[2018] UKFTT 0251 (TC)

TC06483

Appeal number: TC/2012/04492

VALUE ADDED TAX – s80 of Value Added Tax Act 1994 – whether appellant made a valid claim under s80(1B) – no – whether the "set off" provisions of s81(3) and s81(3A) resulted in the Appellant making a "payment" to HMRC – no – effect of decision of Court of Appeal in* Birmingham Hippodrome *– appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

THE RANK GROUP PLC **Appellant**

- and -

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

TRIBUNAL: JUDGE JONATHAN RICHARDS

Sitting in public at Taylor House, Rosebery Avenue, London on 5 to 6 March 2018

Andrew Hitchmough QC and Laura Poots, instructed by PwC, for the Appellant

Andrew Macnab, instructed by the General Counsel and Solicitor for HM Revenue & Customs, for the Respondents

DECISION

1. This appeal gives rise to two issues:

(1) Whether a claim made by the Appellant on 26 June 2013 was an in-time claim to recover an amount paid to HMRC by way of VAT that was not due to them, under s80(1B) of the Value Added Tax Act 1994 ("VATA 1994").

(2) Assuming there was a valid, in-time claim under s80(1B), whether that claim should be allowed.

2. The Appellant argues that it has made a valid claim under s80(1B) of VATA 1994 and that it is entitled to the amount claimed applying the relevant statutory conditions and the principles set out by the Court of Appeal in *Birmingham Hippodrome Theatre Trust Limited v HMRC* [2014] STC 2222. HMRC argue that there has been no valid claim under s80(1B) and, in any event, the Appellant is not entitled to the amount claimed.

Facts

3. Few, if any, facts were in dispute and neither party relied on witness evidence. Rather, both parties made submissions by reference to an agreed bundle of documents. They had also agreed a Statement of Agreed Facts. My findings of fact, which incorporate relevant parts of the Statement of Agreed Facts, are set out at [4] to [12] below.

4. The Appellant is the representative member of the Rank VAT group and has at all relevant times been registered for VAT. The Appellant operates a number of bingo clubs. At all material times, the Appellant made supplies of mechanised and cash bingo to members of the public. Until 2009, in accordance with HMRC's then practice, the Appellant treated its supplies of bingo as taxable at the standard rate and accounted for VAT accordingly. However, following the decision of the Court of Justice of the European Union in the joined cases of *Linneweber* (C-453-02) *and Savvas Akriditis* (C-462/02), it was established that the Appellant's supplies should have been treated as exempt for VAT purposes. Had the Appellant's supplies been treated as exempt when they were made, two consequences would have flowed: first the Appellant would not have been liable to account for output VAT on supplies that it made; second it would not have been entitled to credit for input tax that was connected with supplies of bingo.

5. The Appellant has made claims for repayment of VAT ("Section 80 Claims") under s80 of VATA 1994. HMRC have paid three of those claims ("Claims (i) to (iii)"). In giving effect to the claims that it paid, HMRC have required the Appellant to "take the rough with the smooth" by taking into account both VAT that the Appellant wrongly paid and also input tax for which the Appellant was wrongly given credit. In short, where HMRC paid a Section 80 Claim, HMRC paid the Appellant a net amount that took into account, as a reduction, the amount of input tax associated with supplies of bingo for which the Appellant was wrongly given credit.

6. HMRC rejected a fourth Section 80 Claim ("Claim (iv)") on the grounds that it was made out of time. The Appellant appealed against this decision and litigation ensued in

which the Appellant argued that the time limit in s80 of VATA 1994 breached EU law principles of equivalence, effectiveness and equal treatment. The Appellant was, however, unsuccessful in that litigation and therefore, this appeal proceeds on the basis that HMRC were correct to reject Claim (iv) on the ground that it was out of time. A summary of Claims (i) to (iii) and Claim (iv) is set out in the following table[1].

Claim no.	Date	Periods	Over-declared output tax (£)	Associated input tax set off (£)	Amount repaid (£)	Status of claim
(i)	30.3.09	6/73 to 9/96	132,182,214	57,353,862	74,828,352	Paid on 22.3.11
(ii)	21.10.10	12/02 to 6/04	10,133,680	3,041,427	7,092,253	Paid on 16.2.11
(iii)	Various	3/03 to 6/09	24,573,844	8,484,039	16,089,805	Paid on 21.5.10
(iv)	9.11.11	12/96 to 12/02	118,445,546.11	51,393,522.46[2]	nil	Rejected

7. As can be seen from the table, HMRC accepted Claims (i) to (iii) as in-time valid claims and paid the Appellant the net sum in respect of those claims of £98,010,410 (representing £166,889,738 of over-declared output tax reduced by £68,879,328 of input tax overclaimed).

8. It was common ground that, at the time HMRC made payments to the Appellant in respect of Claims (i) to (iii) they were out of time to make assessments on the Appellant to recover input tax incurred in connection with supplies of bingo for which the Appellant was wrongly given credit.

9. Since HMRC rejected Claim (iv) as being out of time, in respect of its VAT periods 12/96 to 12/02, the Appellant paid an aggregate sum of £67,052,023.65 to HMRC (i.e. £118,445,546.11 of output tax less recoverable associated input tax of £51,393,522.46) that it would not have been liable to pay if it had treated its supplies of bingo as exempt for VAT purposes.

10. In the various letters making Claims (i) to (iii), the Appellant provided information on both the gross amount of output tax that it had paid on supplies of bingo and the gross amount of input tax for which it had obtained credit attributable to supplies of bingo. The Appellant made it clear in all of those letters that it expected HMRC to account to it only for the net sum (i.e. output tax as reduced by input tax).

[1] The parties were agreed that the figures in the table were an accurate reflection of both the amounts of VAT that were the subject of the claims and the amounts of output tax and input tax actually incurred or credited.

[2] Since HMRC did not pay Claim (iv), this figure does not represent an amount that HMRC actually deducted in settling Claim (iv). Rather, it represents the figure that Appellant accepts should have been deducted if Claim (iv) had been paid.

11. By letter dated 26 June 2013, and as further particularised in a letter dated 30 June 2014, the Appellant submitted a further claim (the "Birmingham Hippodrome Claim") to HMRC. In the Birmingham Hippodrome Claim, the Appellant asserted that:

> (1) In determining the amounts of the repayments of Claims (i) to (iii), HMRC had applied s81(3A) of VATA 1994. In applying s81(3A), when the repayments of Claims (i) to (iii) were made, HMRC should have given the Appellant credit for the net VAT overpaid in the 12/96 to 12/02 periods of £67,052,023.65 which was not VAT due to HMRC.
>
> (2) Therefore, rather than reducing the amount of Claims (i) to (iii) by the amount of £68,879,328 in respect of overclaimed input tax, HMRC should only have reduced Claims (i) to (iii) by the lesser sum of £1,827,304.35 (thereby giving the Appellant credit for the net £67,052,023.65 that it had overpaid in 12/96 to 12/02).
>
> (3) HMRC's failure to give the Appellant credit for the sum of £67,052,023.65 meant that the Appellant had, when Claims (i) to (iii) were settled, made an overpayment of VAT of £67,052,023.65 which was not VAT due to HMRC.
>
> (4) The Appellant was entitled to recover the Claim Value.

12. HMRC rejected the Birmingham Hippodrome Claim by letter dated 10 July 2013. By a letter dated 26 July 2013, the Appellant requested an independent review of HMRC's decision set out in their letter of 10 July 2013. In a letter dated 11 September 2013, HMRC upheld their original decision. On 7 October 2013, the Appellant made an in-time appeal against HMRC's decision to reject the Birmingham Hippodrome Claim.

Legislation

13. The relevant statutory provisions governing the Birmingham Hippodrome Claim are set out in s80 of VATA 1994 which, as in force for the relevant time, are as follows:

> **80 Credit for, or repayment of, overstated or overpaid VAT**
>
> (1) Where a person—
>
> (a) has accounted to the Commissioners for VAT for a prescribed accounting period (whenever ended), and
>
> (b) in doing so, has brought into account as output tax an amount that was not output tax due,
>
> the Commissioners shall be liable to credit the person with that amount.
>
> …
>
> (1B) Where a person has for a prescribed accounting period (whenever ended) paid to the Commissioners an amount by way of VAT that was not VAT due to them, otherwise than as a result of—
>
> (a) an amount that was not output tax due being brought into account as output tax, or

(b) an amount of input tax allowable under section 26 not being brought into account,

the Commissioners shall be liable to repay to that person the amount so paid.

(2) The Commissioners shall only be liable to credit or repay an amount under this section on a claim being made for the purpose.

(2A) Where—

(a) as a result of a claim under this section by virtue of subsection (1) or (1A) above an amount falls to be credited to a person, and

(b) after setting any sums against it under or by virtue of this Act, some or all of that amount remains to his credit,

the Commissioners shall be liable to pay (or repay) to him so much of that amount as so remains….

(4) The Commissioners shall not be liable on a claim under this section—

(a) to credit an amount to a person under subsection (1) or (1A) above, or

(b) to repay an amount to a person under subsection (1B) above,

if the claim is made more than 4 years after the relevant date.

(4ZA) The relevant date is—

(a) in the case of a claim by virtue of subsection (1) above, the end of the prescribed accounting period mentioned in that subsection, unless paragraph (b) below applies;

…

(e) in the case of a claim by virtue of subsection (1B) above, the date on which the payment was made.

…

(6) A claim under this section shall be made in such form and manner and shall be supported by such documentary evidence as the Commissioners prescribe by regulations; and regulations under this subsection may make different provision for different cases.

(7) Except as provided by this section the Commissioners shall not be liable to credit or repay any amount accounted for or paid to them by way of VAT that was not VAT due to them

14. Section 81(3) and s81(3A) of VATA 1994 deal with the setting off of sums payable to HMRC and sums payable by HMRC as follows:

81 Interest given by way of credit and set-off of credits

…

(3) Subject to subsection (1) above, in any case where—

(a) an amount is due from the Commissioners to any person under any provision of this Act, and

(b) that person is liable to pay a sum by way of VAT, penalty, interest or surcharge,

the amount referred to in paragraph (a) above shall be set against the sum referred to in paragraph (b) above and, accordingly, to the extent of the set-off, the obligations of the Commissioners and the person concerned shall be discharged.

(3A) Where—

(a) the Commissioners are liable to pay or repay any amount to any person under this Act,

(b) that amount falls to be paid or repaid in consequence of a mistake previously made about whether or to what extent amounts were payable under this Act to or by that person, and

(c) by reason of that mistake a liability of that person to pay a sum by way of VAT, penalty, interest or surcharge was not assessed, was not enforced or was not satisfied,

any limitation on the time within which the Commissioners are entitled to take steps for recovering that sum shall be disregarded in determining whether that sum is required by subsection (3) above to be set against the amount mentioned in paragraph (a) above.

The arguments of the parties

The Appellant's arguments

15. The Appellant argues that it should be paid the amount of the Birmingham Hippodrome Claim by applying the following chain of reasoning:

(1) It was a matter entirely for UK domestic law to prescribe how claims for repayment of VAT should be dealt with as a procedural matter (see, for example, paragraph 34 of the CJEU's decision in *Marks & Spencer Plc v Customs & Excise Commissioners* (Case C-62/00) [2002] STC 1036)[3]. Parliament decided, in s80(1) of VATA 1994 to provide that, in the circumstances of Claims (i) to (iii), in the first instance, the Appellant's claim was for the entire gross amount of the output tax that it had wrongly paid in respect of supplies of bingo.

(2) Section 80(2A) of VATA 1994 modified the position set out in s80(1) by requiring HMRC to set against the gross amount of output tax that fell to be repaid any sums permitted "under or by virtue of" other provisions of VATA 1994.

(3) Section 81(3) was the relevant operative provision of VATA 1994 that permitted HMRC to set off sums that the Appellant was "liable to pay" to HMRC against the gross amount of output tax that fell to be repaid. Ordinarily, the Appellant would only be "liable to pay" HMRC an amount

[3] Of course, any such procedural rules must comply with EU principles of equivalence and effectiveness, but it is no longer disputed that the UK provisions set out in s80 do comply with those principles.

in respect of input tax wrongly credited if HMRC made an assessment to recover that input tax and, at the time HMRC dealt with Claims (i) to (iii), they were out of time to make such an assessment. However, even though HMRC were out of time to assess the Appellant for overclaimed input tax, s 81(3A) of VATA 1994 required HMRC to set that overclaimed input tax off against the Appellant's claim for repayment.

(4) Therefore, the Appellant had no quarrel with HMRC setting off overclaimed input tax off against overpaid output tax when dealing with Claims (i) to (iii). However, it argued that the *Birmingham Hippodrome* case established that, where HMRC rely on s81(3A), they must take into account all of the consequences of the same mistake and, in particular, must take into account all other over and under-declarations whenever occurring.

(5) In the present case, HMRC failed, when exercising their right of set-off under s81(3), to take account of the fact that, for periods 12/96 to 12/02, as a result of the same mistake that led to the s80 claim (i.e. the mistaken belief that supplies of bingo were taxable and not exempt), the Appellant had made a net overdeclaration of £67,052,023.65 (as referred to at [9]). Having ignored this net overdeclaration, HMRC set off £68,879,328 against Claims (i) to (iii). If they had properly taken the net over-declaration into account, they would only have set off £1,827,304.35.

(6) The consequence of HMRC's failure was that the Appellant wrongly paid to HMRC (by way of set off) the sum of £67,052,023.65 which was not due to HMRC. In the Appellant's skeleton argument[4] this sum was characterised as "the input tax recovered by HMRC in the periods covered by [Claims (i) to (iii)]". The relevant "payments" to HMRC were made on 21 May 2010, 16 February 2011 and 22 March 2011 (being the dates on which HMRC made payments to the Appellant after exercising their right of set-off under s81(3) of VATA 1994).

(7) Since the Appellant had made the "payments" referred to at [(6)], the Appellant was entitled to make a claim under s80(1B) of VATA 1994. That claim was in time because it was made on 26 June 2013, less than 4 years after those payments were made.

HMRC's arguments

16. HMRC do not dispute that it is a matter for domestic law to provide the mechanism for dealing with the consequences of the Appellant's mistaken treatment of supplies of bingo as standard-rated. However, agreement ended there and HMRC disputed virtually all aspects of the Appellant's chain of reasoning outlined at [15]. It is not straightforward to summarise all of HMRC's arguments succinctly, since some of them involved them considering the position that would apply even if parts of the Appellant's reasoning were correct, leading to further arguments that, even in such a case, the

[4] Since Mr Hitchmough made the oral submissions at the hearing, as a shorthand, I will refer throughout to Mr Hitchmough making submissions. However, in doing so, I intend no discourtesy to Ms Poots and I recognise the important part she has played in putting the Appellant's case in writing.

Appellant was not entitled to the sum claimed. I will therefore give a flavour of some of the key aspects of HMRC's arguments rather than summarising all of them:

(1) HMRC argued that the Birmingham Hippodrome Claim is nothing more than an attempt to resurrect Claim (iv) which was a claim under s80(1) of VATA 1994 (and not s80(1A) of VATA 1994) which had, following extensive litigation, been determined to be out of time.

(2) By way of expansion on the argument set out at (1), HMRC argued that in order for the Birmingham Hippodrome Claim to succeed, the Appellant must be able to bring into account the output tax of £118,445,546.11 that it overdeclared in the "capped periods" of 12/96 to 12/02 since, only by bringing into account that overpayment, could the Appellant support its argument that HMRC should have taken into account the net overpayment of £67,052,023.65. Section 80(4) of VATA precluded the Appellant from bringing into account the gross output tax in this way.

(3) HMRC do not accept that their power to set off over-credited input tax against over-declared output tax comes only from s81(3) and s81(3A). Rather, they argue that liability for output tax and deductibility of input tax form part of an inseparable whole as a matter of EU law. In seeking to interpret s81(3) and s81(3A) in the way it does, the Appellant is seeking to prise apart that inseparable whole.

(4) HMRC argue that the Appellant has misinterpreted the *Birmingham Hippodrome* decision. That decision proceeded on the basis that set-off of over-declared output tax and over-claimed input tax incurred within the same period (which the parties referred to as "in-period set-off") were two parts of the inseparable whole referred to at (3). Understood in that light, the decision in *Birmingham Hippodrome* was concerned only with whether s81(3) and s81(3A) permitted or required HMRC to set off, against in-time claims, HMRC's own positive claims in respect of other out-of-time accounting periods in respect of which the taxpayer had not made a claim for repayment. *Birmingham Hippodrome* did not, therefore, establish that s81(3) and s81(3A) operated in the manner for which the Appellant contended. Indeed, those provisions are set-off provisions that apply only in HMRC's favour: they cannot be invoked to increase the amount of HMRC's liability.

(5) HMRC deny that the Birmingham Hippodrome Claim is a claim under s80(1B) of VATA 1994. Even if s81(3) and s81(3A) applied in the way for which the Appellant argues, when HMRC applied those provisions in determining Claims (i) to (iii), the Appellant did not "pay the Commissioners an amount by way of VAT that was not VAT due to them". The only such "payments" were made between 1996 and 2002 in consequence of the Appellant having accounted to HMRC for output tax that was not due. HMRC has settled all in-time claims made in that regard and any further claims in respect of that output tax are time-barred by virtue of s80(4ZA)(e) of VATA 1994. Alternatively, the Appellant's formulation of the Birmingham Hippodrome Claim amounts to an assertion that the

over-credited input tax that HMRC set off when settling Claims (i) to (iii) should not have been set-off with the result that s80(1B)(b) of VATA 1994 prevents a s80(1B) claim from being made.

Discussion

17. Since the parties were not agreed on the "architecture" of s80 and s81 of VATA 1994 (i.e. how conceptually those provisions apply), I will start by reaching a conclusion on this issue. Having decided how the provisions apply conceptually, I will apply my conclusions to the facts of this appeal.

The "architecture" of s80(1) of VATA 1994

18. Both parties were agreed that the mechanism for dealing with the consequences of the Appellant's mistaken treatment of its bingo supplies as taxable is within the competence of Member States[5]. I accept Mr Hitchmough's threshold submission that, in the first instance, a claim under s80(1) of VATA 1994 involves a claim for credit (not payment) of the gross amount of output tax overdeclared. That follows clearly from the statutory wording used:

> Where a person—
>
> (a) has accounted to the Commissioners for VAT for a prescribed accounting period (whenever ended), and
>
> (b) in doing so, has brought into account as output tax an amount that was not output tax due,
>
> the Commissioners shall be liable to credit the person with that amount.

The "amount" referred to in the tailpiece of s80(1) can only cross-refer to the "amount" brought into account as output tax referred to in s80(1)(b) as no other "amount" is referenced. Section 80(1)(b) refers only to an amount of output tax that has been brought into account. It does not refer to the net amount of output tax less creditable input tax.

19. The conclusion I have set out at [18] above is reinforced by a consideration of a predecessor version of s80(1) of VATA 1994 that was in force between March 1997 and July 2005. That version of s80(1) of VATA 1994 provided as follows:

> Where a person has (whether before or after the commencement of this Act) paid an amount to the Commissioners by way of VAT that was not VAT due to them, they shall be liable to pay that amount to him.

That predecessor version of s80 contained no analogue of s80(2A). The "amount by way of VAT" referred to in the predecessor version of s80(1) would necessarily have been a net sum consisting of output tax reduced by creditable input tax since s25(2) of VATA 1994 entitled a taxpayer to deduct input tax from any output tax due. Parliament

[5] Of course, that mechanism needs to comply with applicable principles of EU law such as the principles of equivalence and effectiveness. However, the scope of those principles in the context of this appeal has now been determined in other litigation so in this appeal, the Tribunal's task is simply to construe the relevant UK statutory provisions.

therefore enacted s80(2A) when it amended s80(1) to deal with the consequences of moving to a system under which claims under s80(1) were for a credit of gross output tax.

20. Mr Macnab showed me authorities on the interpretation of s80 of VATA 1994, for example *Sunningdale Golf Club v HMRC* [1997] V&DR 79 and *Barclays Bank plc v HMRC* [2003] VAT Decision 18410. However, those authorities dealt with the "old" version of s80(1) referred to at [19]. I do not consider that they are relevant to the construction of the version of s80 that is relevant for the purposes of this appeal.

21. I also agree with Mr Hitchmough's submission that s80(2A) of VATA 1994 is the "gateway" provision that permits over-credited input tax to be set off against the credit for over-declared output tax. Section 80(1) does not set out how much HMRC must pay a taxpayer; it only requires HMRC to give credit for output tax overpaid. Section 80(2A) sets out how much must actually be paid and to calculate the amount payable, it is necessary to determine the amounts that can, in accordance with VATA 1994, be set-off against sums credited to the taxpayer under s80(1) (with HMRC only being obliged to pay the amount remaining after that set-off). The relevant provisions that enable over-declared input tax to be set off against a claim under s80 are contained in s81(3) and s81(3A).

22. Mr Macnab also showed me provisions of the Principal VAT Directive and authorities such as *BP Supergas Anomimos Etairia Geniki Emporiki-Viomichaniki kai Antiprosspopeion v Greece* (Case C-62/93) and *Birmingham Hippodrome* to the effect that the right to credit for input tax and the liability to account for output tax form part of an "inescapable whole". I agree with that as a general statement of VAT law. However, in legislating in an area that was entirely within its competence, Parliament has chosen to provide that a claim under s80(1) is, in the first instance, a claim to be given credit for gross output tax. Parliament has, therefore, in the architecture of s80(1) itself chosen to separate output tax from input tax and it is entitled to do so since, as noted in *Marks and Spencer plc* s80 relates to a matter within the UK's legislative competence.

23. Therefore, the clear conclusion I have reached is that the version of s80 of VATA 1994 that applies in the period relevant to this appeal envisages that the Appellant is making a gross claim for credit of output tax that is then diminished (by operation of s81(3) and s81(3A) which apply for these purposes by virtue of the "gateway" provision in s80(2A)) by overclaimed input tax.

24. In reaching the conclusion at [23], I also reject Mr Macnab's submission that, where a claim under s80(1) of VATA 1994 is made, in-period set-off is achieved by s80(2A) in combination with general EU principles of VAT law. Section 80(2A) does not itself provide for any set-off. Rather, it directs attention to other provisions of VATA 1994 which provide for set-off and provides that the Commissioners are only obliged to pay the net sum remaining after any such set-off has been effected. Again, I do not doubt that input tax and output tax are, as a matter of EU law, an "inescapable whole". However, s80 is concerned with matters that are within the UK's competence alone. Since, as noted above, Parliament has, in exercising its competence, chosen to provide

that a claim under s80(1) is for credit for gross output tax, a UK legislative provision must apply to achieve in period set-off and general principles of EU law cannot do this.

25. Mr Macnab submitted that Lewison LJ followed a different approach from the one I favour when he said, at [15] of the judgment in *Birmingham Hippodrome*:

> [Section 80(2A)] thus deals with set-off within the same accounting period (although it may not be limited to the same accounting period).

I do not accept that submission. Read in context, Lewison LJ was simply saying that s80(2A) provided for set-off to take place. He was not suggesting that s80(2A) or fundamental principles of EU law determine how much should be set-off. The amount that must be set-off can only be determined by applying other relevant provisions of VATA 1994.

The architecture of s81(3) and s81(3A)

26. It follows that I have accepted Mr Hitchmough's submission that the amount of over-credited input tax that must be set off is determined by applying s81(3) and s81(3A) of VATA 1994. In this section, I will determine how I consider those provisions should be construed and applied.

27. Set-off under s81(3) is mandatory and is not just applied at the election of HMRC. There are two pre-conditions for s81(3) to apply:

> (1) an amount must be due from the Commissioners to any person; and
>
> (2) that person must be liable to pay a sum by way of VAT, penalty, interest or surcharge.

28. In the context of a claim under s80(1) of VATA 1994, the relevant "amount" for the purposes of [27(1)] is the amount of that claim which, as I have noted, is a claim for credit of the gross amount of output tax over-declared.

29. How the second condition applies in the context of the Appellant's Claims (i) to (iii) needs to be explained in detail.

30. In order for the Appellant to have any liability to pay HMRC an amount relating to input tax overclaimed on bingo supplies, a UK statutory provision would need to be engaged. The reclaim of over-credited input tax is a matter entirely within the UK's competence as noted above. The general principle of EU law to the effect that output tax and input tax form part of an "inescapable whole" does not, of itself, make the Appellant liable to repay overclaimed input tax to HMRC. Nor can HMRC rely on the direct effect of the Principal VAT Directive to establish an entitlement to reclaim over-credited input tax since, while citizens can rely on the direct effect of directives against Member States, that principle does not apply in reverse.

31. If HMRC had actually made an assessment on the Appellant under s73 of VATA 1994, there would be no difficulty with the second pre-condition of s81(3). The amount stated in any such assessment would be an amount of "VAT due" and the Appellant would, as a result, be liable to pay a sum "by way of VAT" so that the second pre-

condition set out in s81(3) is met. However, when the Appellant made Claims (i) to (iii) it was common ground that HMRC were out of time to make actual assessments under s73 to recover input tax with which the Appellant had been over-credited.

32. At the hearing, there was some argument as to whether HMRC could, or needed to assess, the Appellant under s73 of VATA 1994 to recover input tax for which the Appellant had wrongly obtained credit. Mr Macnab argued that HMRC only needed to make an assessment under s73 if they were seeking to recover a positive sum that they had paid to the Appellant. HMRC had not paid the Appellant a sum by way of credit for input tax. Rather, the Appellant had taken input tax into account in reducing the amount of VAT that it owed to HMRC. In those circumstances, relying on, for example *Benridge Care Homes Ltd and others v HMRC* [2012] STC 1920, Mr Macnab submitted that the fact that HMRC were out of time to issue assessments to recover over-credited input tax was not relevant (since no such assessment would be needed to reduce the Appellant's entitlement to input tax credit).

33. I have not accepted Mr Macnab's submission at [32]. *Benridge* was concerned with the situation where a taxpayer had submitted a tax return that showed only creditable input tax, but had not included output tax due. The taxpayer was, therefore, claiming a repayment from HMRC. HMRC wrote to the taxpayer refusing the claim for a repayment and the Tribunal concluded that the relevant letters were not "assessments" under s73 of VATA 1994. Nor did they need to be assessments since HMRC were not seeking to recover a positive sum from the taxpayer; rather they were simply saying that they would not pay the taxpayer the amount claimed. In this appeal, the position is different. HMRC have, in previous VAT periods, given the Appellant credit for input tax associated with supplies of bingo even though those supplies were exempt. That credit reduced the amount of VAT that the Appellant paid HMRC by operation of s25 of VATA 1994. If HMRC wanted to recover the amount of input credit that was given they would be demanding a positive sum from the Appellant and an assessment under s73 would be needed. Any such assessment would have to be under s73(1) specifically[6]. Section 73(1) permits an assessment to be made in any case where returns are "incomplete or incorrect". Since, in its returns, the Appellant claimed credit for input tax that was not actually creditable, its returns would plainly have been "incorrect" and an assessment under s73(1) would be the mechanism by which HMRC could recover the benefit of that credit.

34. Because HMRC were out of time to recover over-credited input tax by way of an assessment under s73, the second condition in s81(3) was not met. Section 81(3A) of VATA 1994 was enacted to deal with this situation. Section 81(3A) applies where:

[6] An assessment under s73(2) would not be possible since s73(2) deals with assessments to recover "a repayment or refund of VAT" or a "VAT credit" (which, by virtue of s25(3) arises only where a taxpayer's input tax for an accounting period is greater than its output tax). Therefore, assessments under s73(2) are to recover payments that HMRC have made to taxpayers. In the circumstances of this appeal, HMRC did not make payments to the Appellant: rather credit for what was thought to be input tax was set off against what was thought to be the Appellant's liability to account for output tax, with the Appellant making a net payment to HMRC.

(1) the Commissioners have a liability to pay an amount to the Appellant (i.e. the gross amount of output tax for which the Appellant was entitled to credit under s80(1) in Claims (i) to (iii));

(2) The amount falls to be paid in consequence of a mistake previously made as to the amount payable under VATA 1994 (i.e. the mistaken belief that supplies of bingo were taxable and not exempt); and

(3) By reason of that mistake a liability of the Appellant to pay a sum by way of VAT was not assessed (i.e. because of HMRC's mistaken belief that supplies of bingo were taxable, they did not assess the Appellant as liable to repay input tax overclaimed).

35. The conditions for s81(3A) to apply were, as indicated at [34] above, all met when Claims (i) to (iii) were made. Therefore, s81(3A) applied and provided that:

> any limitation on the time within which the Commissioners are entitled to take any steps for the recovery of that sum [i.e. the amount of over-credited input tax] shall be disregarded in determining whether that sum is required by subsection (3) above to be set against [the gross amount of output tax that was the subject of Claims (i) to (iii)].

36. It follows that I agree with Mr Hitchmough that the fact that HMRC were out of time to make assessments under s73 of VATA 1994 to recover over-credited input tax engages s81(3A) of VATA 1994. The next logical task is to determine what s81(3A) means.

37. Section 81(3A) is not a model of clear drafting. The Upper Tribunal in *Birmingham Hippodrome v HMRC* [2013] UKUT 57 (TCC) considered, at [68] to [74] of their decision, the drafting difficulties that arise because s81(3A) only requires time limits to be ignored and does not positively deem an assessment to have been made. The Upper Tribunal's reasoning was as follows, and was not disturbed by the Court of Appeal:

> [68] At this stage we should mention a concern with the words of s81(3A) which taxed us during the hearing. Section 81(3A)(c) relates to 'a sum [paid] by way of VAT' which was not assessed, enforced or satisfied.
>
> [69] In this appeal the sum which HMRC seek to set against the theatre's claim is not the amount of an assessment of a VAT liability (the crystallisation of an existing liability under the Act) but the reclaim of a repayment of VAT (a liability which is not strictly to VAT). As noted above, s 73(2) permits HMRC to assess an amount which was paid to any person as a repayment or refund of VAT which ought not to have been paid, and the tailpiece of s 73(2) provides that HMRC may assess it 'as being VAT due'. Thus once so assessed the liability can be treated as 'VAT due'.
>
> [70] In this case HMRC did not assess the theatre for the overpaid repayment. They could not do so because s 73 and s 77 provided a time limit for such an assessment and they were too late. But without an assessment the sum (which otherwise is not a VAT liability) is not deemed 'as being VAT due' by s 73(2). Thus that deeming did not make

> the recovery 'by way of VAT due' within s 81(3A)(c), and as a result there was no time-barred 'liability' of the theatre to make payment. If assessment is required to create a 'liability to pay a sum by way of VAT', then HMRC may set off a latent reclaim to the recovery of an overpayment under s 81(3A) only if 'liability' means 'liability or any amount which would have been a liability if it had been assessed'.
>
> …
>
> [73] However, in this context, we find the explanatory notes helpful. The mischief at which they show that s 81(3A) was aimed was 'where a taxpayer has overpaid tax, but has as a consequence simultaneously overclaimed input tax, Customs cannot set the overclaimed input tax against the refund due if they are out of time to issue an assessment of the overclaimed input tax'. Thus the section was intended to operate in the circumstance where an assessment for the tax could not be made. For the section to address that mischief, 'liability … to pay a sum by way of VAT', in (c) needs to be given a meaning which does not require the amount to have been assessed. Without that it would not address the mischief at which it was aimed.
>
> [74] We conclude that (c) should be construed so that it has effect as if it included the words 'or would have been such a liability had it been assessed in time'

38. Therefore, applying the Upper Tribunal's guidance set out above, for the purposes of s81(3) of VATA 1994, input tax that the Appellant overclaimed in the periods that were relevant to Claims (i) to (iii) is to be treated as if it were "VAT due" to HMRC even though HMRC have not actually assessed the Appellant as being liable to repay that overclaimed input tax and even though HMRC were, at the times of Claims (i) to (iii) out of time to assess the Appellant. In the next section, I will explain how s81(3) applies to the liability that the Appellant is treated as having.

Whether the Appellant "paid" an amount to HMRC

39. In this section I will consider the question of whether the Birmingham Hippodrome Claim is capable of falling within s80(1B) of VATA 1994.

40. In order to fall within s80(1B), the Appellant must have "paid the Commissioners an amount by way of VAT that was not VAT due to them". Mr Hitchmough characterised the "payment" for these purposes as the amount of excessive input tax that HMRC deducted from the gross amount of output tax for which the Appellant was entitled to credit as part of Claims (i) to (iii). He submitted that HMRC set off £68,879,328 against Claim (i) to (iii) whereas, had they applied the *Birmingham Hippodrome* decision correctly, they would only have set off £1,827,304.35. As a result, he submits, the Appellant "paid" (or repaid) HMRC £67,052,023.65 too much input tax that had been over-credited.

41. Mr Macnab's response to this was that the only amount that the Appellant had "paid the Commissioners by way of VAT that was not due to them" was the net sum representing the difference between output tax and input tax that had been calculated on the mistaken assumption that supplies of bingo were taxable and not exempt. Those

payments were, he submitted, made when the Appellant submitted its VAT returns for 12/96 to 12/02.

42. It is necessary to consider the precise wording of s81(3) and s81(3A) of VATA 1994 in order to determine whether the Appellant has made a "payment"[7] to HMRC (for the purposes of s80(1B)) and, if so, what the precise character of that payment is. The structure of s81(3) and s81(3A) of VATA 1994 that I have considered above produces the following results:

> (1) Although the Appellant had no actual liability to repay HMRC an amount in respect of input tax over-credited (because no assessment in respect of that sum either had been, or could be, made), s81(3A) treated the Appellant, for the purposes of applying the set-off provisions in s81(3), as having such a liability.
>
> (2) The amount of the Appellant's deemed liability to HMRC is then, by virtue of s81(3), set off against HMRC's liability to credit the Appellant with output tax overpaid that was the subject of Claims (i) to (iii).
>
> (3) To the extent of the set-off, the liabilities of both HMRC and the Appellant are discharged.

Mr Hitchmough argues that the point at [(3)] is crucial. If the Appellant's liability was "discharged", that must have involved a "payment". For the reasons set out below, I do not accept that submission.

43. Neither party referred me to any binding authority on whether the Appellant made a "payment" to HMRC, for the purposes of s80(1B) of VATA 1994 when HMRC set off over-credited input tax against the amount of output tax that was the subject of Claims (i) to (iii). In *R (on the application of Cardiff County Council) v Customs & Excise Commissioners* [2004] STC 356, the Court of Appeal considered the issue but expressed no binding conclusion on it. That case concerned a local authority which was entitled to receive payments from HMRC under s33 of VATA 1994 (in respect of VAT that it incurred on supplies made to it) and had an obligation to account to HMRC for output tax on supplies that it made. In practice, the local authority claimed its payments under s33 through its VAT return. In Box 3 of its VAT return, it would state the aggregate amount of output tax due. In Box 4 of its VAT return, it set out the amount of its claim under s33 (which was always greater than the amount stated in Box 3). Box 5 was the difference between Box 3 and Box 4 and always produced an amount due from HMRC. HMRC paid the council the amounts stated in Box 5. The council realised that it had overstated the amount of output tax (in Box 3 of its return). As a result, it considered that the amounts it had stated in Box 5 were too small and HMRC had not paid it enough. It sought to make a claim, under s33 of VATA 1994, for the shortfall.

44. The Court of Appeal decided the case on the basis that the local authority could not make a claim under s33 of VATA 1994 because its claims under s33 VATA 1994 had all been paid in full in the way the council had requested (partly by setting off against

[7] Section 80(1B) uses the verb "paid", rather than the noun "payment", but I will use the expression "payment" as a convenient shorthand.

what was thought to be a liability to output tax with the balance being paid in cash). Since the local authority could not claim under s33, and it was clear that it was out of time to claim under s80, the local authority's claim failed for that reason. This conclusion follows from paragraphs [40] to [43] and [46] of Schiemann LJ's judgment, with which Arden LJ agreed (at least in those respects – see paragraphs [48] and [49] of the reported judgment).

45. Therefore, the Court of Appeal did not need to consider the concept of "payment" in s80 of VATA 1994 or the precise effect of s81(3). Schiemann LJ said as much at [46] of the judgment. At [60], Arden LJ agreed and concluded that "the question should be left open for a case in which it requires to be decided". However, at [81] of the judgment, Scott Baker LJ set out some observations on the effect of the set-off provisions in s81(3). He determined that the question of what "payment" means in a particular statutory context, is ultimately one of statutory construction. However, in his view, "set-off under s81(3) creates a payment albeit by indirect means". It was common ground that these observations of Scott Baker LJ were *obiter dicta*.

46. Mr Hitchmough's argument proceeds on the basis that it is implicit, from Parliament's decision to treat a liability as "discharged" in s81(3) of VATA 1994, that it is intended there to be a "payment" for the purposes of s80(1B) as well. To evaluate that argument, it is necessary to construe what Parliament intended by s80(1B) and s81(3) applying ordinary principles of statutory construction which include having due regard to the purpose of those provisions.

47. Section 81(3) is a general provision that applies for VAT purposes generally. It does not just apply for the purposes of s80. Where s81(3) is applying to an actual liability, arising in consequence of an actual assessment, the purpose of s81(3) in providing for liabilities to be treated as "discharged" is evident. If a taxpayer owes HMRC £100 and HMRC owe the taxpayer £150, HMRC is to pay the taxpayer £50 and that is to be the end of the matter with both liabilities being discharged. It would be contrary to all reason and economic sense if, having paid the taxpayer £50, the taxpayer could demand £150 from HMRC or HMRC could demand £100 from the taxpayer. Parliament's concern, therefore, in providing for actual liabilities to be "discharged" is to avoid any actual liability being double-counted.

48. The purpose referred to at [47] can be achieved without Parliament saying anything about whether either the £100 or the £150 has been "paid" for the purposes of s80(1B) of VATA 1994. Since s81(3) is a general provision that applies for VAT purposes generally, I see no reason why in enacting s81(3), Parliament should be taken as intending both parties to be seen as making "payments" to each other for the purposes of s80(1B) with the Appellant's "payment" being potentially the subject of a claim under s80(1B) of VATA 1994.

49. My conclusion at [48] is reinforced by the fact that, in the circumstances of this appeal (and in the *Birmingham Hippodrome* case), the liability that is "discharged" by s81(3) is not an actual liability, but rather a liability that s81(3A) treats as existing. In those circumstances, the statutory purpose behind s81(3A) also becomes relevant. The Upper Tribunal in Birmingham Hippodrome explained the purpose of s81(3A) in the

extract from their decision that I have quoted at [37]. No part of that purpose makes it obvious that Parliament intended the Appellant to have "paid" its deemed liability to HMRC so as to found potential further claims against HMRC under s80 of VATA 1994.

50. I also note that the architecture of s80 of VATA 1994 envisaged that Claims (i) to (iii) would be settled by a single payment determined under s80(2A). Section 80 did not require HMRC, when settling Claims (i) to (iii) to "pay" the Appellant the gross amount of output tax that it overpaid. Rather, HMRC only had to "credit" that output tax to the Appellant (under s80(1)) and, after reducing it by the amount of overclaimed input tax, "pay" the balance to the Appellant. Since s80(2A) envisages that Claims (i) to (iii) would be settled by the making of a single (net) payment by HMRC to the Appellant, I do not consider that Parliament could have intended that single net payment to be disaggregated into multiple payments when determining whether a further claim could be made under s80(1B).

51. I am also reinforced in the conclusion at [48] by a consideration of the time limits that apply for making claims and appeals. For reasons that I set out in more detail in the next section, I have concluded that the Birmingham Hippodrome Claim is, in substance, an attempt to re-open Claims (i) to (iii). If Parliament had intended that the process of setting over-claimed input tax against Claims (i) to (iii) involved the Appellant making a "payment" to HMRC that could found further claims under s80(1B), that would permit the Appellant to re-open Claims (i) to (iii) long after all relevant deadlines had passed. Such an intention is inconsistent with the scheme of the legislation as a whole which provides (a) that Claims (i) to (iii) needed to be made no later than 4 years after the end of the relevant accounting periods covered by those claims[8] and (b) that any appeal against HMRC's determination of Claims (i) to (iii) needed to be made within 30 days[9].

52. The *obiter* statements of Scott Baker LJ referred to above have given me considerable pause for thought. However, Scott Baker LJ was not considering what it meant for an amount to be "paid" for the purposes of s80(1B) specifically. Moreover, the views he expressed on s81(3) related to the set-off of actual liabilities (or at least liabilities that HMRC and the council thought were actual liabilities) against each other. He was not considering how s81(3) applied to liabilities that were treated as arising pursuant to s81(3A). I am not concluding that the operation of s81(3) can never involve a taxpayer making a "payment", just that, where a liability arising under s81(3A) is involved, s81(3) does not involve a payment for the purposes of s80(1B). I do not, therefore, consider that my conclusion is inconsistent with the observations of Scott Baker LJ.

53. My overall conclusion, therefore, is that, when HMRC set-off over-credited input tax against the Appellant's claims, in Claim (i) to (iii), for repayment of overpaid output tax, the Appellant did not "pay" HMRC anything. It follows that the conditions necessary to make a claim under s80(1B) of VATA 1994 are not present in this appeal.

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[8] See s80(4) and s80(4ZA) of VATA 1994

[9] See s83(1)(t) of VATA 1994 and s83G of VATA 1994

Whether the Birmingham Hippodrome Claim is simply a repeat of Claim (iv) or a re-opening of Claims (i) to (iii)

54. The conclusion that I have expressed at [53] is enough to dispose of this appeal. However, in this section, I will set out a further reason why the Appellant's appeal fails.

55. Mr Macnab argues that the Birmingham Hippodrome Claim is, in reality, a claim under s80(1) of VATA 1994 and nothing more than a repeat of Claim (iv) which was properly rejected as being out of time. To assess that argument, it is first instructive to consider the points of similarity and difference between the Birmingham Hippodrome Claim and Claim (iv).

56. There are some points of similarity. Most obviously, if Claim (iv) had been allowed, the Appellant would have been due a payment of £67,052,023.65 (representing the difference between output tax over-declared from 12/96 to 12/02 and input tax over-credited in that period). That is precisely the amount that is claimed pursuant to the Birmingham Hippodrome Claim. Moreover, both Claim (iv) and the Birmingham Hippodrome Claim rely on the same core facts, namely that the Appellant, from 12/96 wrongly accounted for output tax on supplies of bingo and wrongly claimed input tax associated with those supplies in that period.

57. However, there are some points of difference. Given my conclusions as to the architecture of s80 of VATA 1994 set out above, Claim (iv) was a claim for repayment of gross overpaid output tax, from which HMRC were obliged to deduct amounts of over-credited input tax. The Appellant's letter of 9 November 2011 acknowledged that point, although, rather than leaving it to HMRC to determine how much over-credited input tax should be set-off against its claim, the Appellant included its own determination of this which was expressed to be in accordance with a methodology that HMRC had agreed previously. By contrast, the Birmingham Hippodrome Claim is expressed differently. In the Birmingham Hippodrome Claim, the Appellant did not require repayment of overpaid output tax. Rather, its complaint was that, when HMRC applied the set-off provisions in s81(3) and s81(3A) when dealing with Claims (i) to (iii), HMRC deducted too much from those claims.

58. Although the amount that is the subject of Claim (iv) is identical to the amount claimed under the Birmingham Hippodrome Claim, I accept Mr Hitchmough's submission that this was not inevitable. The essence of the Birmingham Hippodrome Claim is the Appellant's argument that HMRC deducted too much by way of over-credited input tax when dealing with Claims (i) to (iii). The amount of over-credited input tax that HMRC deducted was £68,879,328. Mr Hitchmough accepted that the Appellant's Birmingham Hippodrome Claim could at most produce the result that HMRC should have deducted £nil in dealing with Claims (i) to (iii); it could not have the effect of increasing the amount of output tax that HMRC were liable to repay to satisfy Claims (i) to (iii) by requiring HMRC to deduct a negative amount of input tax. As events transpired, the Appellant had over-accounted for the net sum of £67,052,023.65 between 12/96 and 12/02 (which was lower than the total amount of input tax that HMRC had deducted in satisfying Claims (i) to (iii)). However, if events had turned out differently so that, for example, the Appellant had over-accounted for the net sum of £50m between 12/96 and 12/02, the Birmingham Hippodrome Claim

could only have been for £50m, not the full amount (£68,879,328) that had originally been claimed under Claim (iv).

59. The fact that the Birmingham Hippodrome Claim is phrased differently from Claim (iv), does not mean that it is actually different. However, I have not accepted Mr Macnab's submission that it is nothing more than a repeat of Claim (iv). The differences I have outlined at [57] and [58] are differences of substance. Moreover, to succeed with Claim (iv), the Appellant had to establish that it had overpaid tax in the amounts claimed (and that its claim was in-time). The Appellant needs to establish different matters to succeed with the Birmingham Hippodrome Claim (for example that it made the requisite "payment" to HMRC and that its interpretation of the *Birmingham Hippodrome* decision is correct).

60. However, I do agree with Mr Macnab that the Birmingham Hippodrome Claim is an attempt to re-open Claims (i) to (iii). That is clear from the very way that the Appellant has put its case in this appeal. In effect, the Appellant is seeking either (a) to increase the amount due under Claims (i) to (iii) by amending those claims to reduce the amount of input tax that must be deducted from its credit for output tax or (b) to challenge HMRC's calculation of the input tax that should be deducted. Claims (i) to (iii) have now been dealt with and the Appellant is out of time to follow approach (a) which amount, in substance, to an increase in Claims (i) to (iii)[10]. Approach (b) would have required the Appellant to appeal against HMRC's determination of Claims (i) to (iii) within 30 days.

61. Of course, the Appellant has understandable reasons for not following approach (a) or (b) set out at [60]. The Court of Appeal's decision in *Birmingham Hippodrome* was released after the Appellant made Claims (i) to (iii) and after HMRC determined how much they would pay in satisfaction of Claims (i) to (iii). Therefore, the Appellant could not have known, when Claims (i) to (iii) were made or dealt with, of its possible arguments involving *Birmingham Hippodrome*. However, the fact that there is an understandable reason does not alter the conclusion that, in the Birmingham Hippodrome Claim, the Appellant is either seeking to amend Claims (i) to (iii) or to appeal against HMRC's decision on those claims. It is not in time to take either of these steps and that provides a further reason why the appeal must fail.

The decision in Birmingham Hippodrome

62. In Birmingham Hippodrome, Lewison LJ said:

> The purpose of s 81(3A) is, in my judgment, clear. It is that where a taxpayer makes a claim for repayment of VAT which has been paid owing to a mistake, all the consequences of the mistake are to be taken into account in assessing the quantum of his claim. That purpose is consistent with the overarching scheme of VAT under the Sixth Directive which treats the payment of output tax and the deduction of

[10] As I have noted, set-off under s81(3) is mandatory and not merely at HMRC's election. Therefore, by stating that less must be set off from its credit under s80(1), the Company is necessarily claiming more from HMRC than it did when it made Claims (i) to (iii) even though the amount of output tax to which it is entitled to credit under s80(1) is not changed.

> input tax as an 'inseparable whole'. This is borne out by s 81(3A)(b) which deals with amounts payable 'to or by' the taxpayer. It is clear from this that s 81(3A) was intended to allow HMRC to take into account both credits and debits. It is not, therefore, simply concerned with past claims by the taxpayer for credit of input tax. In evaluating those claims HMRC are also to look at amounts payable 'by' the taxpayer: in other words output tax. Section 81(3A)(b) is not limited to particular accounting periods. The main limiting factor is that the payment 'to or by' the taxpayer must derive from the same mistake as that which gave rise to the claim.

63. Mr Hitchmough argued that HMRC had not given effect to this principle when determining how much input tax to set off against Claims (i) to (iii) and argued that they should have taken into account the Appellant's net overpayment of VAT of £67,052,023.65 between 12/96 and 12/02. Mr Macnab argued that the decision in *Birmingham Hippodrome* did not produce the result for which the Appellant argued and that HMRC had correctly applied the relevant principles of law when dealing with Claims (i) to (iii).

64. I have decided that I will not express a view on whether the net overpayment of £67,052,023.65 should have been taken into account as a reduction to the amount of input tax set-off against Claims (i) to (iii). My conclusions above mean that the Appellant has not made a valid claim under s80(1B) of VATA 1994 and the appeal fails for this reason. I consider that it would be preferable for the Tribunal to express a view on the scope of the principle set out in *Birmingham Hippodrome* only where it is necessary for it do so given the potentially wide ramifications of any such statements of principle.

Conclusion and application for permission to appeal

65. My conclusion is that the appeal is dismissed.

66. 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.

JONATHAN RICHARDS
TRIBUNAL JUDGE

RELEASE DATE: 2 MAY 2018