where no identifiable right exists, but a payment is made, it will often be the case that such a payment recognises an obligation, on the one hand, and an entitlement on the other.
>
> …...
>
> 34.....we find that these were not gifts by GUS plc, but a payment in recognition of the position, accepted as between independent parties acting at arm's length, that the right to the repayments belonged to SDG. That acceptance can be explained only by the fact that the repayments related to the supplies made in the trade of SDG and the trade of RGL which was transferred to SDG on 25 November 2000.
>
> …..... The natural implication is that LL as the representative member immediately passed the payment to SDG as the company accepted by the group to be entitled to it, as beneficial owner, and we so find."

168. In other words, the FTT found that the accounting to the RWS by the representative member of repayments received from HMRC was not gratuitous but

recognised that the representative member was obliged to hand over the repayment. The case was appealed to the Upper Tribunal. In the Upper Tribunal decision *[2013] UKUT 189 (TCC) (19 April 2013)* Mrs Justice Asplin said

> "[67]....In my judgment, the onward transmission of the repayment by the current representative member of the VAT group which for administrative ease receives the repayment from HMRC, to the trader or successor to the trade by which the original overpayment was generated, cannot strip the repayment of its nature or character. The onward transmission by the representative member is just that and is rendered necessary by the statutory fiction of the VAT group. ….
>
> [117] As the FTT pointed out, there was no clarity as to the legal status of any inter VAT group payments or whether the receipts of the Sums were made with reference to any specific legal rights. In the absence of any indication whatsoever that the Sums were received by way of gift, the FTT was entitled to find that each Appellant was entitled to each respective Sum. In my judgment, …. the FTT was entitled to conclude as it did …., that as between commercial entities operating at arms length, it was likely that payment recognised an obligation and an entitlement in the payee."

169. Mrs Justice Asplin did not have to consider how the obligation on the representative member to repay the RWS arose as the payment had already taken place and was not in dispute. She merely had to decide what was the nature of the receipt in the hands of RWS. She agreed that the FTT was right to consider that it was not a gift: but neither FTT nor UT had to decide the nature of the obligation under which it was paid. I have already referred at §42 to the Court of Appeal's conclusion on the nature of the obligation in this particular case.

170. Mr Glick's take on the case is that it demonstrates that only the representative member can claim under s 80. But that is not an issue in the case nor one which was answered. The decision was that the payment by the representative member to the RWS was a trading receipt. That answer would presumably have been the same if the representative member and RWS were no longer part of the same group. But the case does not deal with that situation. It does not contemplate the possibility (as it had no need to do so) whether, in a case where the RWS is no longer in a VAT group with the representative member, the RWS is the one entitled to claim under s 80 itself.

171. All the *Shop Direct* case really shows is that the Tribunals and Court of Appeal were satisfied that the payment by the representative member to the RWS was not a gift but reflected an obligation owed by the representative member to the RWS.

172. BMW's case is that that obligation arises under the law of restitution. As I understand it, their case is that there is no absurdity to the statutory fiction of s 43 resulting in repayments of VAT to erstwhile representative members of the RWS because the law of restitution will put matters right. Mr Glick relied on the decision of Henderson J in the case of *Investment Trust Companies (in liquidation)* [2012] STC 1150 (*"ITC").*

173. Mr Justice Henderson commenced his decision with a summary of the law on restitutionary claims. At §1 he set out the law as stated by Lord Steyn in *Banque Financiere de la Cite v Parc (Battersea) Ltd* [1998] 1 All ER 737 at 740, which is that there are four questions to be answered in order to determine where a person has a restitutionary right against another:

> (A) has the defendant benefited, in the sense of being enriched?
>
> (B) Was the enrichment at the appellant's expense?
>
> (C) Was the enrichment unjust?
>
> (D) Are there any defences?

The law of restitution can no longer be seen merely as a law to recover monies paid under mistake: it is a law to provide a remedy for unjust enrichment.

174. The facts of the case were that investment trusts (the customers) had bought services from investment trust managers. They paid VAT on the fees and the managers accounted for the VAT to HMRC. The managers, of course, only accounted for net VAT. They off set VAT on their expenses from the gross VAT received. For the sake of simplification, the case proceeded on basis that the VAT on the manager's fee was £100 and VAT on manager's expenses was £25, so that the net amount accounted for by the manager to HMRC was £75.

175. Subsequent to paying the VAT to HMRC, it became clear that the managers' fees were not subject to VAT. So HMRC repaid the managers the (hypothetical) £75. The managers repaid the (hypothetical) £75 to their customers, the investment trusts who were the appellants in the case. The appellants considered that, as they had paid VAT of £100, they were out of pocket by (the hypothetical) £25. So they brought an action against HMRC for the remaining £25.

176. The judge agreed that the manager was only liable to repay its customers £75. This was because he considered that the manager had a 'change of position' defence with respect to the remaining £25. (I am not sure that I entirely follow the reasoning on this. The manager received £100, gave £75 to HMRC and kept £25. The judge's point may have been that, while the £25 represented input tax on expenses, and those expenses would have been incurred irrespective of whether the manager's supplies were subject to VAT, the manager might have charged the customer more if it had not believed it could recover the £25 by way of offset. However, the evidence was that the manager would not have charged any more, so at first blush I would have thought the manager was enriched by the full £100. In any event, the reasoning on 'change of position' does not matter for the purpose of the case before me. The significant point is that the Mr Justice Henderson found that the appellants had no remedy against the manager for the remaining £25).

177. The judge went on to say (§45) that HMRC was enriched by the £25. HMRC got £75 in cash from the manager to which it was clearly not entitled as the supply by the manager was not subject to VAT and it had refunded this and was therefore no longer enriched by it. But HMRC had also received £25 VAT from the suppliers to

the manager. (However, it is difficult to see how that £25 could be said to *unjustly* enrich HMRC as there was no doubt that the expenses were properly subject to VAT. It was the supply by the manager on which VAT was wrongly charged: the VAT on the supplies *to* the managers was correctly charged.)

178. Be that as it may, based on the finding HMRC were unjustly enriched by £25, the ruling of the case was that, as a matter of UK law of restitution, HMRC were liable to repay the £25 to the taxpayer's customers, the appellants. The Judge went on to consider whether the effect of s 80(7) was to override this claim and he held that it did.

The relevance of s 80(7) VATA

179. This section provides:

> "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."

180. Mr Justice Henderson said:

> "[90] It is common ground that for the taxpayers who have themselves accounted to the Revenue for output tax that was not due …, section 80 provides a code for the recovery of the undue VAT which is both exhaustive and excludes other remedies as such as a common law claim for restitution.....
>
> ...It is common ground that the Investment Trusts could never have made a claim under section 80 in respect of the VAT which they paid to the managers because it was the mangers and not the Investment Trusts who paid or accounted for the tax to the Revenue...The critical question therefore is whether...the exclusion of other remedies in sub-section 7 applies only to taxpayers who would in principle be able to claim a refund of undue VAT under sub-section 1 or whether...the exclusion in sub-section 7 is potentially wider in scope and applies to the facts of the present case...."

The court concluded as a matter of statutory construction and in particular by reference to what Parliament must have intended, that s 80(7):

> "should be construed as extending to claims of the present type with the consequence that...the claims must fail"

181. Lastly, Mr Justice Henderson went on to consider whether s 80(7) was lawful as a matter of EU law and considered that *Reemtsma* and *Danfoss* (both discussed below) required the UK to give effect to ITC's rights to repayment. He adjourned consideration of the remaining issue which was whether ITC's claim was out of time. The dispute on this last point centred around whether the time limit was the one in s 80 or the one for restitutionary claims.

182. To summarise the second respondent's view, the *ITC* case demonstrates that MGR's primary claim is against the representative member. To the extent that HMRC is enriched at MGR's expense and MGR has exhausted its remedies against BMW, then, runs their case, HMRC may be liable to repay MGR (subject to defences such as time limits).

183. Therefore, runs the second respondent's case, there is no absurdity in the deeming effect of s 43 because the RWS has rights under common law (on the basis EU law requires s 80(7) to be disapplied) to recover money where the representative member unjustly enriched at its expanse, and to the extent that that does not provide a remedy, the RWS can pursue HMRC. The case shows that to the extent HMRC has a good defence to a claim by the representative member (such as unjust enrichment), the RWS may be able to pursue HMRC.

Are reimbursement rights the answer?

184. But is this analysis right? It seems to me that it overlooks certain matters. Firstly, the representative member is not unjustly enriched at the RWS's expense other than where HMRC repays the representative member the overpaid VAT. Here BMW is seeking repayment from HMRC. But what if it was not? What if the representative member had been dissolved, or simply chose not to take proceedings against HMRC? There is nothing in the doctrine of unjust enrichment as explained in *Banque Financiere de la Cite v Parc (Battersea) Ltd* or *ITC* that would permit the RWS to compel its erstwhile representative member to make a claim against HMRC, in order for the erstwhile representative member to become enriched, so that the RWS could make a claim against it.

185. The answer to that might be that if the erstwhile representative member chooses not to pursue a claim against HMRC, the RWS would have exhausted its remedies against it, and could pursue HMRC directly as the customers did in the *ITC* case. In that case, MGR's claim against HMRC would be under the law of enrichment rather than s 80.

186. That is not the only concern. What happens if the representative member is insolvent? If the representative member can made the s 80 claim and the RWS cannot, HMRC is obliged to repay the representative member. RWS can prove in the representative member's insolvency but the result is likely to be the representative member's creditors get the VAT refund rather than RWS. RWS cannot expect reimbursement from HMRC under the doctrine in *ITC* as HMRC will have the defence that they are no longer enriched: they will have repaid the representative member. So the *ITC* case does not, contrary to what Mr Glick says, remove all absurdity from the interaction of s 43 and s 80.

187. Indeed, the implication of the second respondent's case on this is that, where HMRC is faced, as it is in the case, with competing claims by the representative member under s 80 and a claim by the RWS (theoretically under *ITC*) it must pay the representative member, as paying RWS would be no defence to a s 80 claim, while

paying the representative member under s 80 would be a defence to an *ITC*-type claim by RWS.

188. So, the second respondent's case is that HMRC must repay the representative member under s 80, even if the representative member has no present relationship with the RWS and may never had had a relationship with the RWS, leaving the RWS to the uncertainties of pursuing both the representative member and HMRC under the law of restitution. If this is right, the RWS is likely to lose out if the representative member is insolvent yet makes a s 80 claim, or if it itself is insolvent and (as I am told may apply in this case) the representative member a creditor. The effect, as Mr Codara points out, of giving the deeming effect of s 43 full rein, is that the erstwhile representative member may gain the equivalent status to a preferential creditor in the insolvency of the RWS.

189. Further, while it is accepted in this case that MGR's customers have not borne the burden of the overpaid VAT on the facts of this case, that would not always be the case of a s 80 overpayment by a representative member. However, the more remote the RWS's claim is against HMRC, the less likely it is that its customer will ever be repaid. Theoretically a customer would have to exhaust first its remedies against the RWS, and then against the representative member, before it could apply to HMRC for repayment.

190. Further, the second respondent's case on this in no way deals with the absurdities which arise in allowing the deeming effect of s 43 to survive beyond the RWS membership of a group where there is a tax underpayment, as discussed above at §§108, 109, 125, 143 & 163. Further, I see no reason why the principles of interpretation on deeming (as discussed at §§58-62) should permit an unjust, anomalous and absurd result because a different principle of law might in some cases partly negate the effects, particularly where more litigation would be required to assert those rights.

191. Further, I am considering the limits of a deeming provision in UK law, on the assumption MGR is relying on its rights under UK law. Ignoring EU law, MGR has no rights against HMRC for unjust enrichment because of s 80(7) as held by Mr Justice Henderson in *ITC* (see §§179-183 above). So the second respondent's case on this is very far from providing a complete answer to the injustice and absurdity of the deeming effect of s 43 surviving the departure from the group of the RWS.

192. I reject the second respondent's case that *ITC* is an answer to the anomalies that their interpretation of s 43's deeming effect gives rise to, and I agree with Mr Macnab that *ITC* is irrelevant in this context.

Assignments

193. Another way of testing whether allowing the deeming effect of s 43 to survive the departure from the group of the RWS leads to absurd, unjust or anomalous results is to consider what happens if the right to any repayment of overpaid VAT is assigned. It is indeed an issue I have to consider in this case because an assignment is

the basis of the appellant's claim for the period when RCL and Wholesale were the RWSs.

194. It follows that because it is the respondents' position that the s 80 right to repayment belongs to the representative member (for the time being) up until the point the VAT group (identified by its number) ceases to exist, it is their position that the representative member can assign that right if it chooses, and the RWS has no s 80 right to assign either before or after it leaves the VAT group.

195. In the hearing, I queried whether this was right as a matter of English law. A claim for repayment under s 80 or under the law of restitution/unjust enrichment is a chose in action. An assignment of it without the sale of the business which gave rise to the cause of action is likely to be void for champerty (see the analysis in *Skywell (UK) Limited* [2012] UKFTT 611 (TC)). It is not obvious to me how the representative member could validly assign any s 80 right unless the RWS at the same time transferred to the assignee the business which gave rise to it.

196. While a minor point, the rule against champerty recognises that causes of action should not be freely assignable (unlike the position with debts) because it encourages litigation. Only persons with a proper interest in the outcome of a case can maintain litigation: a person who has purchased a bare right to litigate is not such a person.

> "…the law will not recognise on the grounds of public policy an assignment of a bare right to litigate, that is, a right to litigate unsupported by an interest of a kind sufficient to justify the assignee's pursuit of proceedings for his own benefit."
>
> Per Moore-Bick LJ in *Simpson v Norfolk and Norwich University Hospital NHS Trust at §15.*

197. Therefore, in so far as the respondents' interpretation of the deeming provisions of s 43 result in a split of ownership of the cause in action from the ownership of the business which gave rise to it, public policy would suggest that the deeming effect should be limited because Parliament would not have intended to go against public policy.

198. This suggests that, consistent with what I have said above at §163, the cause of action should remain with the representative member only so long as it is closely linked with the RWS. It would be anomalous for the right to repayment to be split from the business which generated the overpayment so that the deeming effect of s 43 terminates when the RWS leaves the group.

199. Mr Glick suggested that in this case the right to repayment was a debt rather than a chose in action but, while it is defended by HMRC and unquantified, as in this case, it is a chose in action and not a debt. And that is the case even if (as it seems to me) HMRC appear to have accepted that they may have some as yet unquantified liability to make a repayment under *Elida Gibbs* to a recipient unidentified before this decision notice in respect of sales made by the Rover VAT Group.

Conclusion on construction of s 43(1)(b)

200. The purpose of s 43 was to enable companies in common control to be treated for VAT purposes as a single entity. This goes beyond administrative convenience to the point that it can affect the nature of what is supplied (*Kingfisher)* subject to the normal rules of single and multiple supplies.

201. Its purpose is therefore limited in time to when the companies are in common control: its purpose is not fulfilled if companies no longer in common control are yet treated to some extent as still grouped. Moreover, if the deeming effect of s 43(1)(b) does not end when the RWS leaves the VAT group absurd, unjust and anomalous consequences follow in cases involving VAT overpayments, BDR claims, VAT underpayments and assignments of rights to VAT overpayments. Allowing the deeming effect to continue after the RWS has left the group uncouples the burden of paying the VAT from the liability to pay it. It leads to a situation where Company X overpays the VAT but Company Y recovers it from HMRC, or Company X underpays VAT but Company Y is primarily liable for the assessment, even though Company X and Y are no longer connected, and (in some cases) may never have been connected.

202. So I conclude that as a matter of UK law, and applying the principles outlined in *DCC*, the deeming effect of s 43(1)(b) ceases when RWS leaves the group. At that point the RWS (or its new representative member if it joins another VAT group) is able to make (and assign) s 80 and BDR claims for VAT accounted for by the RWS' erstwhile representative member, and the RWS is primarily liable for VAT underpaid while it was a VAT group member (albeit the companies in the group at the time, including the erstwhile representative member, will retain joint and several liability).

203. That conclusion is consistent with the outcome of the cases of *Triad*, *Proto Glazing*, *Taylor Clark*, *Thorn plc* and *Chubb* and consistent with the reasoning in those cases in so far as they were based on the limited extent of the deeming provisions of s 43. It is not inconsistent with the decision and outcome of *Thorn Materials*, although that case concerned s 43(1)(a) rather than s 43(1)(b).

204. That conclusion concludes the preliminary issue in favour of MGR in so far as the period 1 January 1990 to 24 November 1995 is concerned. MGR is entitled to rely on its UK law rights. While it was a member of the VAT group the s 80 right could only be asserted by its representative member; it left the VAT group on 9 May 2000 and at that point the accrued s 80 rights could be asserted by MGR as RWS.

205. So far as the period prior to 1 January 1990 is concerned, I have concluded that any s 80 right would have been with the representative member and not with RCL. RCL would have acquired the right when it left the VAT group on 9 May 2000. Whether MGR can now assert that right depends on whether RCL assigned future rights to it when it assigned to MGR its business by the 1989 assignment. I discuss this below.

206. So far as the period post 24 November 1995 is concerned (the last year of the claim) again my analysis is that the representative member was the person entitled to

make the s 80 claim up until Wholesale left that group on 9 May 2000. At that point the right became Wholesale's as the deeming effect of s 43 came to an end with retrospective effect. Wholesale was free to assign its s 80 right and it is for MGR to prove that it made a valid assignment to it. This was not something I was asked to decide.

The Rover Group claim

207. As stated above, prior 1 January 1990 the business which gave rise to the *Elida Gibbs* claim subject to these proceedings was assumed for the purpose of these proceedings to have been carried on by RCL. MGR claims to be entitled to the VAT overpaid from the period when the business was carried on by RCL because RCL assigned its rights to MGR when it assigned to MGR its business.

208. The *Midlands Co-operative Society Ltd* case [2008] STC 1803 established that rights to reclaim VAT overpayments can be assigned. I have mentioned (§§195-197) that such assignments can be champertous (see *Skywell)* but there was no question of that in the *Midlands Co-op* case as the assignment was part of the sale of the business and the purchaser therefore had an active interest in the business underlying the chose in action assigned to it. That would similarly be the case with 1989 assignment to MGR as any chose in action assigned to MGR was assigned as part of the sale of the business giving rise to the chose in action.

209. The issue here is whether the rights were assigned at all. The respondents' case is that RCL had no rights to assign. Mr Cordara's position is that RCL's rights to repayment arose as soon as the overpayments were made and despite the fact that it remained a member of the Rover VAT Group. I have rejected this (see §95-98). His alternative submission was that RCL gained the right to sue HMRC for recovery of the overpayment at a later point in time (such as when it left the VAT Group) and the 1989 Assignment was effective to assign future as well as existing rights to recover overpaid VAT.

210. As I have noted before, agreement was dated 19 December 1989. The preamble provided:

> "The Vendor has agreed to sell and the Purchaser has agreed to purchase the Business and (save as hereinafter provided) all property, rights and assets of the Vendor used in connection therewith as a going concern as at the Effective Date hereinafter mentioned."

The Vendor was RCL. The Purchaser was MGR (by its then name of BL Cars Ltd).

211. Mr Cordara's point was that the Recital showed that a 'clean sweep' of all RCL's assets to MGR was intended, and that that would include any unknown or even unknown future claims for repayment for substantial sums of money.

212. The operative clause was 2 and provided:

> 2.1 The Vendor shall sell and transfer and the Purchaser shall purchase and take over the Business as a going concern and the properties, rights and assets used in connection therewith as at the Effective Date.
>
> 2.2 Without prejudice to the generality of the provisions of clause 2.1 there shall be included in the sale hereunder:
>
> a) The benefit (so far as the same can lawfully be assigned or transferred to or held in trust for the Purchaser) of the Claims;
>
> b) ….
>
> c) The benefit (so far as the same can lawfully be assigned or transferred to or held in trust for the Purchaser) of the Debts;
>
> d) …..

213. The Effective Date, as I have already said, was 1 January 1990. The "Claims" were defined as:

> "all rights and claims to which the Vendor may be entitled by contract or operation of law in relation to any property, rights or assets included in the sale hereunder."

214. the "debts" were defined as:

> "the book and other debts owing to the Business (and whether or not yet due and payable) at the Effective Date including (without limitation) the outstanding balances of the debts (including interest charges) receivable by the Business under hire-purchase, lease and credit sale agreements entered into by the Vendor prior thereto."

215. Mr Cordara's submission was that, even if the right to repayment only arose at a later point, it was included within "claims" or "debts" and transferred to MGR. It was his case that this put MGR in the position of the appellant in *Midlands Co-op* and able to pursue a claim for overpaid VAT validly assigned to it by the taxpayer who actually overpaid the VAT.

216. He points out that the consideration for the sale of the Business was allotment by MGR of shares to RCL plus the agreement by MGR to take on liability for, and indemnify RCL against, the "Liabilities". These were defined as:

> "all debts, contracts, engagements, obligations and liabilities of the Vendor (or any other subsidiary of Rover Group Holdings Plc) whatsoever and wheresoever, whether accrued, absolute or contingent, and whether existing at the Effective Date or arising thereafter of any nature whatsoever relating to or arising out of the conduct of the Business…..including all liabilities for taxation whether or not presently assessed or anticipated and whether or not dependant on any future event or contingency insofar as such liabilities are attributable to

> the Business and the property, rights and assets included in the sale hereunder….." (my emphasis)

217. Mr Cordara's point was that the definition of "Liablities" clearly included future liability to tax so it was reasonable to suppose the parties intended "Claims" to mirror that provision and include future entitlement to repayment of taxes.

218. The respondents' view was, on the contrary, the absence of the reference to future claims from the definition of "Claims" indicated that it was not intended to mirror "Liabilities" and future entitlement to tax repayments were not intended to be included in the sale to MGR.

219. However, while "Claims" do not specifically mention claims arising in the future, section 2.1 is a very general provision and the sale was "including" the claims. The question is really whether "the Business as a going concern and the properties, rights and assets used in connection therewith as at the Effective Date" was intended to include claims arising in the future which related to something that happened to the business before the Effective Date. My conclusion is that the entire tenor of the agreement is that *everything* to do with the business (with a couple of named exceptions) was intended to be transferred: neither party would have intended a narrow interpretation to be put on clause 2.1 as the deal was not at arm's length. The companies were sufficiently closely linked to both be a part of the same VAT group and so the agreement must be read on the basis it was a "friendly" transfer of the entire business from one group company to another. And for that reason I find that clause 2.1 was intended to include everything, including any unanticipated future entitlement to tax repayments arising out of anything that had happened prior to the Transfer Date.

220. I note in passing that I reject Mr Cordara's submission that RCL's future rights to a claim for VAT overpayment should be seen as a "debt" and assigned as a debt in in equity. As a matter of law, unless liability is certain there is no debt, just a chose in action. As it is clear that HMRC deny both MGR's and RCL's rights to reclaim the VAT said to be overpaid on fleet bonuses, and indeed that is why they are litigating in front of this Tribunal, there was a chose in action and not a debt.

Does the RWS have a right to repayment under EU law?

221. Strictly I do not have to consider the position as a matter of EU law because my conclusion is that MGR succeeds on all parts of its claim (if it can prove the facts which I have only assumed for the purpose of this decision) for the reasons I have given.

222. Nevertheless, the point was argued and I set out my views.

What rights to repayment are conferred by EU law?

In *San Giorgio* C-199/82 [1993] ECR 3595 the CJEU said:

> "[12] In that connection it must be pointed out in the first place that entitlement to the repayment of charges levied by a Member State contrary to the rules of Community law is a consequence of, and an adjunct to, the rights conferred- on individuals by the Community provisions prohibiting charges having an effect equivalent to customs duties or, as the case may be, the discriminatory application of internal taxes. Whilst it is true that repayment may be sought only within the framework of the conditions as to both substance and form, laid down by the various national laws applicable thereto, the fact nevertheless remains, as the Court has consistently held, that those conditions may not be less favourable than those relating to similar claims regarding national charges and they may not be so framed as to render virtually impossible the exercise of rights conferred by Community law."

223. This sets out EU law that HMRC is liable to repay overpaid taxes. The ratio is not helpful in answering the question of *to whom* the repayment must be made, as there was no dispute about that in that case.

Who has the San Giorgio right to repayment?

224. The appellant's primary case is that the *San Giorgio* right rests with the RWS from the moment the VAT is overpaid. Its case is that MGR as RWS bore the economic burden of the supply and that means that the *San Giorgio* right always rested with the RWS and never with the representative member, even when they were in the same VAT group. Mr Cordara's view is that the CJEU have said enough in other cases raising different issues for me to be certain that this is the right interpretation of EU law but that if I am not certain, I should refer it.

225. The respondents' view is that the *San Giorgio* right rests with BMW as the person liable under s 43 to pay the tax.

226. I note that the cases, such as *Comateb* C-192/95 [1997] ECR I-165 (discussed below), talk in terms of "repayment" to "the person required to pay such charges". So it seems to me that the *San Giorgio* right rests, not with the person who actually paid the charges, but with the person who was required by EU law to pay such charges.

227. Who does the 6VD or PVD require to pay the VAT? That is clearly the taxable person. Who is the taxable person where there is VAT group? (The following discussion arises out of a question I raised at the hearing as it was not originally, at least, MGR's case that s 43 did not properly implement art 4(4).)

228. There is very little about VAT grouping in EU law. Art 4(4) – second indent of the 6VD provides, as I have already set out:

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

I note for completeness although I do not think it relevant that the provision is effectively the same in the PVD although it now carries the additional paragraph since 2006:

> A member State exercising the option provided for in the second subparagraph may adopt any measures needed to prevent tax evasion or avoidance through the use of this provision.

229. Art 4(4) gives very wide discretion to the member States. They can adopt "VAT group" rules if they want and, subject to consultation, appear entirely free as to the form of these rules as long as they only group persons who are legally independent but closely bound as described in Art 4(4).

230. The respondents' position was that s 43 implements Art 4(4) second indent: the PVD gives wide discretion on the grouping provisions and the UK has used that discretion to provide, for instance, for a representative member.

231. I am unable to agree. While Art 4(4) does give member states a great deal of latitude, one of the few things on which it is prescriptive is that member states only have a discretion to treat certain persons as a single taxable person. But S 43 VATA does not do this. On the contrary, s 43 treats only the representative member of a VAT group as the taxable person because it provides:

> (1) Where …. any bodies corporate are treated as members of a group any business carried on by a member of the group shall be treated as carried on by the representative member, and -
>
> …..
>
> any supply which …. 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; ...
>
> ….

232. There was a dispute in the hearing whether the members of a VAT group even retain the status of taxable persons while they are a member of a UK VAT group. As a matter of UK VAT law, it appears that they do not because they are deemed to make no supplies: intra group supplies are ignored under s 43(1)(a) and external supplies are deemed to be made by the representative member: s 43(1)(b).

233. In the hearing, HMRC relied on *Commission v Ireland* to show that CJEU did not question the legality of Ireland's similar implementation of VAT grouping. However, Irish law on grouping does not provide for a representative member and the issue in that case (whether non-taxable persons could be members of VAT groups?) was quite distinct.

234. After the hearing HMRC wrote to the Tribunal to draw its attention to the case *European Commission v United Kingdom* [2013] STC 2076. Again this case dealt with the Commission's contention that Art 9 and 11 PVD (ie Art 4(4) 6VD) meant

that only taxable persons could be members of VAT groups and that therefore s 43 did not properly implement art 4(4).

235. The CJEU, as it did in the *Ireland* case, dismissed the Commission's infringement action, ruling that non-taxable persons could be members of VAT groups. HMRC's case is that this decision gives the "all clear" to the UK's VAT grouping provisions and in particular its provisions appointing representative members. I do not agree. The CJEU considered s 43 only in respect of one aspect and made no general comment on its legality. What the CJEU said in that case is of no relevance to the question of the lawfulness under EU law of the UK's representative member provisions. Further, at a number of times in the judgment the CJEU referred to the purpose of Art 11 (Art 4(4) in 6VD) being to "permit a number of persons [to be] regarded as a single taxable person".

236. I note that in *Ampliscientifica Srl* the CJEU's summary of the EU's VAT grouping rules which I have referred to above, but setting it out again was:

> "[19] …national legislation adopted on the basis of [Art 4(4)] allows persons, in particular companies, which are bound to one another by financial, economic and organisation links no longer to be treated as separate taxable persons for the purposes of VAT but to be treated as a single taxable person....It follows that treatment as a single taxable person precludes persons who are thus closely linked form 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...."

237. This precludes the representative member being seen, for the purposes of EU law, as the taxable person. It really precludes representative members at all: the taxable person is the VAT group. BMW cannot claim any *San Giorgio* rights as the person liable to pay the tax. The VAT group was the person liable to pay the tax in EU law.

238. Mr Glick's point was that the UK's representative member rules are simply one way of implementing the Art 4(4) discretion. The UK VAT group is a single taxable entity. After all, only one person can make the VAT returns. I do not agree. The directive provides for all the members of the group to be treated as a single taxable person. It implies that they are all responsible for the submission of a single VAT return, even though, no doubt, that task would be administratively delegated to a single individual. It implies *all* group members are deemed to make the supplies to persons outside the group. The provision of joint and several liability goes someway perhaps to narrowing the gap with the EU rules, but joint and several *liability* is not the same as joint and several *rights*. And it seems to me that Art 4(4) gives all members of the VAT group equal rights as well as equal liabilities, and in so far as s 43 fails to do this, it has failed to properly implement Art 4(4).

239. I note that a later implementation by the UK of Art 4(4) in Schedule 1 paragraph 1A VATA did not go the representative member route but sticks far closer to provisions of art 4(4).

240. So, in the context of groups, while UK law provides for the "taxable person" to be the representative member, EU law provides for the "taxable person" to be all the members of the group. It follows that the *San Giorgio* right to repayment would belong to all the members of the group which made the overpayment because under EU law it is all the members of the group who are deemed to make the supply and therefore deemed to be liable to pay the tax. Under EU law, there is no question of a single one of those group members making a *San Giorgio* claim to the exclusion of other group members.

241. According to the respondents, the VAT group is identified by its VAT number and survives irrespective of companies joining and leaving it and the appointment and retirement of any number of representative members. While this may be convenient for administrative reasons, it goes well beyond what is envisaged by Art 4(4). Art 4(4) provides that the VAT group is its members. It is the membership which identifies the VAT group. It implies that when a company joins or leaves the VAT group, that previous VAT group ceases (although a new one may then exist).

242. Moreover, there is nothing in EU law which regards the VAT group as an entity distinct from its members and which has a life beyond the membership of individual members. So not only is there nothing in EU law to justify BMW making the claim in its own name to the exclusion of MGR, there is certainly nothing to justify BMW doing so after its grouping with MGR has ceased and at a time they no longer retain any economic link with MGR.

Who has the San Giorgio right during membership of the VAT group?

243. As I have said, Mr Cordara's primary submission is that the RWS is the person who accounted for VAT despite the provisions of s 43 and Art 4(4), whether or not it was a member of a VAT group at the time of the overpayment or at the time of the claim.

244. While s 43 appears to remove from group members their status as taxable persons for the reasons given at §232, so far as Art 4(4) is concerned, group members become a part of a single taxable person and in that sense do not lose their status as (a part of) a taxable person.

245. Mr Cordara's view is that the RWS as the taxable person who bore the economic burden is the taxpayer with the *San Giorgio* right from the moment of overpayment.

246. A straightforward reading of Art 4(4) suggests to me that, during the existence of the VAT group and in particular while the RWS is a member of the group, the taxable person is the VAT Group and the person with the *San Giorgio* right will be the VAT group as a whole. Therefore, while the RWS is a member of the group it cannot assert a *San Giorgio* right against other group members: it can only assert a *San Giorgio* right with its group members. As indeed membership of the group requires the members to have close economic links, it seems likely the requirement to act together presents no practical difficulties.

247. The effect of my interpretation is that RCL would not have an individual right to repayment while it was a VAT group member and therefore it would be unable to assign that right. It could assign future rights and of course I have found that it did.

248. While I am inclined to this view I agree that it is a novel question of EU law and one which, if it was necessary to my decision, ought to be referred. But as I have said, because of my interpretation of the 1989 Assignment, the resolution of this issue of EU law is not necessary for my decision.

Who would have the San Giorgio right after group membership ceases?

249. It is less obvious from Art 4(4) who would have the *San Giorgio* rights after the group has terminated or members have left. The "person required to pay such charges" was the VAT group, which was a group of closely linked entities, but which no longer exists, or at least no longer exists with the same membership as when the overpayment was made. It is clear:

- *San Giorgio* would not give a right to a representative member as against other group members;
- *San Giorgio* would not give entitlement to a company which was not a member of the group at the time of the supply.

250. So the right to recovery would not be with BMW by itself, whether because it was representative member at the time or is the representative member now of a group to which RWS once belonged. But it is not clear whether the repayment claim would rest with the RWS as the person who bore the economic burden or whether, say, the old VAT group would have to act together to make the claim.

251. A logical and practical solution, which resonates with the CJEU's existing case law on economic burden, would be for the claim to rest with the RWS from the moment it leaves the VAT group. The RWS always bore the burden of the overpayment and it is no longer a member of a group under which it has agreed to act as if it were a single taxpayer with other group members. To require the group members which comprised the group of which the RWS was once a member to make the claim as a whole would involve many practical difficulties, not least of which that the other group members would be unlikely to have an interest in pursuing the claim if they no longer have a connection with the RWS (on the assumption that any sums reclaimed would under the law of restitution ultimately belong to the RWS).

252. HMRC do not agree. Mr Macnab points to *Commission v Ireland* in which the CJEU rejected the Commission's contention that VAT grouping is an exception to be narrowly construed. Therefore, he argues that the effects of VAT grouping should not be narrowly construed. The effects continue after group membership has ceased, he says. Companies join VAT groups voluntarily: they voluntarily surrender their individual taxable person status and all the rights and obligations that go with it. They must live with the consequences of that.

253. Mr Glick sees *Reemtsma* C-34/05 [2008] STC 3448 (discussed below) as the ultimate answer to MGR's EU law claim. He says it is apparent from their decision in this case that the CJEU does not consider the right to reclaim to necessarily follows the person who bore the economic burden of the tax. I consider, however, that *Reemtsma* is very far from a conclusive answer to the question of which group member is entitled to claim for VAT overpaid by a group and that is because:

- It is clear that the CJEU considered that ultimately the tax should return to the person who bore the economic burden, even if that person may not have a direct claim against the tax authorities;

- *Reemtsma* deals with the rights of customers and not the competing rights of different members of a single taxable person in the form of a VAT group.

254. I consider *Reemtsma* is no help in resolving the issue of which VAT group member(s) can recover overpaid VAT after the RWS has left the VAT group, other than indicating a general policy that ultimately the repayment should accrue to the benefit of the RWS.

255. I am unable to agree with the respondents that as a matter of EU law the right to recovery of overpaid VAT would remain with the members of the VAT group after the RWS left the group. While a company is a member of a VAT group by choice, for the effects of grouping to continue after it has chosen to leave, leaves companies which exit a VAT group prey to capricious and unforeseeable consequences. By joining a VAT group it can't be taken to have intended to have given up to its group members, after its economic link with them has ceased, the right to repayment of any future overpayments (while a VAT group member) of VAT in respect of its own business.

256. Nevertheless, there it seems that this really is a novel question of EU law which I would refer if necessary for my decision.

What if BMW has the San Giorgio right to repayment?

257. Further, even assuming that I am wrong to say that BMW never had the *San Giorgio* right to repayment as EU law recognises the VAT group and not the representative member as the taxable person, it was still MGR's case that as a matter of EU law the right to claim the repayment would now rest with MGR, for a different reason. Mr Cordara's view is that, even if BMW would otherwise have the *San Giorgio* right, BMW had no *San Giorgio* right because, he says, CJEU case law shows that a taxpayer who has passed on the VAT to another person has no *San Giorgio* right. For this view Mr Cordara relies on *Societe Comateb*.

258. That case was about whether the French government was liable to repay illegal taxes. It established the rule that repayment need not be made where the tax had been passed on: at [21] the CJEU said that there was an exception to the *San Giorgio* principle:

> "where it is established that the person required to pay such charges has actually passed them on to other persons.
>
> [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."

259. Mr Cordara's point is that the RWS puts the representative member in funds to pay the VAT; if the representative member obtains repayment of overpaid VAT from HMRC it is, as the CJEU said in §22 of *Comateb*, tantamount to paying the representative member twice and results in unjust enrichment, whilst failing to give the RWS any remedy for its overpayment to (or via) the representative member.

260. Mr Glick does not agree that *Comateb* has any relevance to the VAT grouping situation: *Comateb* dealt with the position where a supplier was put in funds by its customer. He also considers that being put in funds by the group member is not the same as "passing on".

261. Mr Glick's view relies on the later CJEU case of *Lady & Kid* C-398/09 [2012] STC 854. This case was about whether a member state has any other unjust enrichment defence to claim for a repayment of overpaid taxes other than passing on, and, in particular, whether the fact that the unlawful tax replaced a lawful tax could be a defence. The CJEU rejected the possibility of widely defined defence of unjust enrichment. It repeated the *San Giorgio* ruling and went on to say:

> "[18] However, by way of exception to the principle of reimbursement of taxes incompatible with European Union law, repayment of a tax wrongly paid can be refused where it would entail unjust enrichment of the persons concerned. The protection of the rights so guaranteed by the legal order of the European Union does not require repayment of taxes, charges and duties levied in breach of European Union law where it is established that the person required to pay such charges has actually passed them on to other persons (see *Comateb and Others*, paragraph 21).
>
> [19] 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 (*Comateb and Others*, paragraph 22).
>
> [20] None the less, since such a refusal of reimbursement of a tax levied on the sale of goods is a limitation of a subjective right derived from the legal order of the European Union, it must be interpreted narrowly. Accordingly, the direct passing on to the purchaser of the tax

> wrongly levied constitutes the sole exception to the right to reimbursement of tax levied in breach of European Union law."

262. Mr Cordara's point is that the underlying rationale of the decisions is that the right to repayment only arises in so far as a taxpayer has borne the economic burden of paying the tax. BMW, he says, did not bear the economic burden, so has no *San Giorgio* right.

263. BMW's view is that the case law shows that the CJEU has put a very narrow interpretation on the unjust enrichment defence in the context of *San Giorgio* claims. The *only* defence is passing on to a customer. BMW did not pass on the VAT to a customer. It was put in funds by a group member.

264. Further, he says MGR's case is a leap of deduction in that even if the persons who did not bear the economic burden are not entitled to a refund, that does not mean that a person who did bear the economic burden is entitled to the refund. For this view, reference was made to *Reemtsma* and *Danfoss* which demonstrate that a customer who bore the economic burden of the tax, but who did not have liability to account for the VAT to the tax authorities, only has a limited right of recovery against the tax authorities.

265. In *Reemtsma* the German customer was charged and paid VAT to its Italian supplier for services supplied. The supplier accounted for the tax to the Italian tax authorities. But as a matter of law no VAT was due on these particular cross border supplies. An assumption underlying the case apparent from §29 is that Italian law enabled the German customer to make a claim to against supplier to recover the overpaid tax, and the supplier to claim against tax authority for the overpaid tax.

266. The advocate general said:

> "[86]...Consequently there is no need to allow a direct claim by the customer against the tax authorities, of the kind which Reemtsma appears to have attempt to bring, *unless* the basic system of remedies has been set in train but has, as a result of material circumstances unrelated to the merits of the claim, failed to produce the normal outcome."

By a footnote, Ms Sharpston gives as an example of something unrelated to the merits of the claim as the insolvency of the supplier.

267. She repeats the comment in her conclusion at [92]:

> "where however success in such a civil action is precluded by material circumstances unrelated to the merits of the claim, national law must provide, in compliance with the principle of neutrality of VAT, the principle of effectiveness and the prohibition of unjust enrichment on

> the part of the tax authorities, for a means whereby the customer who has borne the burden of the amount invoiced in error m ay recover that amount from the tax authorities...."

268. The CJEU's decision was:

> "[31]...Article 21 [6VD] thus establishes the basic rule that only the supplier is liable for payment of VAT and subject to obligations towards the tax authorities. [33]...only the supplier must be considered to be liable for payment of VAT for the purposes of the tax authorities of the member state where the services are supplied.....
>
> [41] … if reimbursement of the VAT becomes impossible or excessively difficult, in particular in the case of the insolvency of the supplier, those principles [of neutrality and effectiveness] may require that the recipient of the services to be able to address his application for reimbursement to the tax authorities directly …."

269. Another assumption that must underlie these statements is that where the customer is able to pursue the national authorities direct, the supplier will have no claim against the tax authorities. In other words, an insolvent supplier who passed on the VAT charge to its customers will be unable to pursue a *San Giorgio* claim. Indeed this follows from *Comateb* and *Lady & Kid* that "passing on" is an absolute defence to a *San Giorgio* claim.

270. The sum of these cases demonstrates that the person who accounted for VAT which was not due is absolutely entitled to repayment from the taxing authorities unless and to the extent it can be demonstrated to have passed on the charge; the customer who bore the economic burden will also have a direct right of recovery against the tax authorities but only to the extent it has been unsuccessful in recovering the tax from its supplier.

271. This suggests that where the supplier did pass on the "VAT" charge (the wrongly charged tax) to its customer, the supplier will have no claim against the tax authorities, and while the customer would be required to exhaust its remedies against the supplier first, where the supplier has a defence of change of position (ie it paid the tax to HMRC), the customer can take direct action against the tax authority for repayment. The supplier virtually drops from the picture.

272. The matter was considered again by the CJEU in *Danfoss A/S and another* C-94/10 [2013] STC.

273. This case involved an overpayment of excise duty. The supplier passed on the tax charge to its customer. It did not lodge a claim with the tax authorities for repayment. So the customer made a direct claim against the tax authorities. The CJEU repeated what it said in *Reemtsma*. The decision suggests it is for the national courts to decide whether it is "virtually impossible or excessively difficult" for the

customer to obtain a refund from the supplier, and, if it is, to allow a direct claim against the tax authority.

274. However, under English law it must be "virtually impossible" for a customer to obtain a refund from its supplier who has *not* sought to recover the overpayment from HMRC because the supplier will be able to rely on a change of position defence. Of course that position does not arise here as BMW is seeking repayment.

275. Mr Cordara also relied on *Alakor Gabonatermelo es Forgalmazo Kft* C-191/12. The taxpayer reclaimed input tax which had been incorrectly withheld from it. It had nevertheless been compensated for a part of the unrecovered input tax by way of government subsidy. The CJEU said it was not entitled to recover the input tax to the extent it had been compensated by the subsidy:

> "[33] It follows that, in order to neutralise the economic burden relating to the prohibition on deducting input tax, the amount of the repayment which the application…may claim must correspond to the difference between first, the amount of VAT which Alakor was unable to deduct…and, second, the amount of the aid granted to Alakor which exceeds that which would have been granted had it not been prevented from exercising its right to deduct."

276. As Mr Macnab rightly points out this is not a *San Giorgio* claim but simply a claim to repayment of input tax. *Lady & Kid* shows that the *Alakor* position does not apply to tax overpayments.

277. Where does this leave the MGR case?

278. The respondents press the view that being put in funds by the RWS is not the same as "passing on" the VAT to the customer. Therefore, they say that being put in funds by MGR is not defence to BMW's *San Giorgio* claim and HMRC must pay BMW while MGR is restricted to making a claim against BMW (although presumably they accept it could claim against HMRC to the extent that the VAT sought by MGR is for a period not covered by BMW's claim.)

279. MGR do not consider that their rights against HMRC are as limited as those of customers. MGR was not a customer. It was the supplier but for the fiction of s 43.

280. My preliminary conclusion on this is that, while *Lady & Kid* established that "passing on" is the only defence to a claim by the taxable person for repayment of overpaid tax, this case seems to be the archetypal case of "passing on" because BMW was (presumed to be) put in funds by MGR before it paid over the tax to HMRC. Thus, HMRC could refuse to repay BMW.

281. And if HMRC have a defence to BMW's claim, then by analogy with *Reemtsma*, my preliminary view would be that HMRC would be liable to repay MGR because MGR was the person who (is presumed to have) borne the economic burden of the tax and it is impossible for it to pursue a remedy against BMW because BMW is unable to recover the money from HMRC (see above paragraph) and would therefore have a change of position defence against a claim from MGR.

282. However, I agree that these are novel questions and if essential in order to decide this preliminary hearing, I would refer the matter to the CJEU.

Conclusions on EU law

283. In my view, during the currency of the VAT group, the *San Giorgio* right belonged to the group as a whole. Whether MGR can claim for the period it was RWS depends on whether EU law transfers the *San Giorgio* right to the RWS when it leaves the VAT group. I am inclined to the view that it does (for much the same reasons as I found that s 43 had a limited deeming effect for the purpose of UK law) but if this point was essential to my decision I would refer it to the CJEU for a preliminary ruling.

284. Whether MGR can claim for the periods RCL and Wholesale were RWS depends on the answer to the same question *and* whether there was a valid assignment to MGR of their rights. So far as RCL is concerned, it has done so – see §§207-220 above. I was not asked to consider the terms of the Wholesale assignment.

285. Even if I am entirely wrong on this, in my preliminary view on EU law MGR would succeed on the *Reemtsma* line of cases that HMRC has a complete defence to BMW's claim because BMW was put in funds by the RWS; enforcing a claim against BMW in that situation is impossible as BMW would have a good defence (change of position) and therefore MGR can bring a direct claim against HMRC. S80(7) has to be disapplied, as per *ITC*, to comply with EU law.

286. However, the issues on which I express preliminary views are novel ones in EU law and I would refer them if essential to decide the preliminary hearing in this appeal.

Reference to CJEU?

287. However, it seems to me that MGR wins its case under UK law and does not need to rely on any EU law rights which it may possess. The correct interpretation of EU law is therefore not necessary to my decision and for that reason the matter should not be referred.

288. I recognise that if my decision on UK law is successfully appealed, MGR's EU law rights may become critical and a court may later refer. Mr Cordara tells me that his client, in liquidation, would prefer a referral earlier rather than later in proceedings. However, in the circumstances that MGR have won on UK law, such a referral would fail to determine any issue actually arising in this case and I am unable to make the reference.

A nasty trap for HMRC?

289. While no reference was made to this in the hearing, as I have said this case appears to me to raise the spectre for HMRC that it might be obliged to repay the tax *twice*. If I am wrong on my interpretation of UK law and the right of repayment

belongs to BMW, then it seems MGR may nevertheless have rights to repayment under EU law. If such EU law rights are found to exist by the CJEU, then MGR are entitled to rely on their EU law rights in the same way BMW would be able to rely on UK law (if I am wrong in saying they have no rights to repayment under UK law

The Commission Communication

290. By way of footnote, I note that I was referred by Mr Glick to a Commission Communication on VAT Grouping. The parties accepted it had no authority and indeed that the cases of *Commission v Ireland* and *Commission v United Kingdom* indicated that the Commission's views on grouping had not always been entirely correct. The particular part of the document relied on by BMW was the Commission's statement:

> "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..."
>
> "it follows that when a VAT group eases 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"

291. Mr Glick considered that the last sentence qualified only the immediately preceeding sentence. He said it was support for his view that the right to repayment of overpaid VAT remained with the VAT group up to the moment it was dissolved and only then reverted to the individual RWS. Mr Cordara's view was that the last sentence qualified both preceding sentences. In other words, he considered that the Commission's view was that the right to repayment of overpaid VAT reverted to the RWS when it left the VAT group irrespective of whether the VAT group continued in existence.

292. I prefer Mr Cordara's interpretation as I consider this to be more logical, for all the reasons I have given above. However, it remains the case that the Commission's views have no force of law so this does not advance either party's case.

Does it matter if s 80 does not correctly implement EU law?

293. By way of another footnote, I mention in passing HMRC's case was that it doesn't matter if s 80 does not properly implement EU law, and in particular gives the right to repayment to BMW rather than MGR. I only mention this in passing as my decision is that s 80 does give the repayment right to MGR from the moment it left the VAT group and the submissions on this do not bear on the outcome.

294. HMRC's case is that there is no directly effective right to repayment because s 80 does not implement any provision of the PVD. For this Mr Macnab relies on the Upper Tribunal decision in *F J Chalke Ltd* [2009] STC 2027. In that case the appellants

sought compound interest on repayments to them under s 80. In an obiter dicta the Tribunal said:

> [100] It is a general principle of statutory construction that domestic legislation intended to implement Community legislation, in particular directives, will be construed in the light of, and so far as possible in a way to give effect to, the relevant Community instrument. This is a principle of Community law which finds statutory force in s 2 of the European Communities Act 1972. It is a strong principle and can lead to some perhaps surprising results. As we have already pointed out, however, there is nowhere in the Sixth Directive or in any other relevant Community legislation any requirement concerning repayment of overpaid VAT, let alone interest on VAT. The obligation to make repayment of the tax and to make payment of interest rests on the principles which we have considered earlier in this decision, in particular the San Giorgio principle and its application, as explained by Henderson J, to interest. (my emphasis) …..
>
> [103] The first is that the *Marleasing* principle is concerned to ensure that Community legislation is given full effect in member states. National legislation which is enacted specifically for the purpose of implementing a directive is to be assumed to be intended fully to implement the directive and is to be construed conformably in so far as possible. It has nothing to say about the interpretation of a national legislative provision outside the context of the implementation of Community legislation. It may be that a piece of domestic legislation which is enacted to give effect to some other Community law right—for instance, a *San Giorgio* right to repayment of charges wrongfully levied—would fall to be construed against the background of that purpose; but that is not part of the *Marleasing* principle.
>
> [105] The second point (see paragraph 115 of Arden LJ's judgment) is that there is no narrow focus on domestic implementing legislation (although it may be the primary focus) rather than on national law as a whole. Accordingly, if domestic law makes provision somewhere for that which is required by directive, it does not matter that it cannot be found in the particular piece of domestic legislation which is enacted to implement that directive.
>
> [106] It follows from these two points taken together that there is nothing in *Marleasing* or *Pfeiffer* which would require the right to compound interest in the present cases to be found within the 1994 Act *even if* the Sixth Directive had made provision for repayment of charges wrongfully levied. Still less is there any such requirement where the right to compound interest is not found in the Sixth Directive but is a right which arises under general principles of Community law. It is enough that an appropriate remedy is available under English law which gives full effect to the claimants' Community entitlement.

295. In my view this case does not say that MGR or RCL have no effective right to repayment of overpaid VAT, even if under *San Giorgio* they are the persons entitled to repayment. The case was merely about statutory construction. The ratio seems to

be that it is enough that UK law gives a taxpayer the *San Giorgio* right to repayment: it does not matter if that right is not contained in VATA. The correct legal position is that the UK government must give effect to *San Giorgio* and repay the overpaid tax to the taxpayer who is entitled. It is no authority for saying that, even if RWS is the taxpayer with the *San Giorgio* right, HMRC do not have to repay the RWS because the RWS has (or may have) a right to claim under the law of unjust enrichment against the representative member.

296. 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.

BARBARA MOSEDALE
TRIBUNAL JUDGE

RELEASE DATE: 31 March 2014