TC07869

VALUE ADDED TAX – motors traders – claims for repayment of output tax on demonstrator vehicles – previous claims using Italian Tables – whether legitimate expectation that Italian Tables were accurate – jurisdiction of the tribunal in relation to EU law principle of legitimate expectation – whether Italian Tables contained a material inaccuracy – whether claims out of time – EU law principle of equal treatment – whether appellants entitled to be treated consistently with another trader – appeals dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2017/02046 & others

BETWEEN

R T RATE LIMITED & OTHERS **Appellants**

-and-

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

TRIBUNAL: JUDGE JONATHAN CANNAN

The hearing took place on 14 and 15 July 2020 as a video hearing using the Tribunal Video Platform. A face to face hearing was not held because of restrictions arising from the Covid-19 pandemic.

Mr Michael Firth instructed by Streets Myton Indirect Tax for the Appellants

Mr James Puzey instructed by HM Revenue and Customs' Solicitor's Office and Legal Services for the Respondents

DECISION

INTRODUCTION

1. These appeals by RT Rate Limited ("RT Rate") and others are against refusals by HMRC to make repayments of VAT said to have been overpaid in connection with supplies of demonstrator vehicles prior to November 1992. The names of the appellants, tribunal reference numbers and the amounts of individual claims which have been refused are set out in the Annex to this decision. In total, the sums in dispute for all the appellants amount to £1,676,090.

2. The background in relation to all appellants may be summarised as follows:

   (1) The appellants are all motor traders who made claims for repayment of overpaid output tax on supplies of demonstrator vehicles.

   (2) Those claims were made in or about 2003 on the basis of what are known as "the Italian Tables", which I describe in more detail below. By about 2007 the claims had been paid by HMRC.

   (3) The appellants say that the Italian Tables contained an error arising from incorrect assumptions in relation to car tax, which was abolished on 12 November 1992. As a result, claims and repayments in relation to periods prior to 12 November 1992 are said to have been understated.

   (4) In or about 2016 the appellants sought to make amended claims seeking further repayments of overpaid output tax between 1973 and November 1992. Such claims have come to be known as "Italian uplift claims". These claims were refused on the basis that the original claims were closed and these were new claims which were outside the time limits implemented by section 121 Finance Act 2008 ("FA 2008"). The refusals were upheld on review.

3. The appellants' case may be summarised as follows:

   (1) The appellants had a legitimate expectation pursuant to EU law that their claims would not be treated as closed on a materially incorrect basis. The Italian Tables were materially incorrect because they failed to adjust for the abolition of car tax in periods prior to 12 November 1992. The claims should therefore be treated as remaining open.

   (2) In July 2018, HMRC agreed to pay claims by Kent Auto Panels Limited which were the same as the appellants' claims in these appeals. The EU law principle of equal treatment requires HMRC and this tribunal to afford the same treatment to the appellants.

4. HMRC dispute that this tribunal has any jurisdiction in relation to legitimate expectation arguments which are matters of public law and where any remedy must be sought by way of judicial review. In any event, HMRC say that the appellants had no legitimate expectation that their claims would not be treated as closed when made outside the time limit in section 121 FA 2008. HMRC dispute that there has been any breach of the EU law principle of equal treatment.

5. During the course of the appeals there was an application to treat RT Rate as a lead case pursuant to Tribunal Rule 18. No lead case direction was made, but the parties did at least agree that the following issues arise in relation to all the appellants and the question of legitimate expectation:

> "The first common issue is whether the FTT has jurisdiction to consider and give effect to the Appellants reliance on the principles of legitimate expectation. If such a claim is within the FTT's jurisdiction, then the second and third common issues arise;
>
> The second common issue is whether persons who made Italian Uplift claims in reliance on the figures in the tables published by HMRC had as a matter of both fact and law an EU law legitimate expectation that in relying on those figures, their claims would be closed on a correct/not materially wrong basis such that, in light of HMRC's figures being materially wrong, the claims should be treated as remaining open/not having been closed;
>
> The third common issue is whether the time limit for such claims should be disapplied to the amendments which are sought to be made."

6. The evidence before me comprised witness statements and non-contentious documentary evidence. The appellants relied on a witness statement from Mr Colin Rate, who is a director of RT Rate. The respondents relied on a witness statement from Mr Paul Jarvis, who is an officer of HMRC with responsibility for dealing with claims for repayment of overpaid tax. Mr Rate's evidence was not disputed and he was not required to give oral evidence. Mr Jarvis gave oral evidence, and was cross-examined.

FINDINGS OF FACT

7. I do not need to set out detailed findings of fact in relation to the claims made by each appellant. Essentially, the issues in this case are issues of principle. However, certain matters are disputed and I make the following findings of fact based on the evidence before me. The evidence focussed on the appeal of RT Rate and I shall do the same in this decision. For the sake of convenience and context I also include some of the legislative and case law background in this section of the decision.

8. Car dealers make their profit when selling demonstrator vehicles in at least two ways. First, there is the "front-end" profit. That is the difference between the sale price and the original purchase price paid to the manufacturer. Second, there is the "back-end" bonus. That is an amount paid by the manufacturer to the dealer when certain conditions are met. These two amounts give the dealer its profit on sale.

9. The appellants' case on the facts which I shall consider in more detail below is that the level of profit available to a dealer on the sale of a demonstrator has remained relatively constant. However, the appellants say that there was a significant change in the apportionment between front-end profit and back-end bonus following the abolition of car tax on 12 November 1992. Prior to this date the tendency was for manufacturers to give a larger up-front discount, and a smaller amount was paid by way of back-end bonus. Following the abolition of car tax, there was a shift towards the payment of a larger back-end bonus and a smaller front-end discount. The appellants say that the effect of this was that front-end profits were higher before 12 November 1992 than after that date.

10. Motor dealers were originally denied input tax recovery on the purchase of demonstrators, but required to account for output tax when a demonstrator was sold. Output tax was accounted for on the margin under the second-hand margin scheme. Following the decision of the European Court of Justice in 1997 in *Commission v Italy* C-45/95 it became apparent that motor traders had been incorrectly accounting for VAT on sales of demonstrators. HMCE (as it then was) accepted that sales of demonstrators should have been treated as exempt, whereas UK domestic law had required output tax to be accounted for on the profit margin. UK domestic law was changed with effect from 1 December 1999.

11. As a result, it became possible for motor traders to make claims for repayment of VAT going back to the introduction of VAT in 1973, pursuant to section 80 Value Added Tax Act 1994, in cases of mistake. A 3-year time limit for making such claims was introduced in 1997

which led to litigation as to the lawfulness of the time limit. In 2002 the 3-year time limit was held to be unlawful by the ECJ in *Marks & Spencer Plc v HM Customs & Excise* Case C-62/00 ("Marks & Spencer II") because it was retrospective. As a result, a transitional period was announced by HMCE in Business Briefs 22/02 and 27/02 for claims relating to periods prior to December 1996. Taxpayers were given until 30 June 2003 to make such claims.

12. The substance of Mr Rate's evidence was that he was contacted by Grant Thornton following the release of Business Briefs 22/02 and 27/02 regarding the opportunity to submit a retrospective VAT claim in connection with the sale of ex-demonstrator cars. He was concerned that the lack of historic records would prejudice his claim but Grant Thornton advised him that HMCE had produced tables for taxpayers to rely on in making historic claims. On that basis, he authorised the making of the claim and in doing so he relied upon the tables being accurate as an average for the industry. That is the basis on which he understood they had been presented by HMCE. Mr Rate's evidence to this effect was not disputed and I accept it.

13. HMCE recognised that due to the passage of time it was unlikely that motor traders would still hold evidence to support claims going back many years in relation to output tax wrongly accounted for on sales of demonstrators. It therefore worked with trade bodies and prepared what are known as the "Italian Tables". I understand that the Italian Tables were first published in March 2003 in a guidance note issued by HMCE. It is necessary to read the guidance note as a whole, but the following extracts are particularly relevant:

> "Detailed guidance on claims to recover VAT paid on the profit margin on cars where dealerships were required to block the input tax when the car was new. Commission –v- Italian Republic, Case C-45/95 [1997] STC 1062 (the 'Italian case')
>
> 1. Claims can be made in respect of output tax declared on new cars purchased by dealers for use in their business from 1973 onwards where UK legislation required dealers
>
> - to block the input tax…
>
> Demonstrator cars fell into this category until the UK law changed on 1 December 1999.
> …
>
> 5. Claims should take account of the franchise(s) held at the time the tax was declared. This is relevant because
>
> - Some franchises may not have been required to block tax as no private use of the demonstrator car was allowed. (Typically very high value vehicles);
> - Franchises with restricted model ranges would have registered fewer demonstrator cars each year;
> - Many franchises would not have operated courtesy cars in the 1970's or at all.
> - The number of demonstrator cars at a retail or wholesale site would be different;
> - Market shares have changed substantially between 1973 and 1996;
> - The total number of sites has reduced by a third since 1973.
>
> 6. Claims must also take account of changing prices and VAT rates.
>
> 7. The enclosed table has been prepared on the basis of information supplied to Customs by the motor trade bodies (RMI and SMMT). To use the table, for each franchise site for which you are submitting a claim, you should follow these instructions:
>
> - categorise the type of franchise between 'Prestige' (typically Mercedes, BMW, Jaguar, Saab) 'Volume' (Ford, Vauxhall, British Leyland) and 'Other';

- Using known information and any historic information, estimate the number of eligible cars (see 1 above) that each franchised site would have operated each year. The table shows, by way of example, an estimate of 27 for Prestige and 67 for Volume;
- Remember to take account of changing fortunes of franchises. For example, most European and Japanese franchises had a much smaller presence in the market in 1970's and early 1980's, and some did not exist at all;
- Most sites would have had a minimum of seven or eight demonstrator cars a year. Where total sales of new cars was low, then the proportion of demonstrators would also be low. The tables show a considerable increase over the minimum and are for medium sized businesses;
- If your estimate for a 'volume' site is 60, you should take 60/67ths of the VAT shown in the final column as your claim for that site in that year;

Add the VAT amounts for each site to total the whole claim.

Claims should be realistic and may be checked against historic information held by Customs in local files."

14. The guidance included a table for each category of franchise with figures for each year between 1973 and 1997. For example, in relation to volume and prestige vehicles the table provided the following information in relation to 1973:

Volume

	No. of eligible cars Sold	Typical sale Price	Profit per unit	VAT Rate	VAT
1973	67	2,030	134	10%	897.56

Prestige

	No sold	Sale Price	GPU	VAT Rate	VAT
1973	27	4,478	276	10%	736.45

15. The evidence before me also included guidance issued by HMRC in relation to what are known as "Elida claims". These are claims for repayment based on the decision of the ECJ in *Elida Gibbs Ltd v Customs & Excise Commissioners* C-317/94 which concerned the incorrect treatment of VAT on manufacturer bonuses paid to motor dealers. That issue is not relevant for present purposes, but the guidance issued by HMRC in October 2006 is relied upon by the appellants. It stated as follows:

"13. Abolition of car tax

The abolition of car tax on 12 November 1992 affected the way in which bonuses were paid to retailers. Prior to this date the tendency was for the manufacturer to pay a larger up front discount, and a smaller amount was paid as a back end bonus. Following the abolition of car tax, there was a shift towards the payment of a larger back end bonus and a smaller front end discount. This should, therefore, mean that Elida claims are lower pre 1992. In addition, the net list price would exclude both car tax and VAT before 1993, but only VAT thereafter. Claims should take this into account."

16. In other words, the effect of the abolition of car tax meant that Elida claims prior to November 1992 would be lower than they were after November 1992.

17. In January 2008, the House of Lord held in the joined cases of *Fleming (t/a Bodycraft) and Conde Nast Publications Ltd v HM Revenue & Customs* [2008] UKHL 2 that the

administrative transitional period for 3-year capping announced in 2002 was not effective. Further, the retrospective 3-year cap originally introduced in 1997 fell to be disapplied. I consider this decision in more detail below.

18. Updated guidance for use of the Italian Tables was published in 2009 containing the following extracts:

> "7. Number of blocked cars
>
> The published guidance includes a table with examples of numbers of cars and margins. The claimant must scale for actual numbers of blocked vehicles per dealership on a year-by-year basis, this is essential to achieve a realistic claim for the business.
>
> Claims using only the guidance numbers are unlikely to be acceptable.
>
> …
>
> 8. Average margin per car
>
> The table gives sales and profit margins by way of example.
>
> Claimants must ensure that the margins used are scaled to the reality of the individual business. This should be done using whatever information is available. To calculate the average VAT on the margin for your business, take the VAT declared on the margin of Input Tax blocked cars sold and divide by the number of such units sold. The number of units should include those sold at or below cost.
>
> Claims using only the guidance margins are unlikely to be acceptable.
>
> 9. Abolition of car tax
>
> An argument has been put forward by some advisors that the abolition of car tax in 1992, which caused a shift in the emphasis of bonus payments from front-end discounts to back-end bonuses, must have resulted in higher margins than those shown in the tables for periods before 1992. Whilst HM Revenue & Customs (HMRC) accept that the theory behind this has some credibility, claims based on actual records have not supported the contention in terms of the VAT payable on the margin.
>
> If a business produces evidence to demonstrate changed VAT on margins, HMRC staff should be requested to forward it to the HMRC Motor [Unit of Expertise] for consideration.
>
> 10. The Italian table has been prepared on the basis of information supplied to HMRC by the motor trade bodies (RMI and SMMT). To use the table, for each franchise site for which you are submitting a claim, you should follow the guidance above and in the General note then:
>
> …
>
> 11. Claims should be realistic and may be checked against historic information held by HMRC in local files."

19. This updated guidance is the first reference in the evidence before me that the Italian Tables may not have been accurate for periods prior to the abolition of car tax.

20. Mr Rate's evidence was that he now understands from his advisers that the Italian Tables were not accurate because they did not take account of the change in apportionment of dealer's profit between front-end profit and back-end profit in 1992. The result was that front-end profits (and therefore overpaid VAT) were materially higher before 1992. There is a dispute as to whether Mr Rate's advisers were correct in telling him that the Italian Tables were inaccurate which I deal with below.

21. Mr Jarvis' evidence, which I accept was that there were several different versions of revised tables, with different advisers agreeing different revisions with HMRC on behalf of their clients. This was because different advisers produced different evidence in support of

revisions to the tables. Mr Jarvis was not involved in producing the Italian Tables or agreeing any revisions to the Italian Tables. However, his understanding was that revisions were based on the shift from front-end profit to back-end profit because of changes to car tax in 1992 and that revisions were dealt with on an adviser by adviser basis. The revised tables were only applied to traders with open claims.

22. There was evidence before me that the gross profit per unit claimed for Beadles Sidcup Limited, one of the appellants operating a volume franchise, was £232 in 1973 taking into account the abolition of car tax. This compared to a gross profit per unit of £134 which appeared in the original Italian Tables. Mr Jarvis accepted that this was an agreed revision to the Italian Tables for all the appellants and I so find.

23. The appellants now accept that the 2003 claims of RT Rate and the other appellants would fall to be treated as closed as a matter of UK domestic law, subject to their arguments based on legitimate expectation. There was no appeal against any aspect of the decisions on those claims. Therefore, as a matter of UK domestic law, claims made in 2016 onwards would fall to be treated as new claims which are time barred by virtue of section 121 FA 2008. Section 121 was introduced after the decision of the House of Lords in *Fleming* and made provision for a statutory transitional period applying to claims for both output tax and input tax. Section 121(1) applies to output tax and provides as follows:

> "(1) The requirement in section 80(4) of VATA 1994 that a claim under that section be made within 3 years of the relevant date does not apply to a claim in respect of an amount brought into account, or paid, for a prescribed accounting period ending before 4 December 1996 if the claim is made before 1 April 2009."

24. On 14 November 2016 RT Rate made the claim which is in dispute in the present appeals. An accompanying letter dated 10 November 2016 stated:

> "I write to submit a further claim for the above company in the sum of £98,832.55 exclusive of interest.
>
> The claim is based on identical grounds to that of Kent Auto Panels in that, we believe that the claim remains open for further adjustment in accordance with the decision in University of Liverpool as:
>
> 1. the 2003 claim was not met in full; and
>
> 2. no appealable decision was received.
>
> The claim has been calculated using the tables agreed with Fiona Fraser and taking Nordania into account.
>
> Given that Kent Auto Panels has been appealed, I assume that The Commissioners will agree with me that we should avoid the cost of an Official Review and move directly to an appeal to the First Tier Tribunal and stand this claim behind Kent Auto Panels."

25. I am satisfied from Mr Jarvis's evidence that Fiona Fraser was a senior member of HMRC's motor unit of expertise at or about this time. Mr Jarvis was aware that Ms Fraser was involved in discussions with Mr Myton who was representing RT Rate. He was aware that amended tables were agreed by the motor unit of expertise with different advisors, but he was not aware of the nature of the amendments. The reference to Nordania is to a partial exemption calculation adjustment which is not relevant to these appeals.

26. The schedules attached to the letter in which the claim is calculated show revised profit per unit. As with Beadles Sidcup Ltd, the profit per unit for volume franchises in 1973 was £232, compared to £134 in the original tables. It was not suggested by HMRC that these schedules were incorrect nor was there any evidence that Ms Fraser had not agreed these as

amended tables to be used for Mr Myton's clients. Mr Jarvis did not take any issue with the suggestion that these were amended tables agreed with Ms Fraser for use in relation to Mr Myton's clients. I am satisfied that is what they were.

27. Mr Firth criticised HMRC for not producing any evidence dealing with the error in the original Italian Tables. Mr Puzey did not accept that criticism. I am satisfied on the evidence before me that the appellants' claims are based on revised Italian Tables agreed between Mr Myton and Ms Fraser. The revised Italian Tables incorporate a higher profit per unit for periods prior to 12 November 1992 because the original Italian Tables did not take into account the abolition of car tax. In the light of those findings I do not need to consider Mr Firth's criticism any further.

28. The claim by RT Rate was refused by HMRC on 1 December 2016 on the basis that the 2003 claim was closed and the new claim was out of time. That decision was upheld on review. In fact, claims for certain of the accounting periods which were refused were later treated as open and repaid by HMRC in 2019. The circumstances of those repayments are not relevant to the present appeals.

29. RT Rate submitted a notice of appeal to the FTT on 24 February 2017 in which it was alleged that the 2003 claims were still open. Amended grounds of appeal were submitted on 29 March 2019 raising the EU law principles of legitimate expectation and equal treatment referred to above.

30. The reference to Kent Auto Panels ("KAP") in the letter from RT Rate dated 10 November 2016 was to an appeal by *Kent Auto Panels Limited v HM Revenue & Customs* TC/2016/05778. That appeal came on for hearing on 1 May 2018 but was adjourned part heard when the parties reached a settlement agreement. The settlement was embodied in a written agreement dated 31 July 2018 pursuant to section 85 VATA 1994. I shall call this "the KAP Agreement". The recitals and relevant extracts from the KAP Agreement are as follows:

> "WHEREAS:
>
> (A) Kent Auto Panels Ltd submitted the Italian Claim (as defined below).
>
> (B) HMRC paid the Guidance Amount (as defined below) plus simple interest thereon. HMRC did not agree that the additional Italian Claim was submitted within the required timescales and refused to pay any further amount of principal in respect of the Italian Claim.
>
> (C) Kent Auto Panels Ltd appealed against HMRC's refusal to repay principal greater than the Guidance Amount.
>
> (D) The parties now wish to settle the Appeal (as defined below) by way of a binding agreement under section 85 of VATA 1994, This Agreement is intended to set out the settlement terms agreed between the parties.
>
> 1 DEFINITIONS AND INTERPRETATION
> …
>
> "Guidance Amount" means the principal amount(s) of the Italian Claim that HMRC paid to the Kent Auto Panels Ltd in accordance with HMRC's published guidance applicable at that time taking into account the specific circumstances of Kent Auto Panels Ltd.
>
> "Italian Claim" means Kent Auto Panels Ltd's claim submitted on 16" June 2003 for repayment of output tax pursuant to the decision of the Court of Justice of the European Union in European Commission v Italian Republic (Case C-45/95) [1997] STC 1062, plus interest thereon.

> "Principal Amount" means the principal sum set out in Schedule 1 hereto, which sum includes any input tax partial exemption adjustment required in relation to the transactions under consideration in the Appeal, following Nordania Finans AIS & Anr v Skatteministeriet (Case C-98/07).
>
> 2. SETTLEMENT OF DISPUTE
>
> 2.1 The parties agree that the total amount of principal due from HMRC to Kent Auto Panels Ltd pursuant to the Appeal is the Guidance Amount plus the Principal Amount."

31. The principal amount in Schedule 1 of the KAP Agreement covered years 1973 to 1992 and simply showed a separate amount for each year.

32. The parties will be aware that the hearing in KAP which was adjourned because the parties had reached a settlement was before me. I do not have any recollection of the detail of that case, but in any event it is for the appellants to adduce evidence as to the nature of the claim and the circumstances in which it was settled. I have no evidence beyond the KAP Agreement.

DISCUSSION

33. These appeals are made pursuant section 83(1)(t) VATA 1994 which provides as follows:

> "(1) Subject to sections 83G and 84, an appeal shall lie to the tribunal with respect to any of the following matters—
>
> […]
>
> (t) a claim for the crediting or repayment of an amount under section 80, an assessment under subsection (4A) of that section or the amount of such an assessment;"

34. At the time of the appellants' claims in 2016 to 2018, the relevant parts of section 80 provided as follows:

> "(1) Where a person —
>
> (a) has accounted to the Commissioners for VAT for a prescribed accounting period (whenever ended), and
> (b) in doing so, has brought into account as output tax an amount that was not output tax due,
>
> the Commissioners shall be liable to credit the person with that amount.
>
> (2) The Commissioners shall only be liable to credit or repay an amount under this section on a claim being made for the purpose.
>
> (3) It shall be a defence, in relation to a claim under this section by virtue of subsection (1) or (1A) above, that the crediting of an amount would unjustly enrich the claimant.
>
> (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."

35. There are various domestic authorities which consider the question of what amounts to a claim and what amounts to a new claim as opposed to the amendment of an existing claim for the purposes of the time limit in section 80(4). See in particular *Reed Employment Limited v HM Revenue & Customs* [2013] UKUT 109 (TCC). A claim which has been finally determined and cannot be amended is often described as a "closed" claim.

36. It is convenient to consider the issues in this appeal under the following headings:

(1) Does the FTT have jurisdiction in these appeals to consider and give effect to the EU law principle of legitimate expectation?

(2) If so, as a matter of law and fact did the appellants have a legitimate expectation that their claims made in 2003 would not be treated as closed on a materially incorrect basis?

(3) Are the appellants' claims to be treated as out of time by virtue of section 121 FA 2008?

(4) In any event, as a matter of law and fact are the appellants entitled to rely on the EU law principle of equal treatment and thereby entitled to require HMRC to repay the sums claimed by the appellants?

(1) Jurisdiction in relation to legitimate expectation

37. The question in relation to jurisdiction is a procedural one. The appellants say that their claims cannot be treated as closed when they have an EU law legitimate expectation that they would not be closed on a materially incorrect basis following reliance on the Italian Tables. They say that the EU law principle of legitimate expectation requires the Tribunal to give a conforming interpretation to the UK procedural rule that the claims would otherwise be treated as closed, or to disapply that rule. In short, Mr Firth submitted that the question of jurisdiction boils down to whether the FTT has jurisdiction to apply a procedural rule which is unenforceable because it breaches EU law.

38. In relation to jurisdiction, Mr Firth emphasised the difference between the EU law principle of legitimate expectation and the domestic public law principle of legitimate expectation. He described them as different bodies of law, and observed that the appellants were not seeking to rely on a domestic public law jurisdiction of the tribunal. However, he submitted that the tribunal can and must apply the EU law principle of legitimate expectation, along with other EU law principles in determining VAT disputes. In support of that submission he relied on four principal authorities.

39. The first is *Fleming (t/a Bodycraft) v HM Revenue and Customs* which I have previously mentioned. The House of Lords was concerned with the transitional provisions introduced by Business Briefs 22/02 and 27/02 in relation to a reduction in the time limits for making claims to deduct input tax under regulation 29 VAT Regulations 1995. Lord Hope recorded as common ground at [5] that the amendment in regulation 29A to restrict claims for deduction of input tax to 3 years from the date of the return for the relevant period was incompatible with EU law because it was retrospective and did not include any transitional provisions. Further, at [6] that legislation which is incompatible with EU law must be disapplied.

40. Lord Walker described the position as follows:

> "24. It is a fundamental principle of the law of the European Union ("EU"), recognised in section 2(1) of the European Communities Act 1972, that if national legislation infringes directly enforceable Community rights, the national court is obliged to disapply the offending provision. The provision is not made void but it must be treated as being (as Lord Bridge of

Harwich put it in R v Secretary of State for Transport, Ex p Factortame Ltd [1990] 2 AC 85, 140)

'without prejudice to the directly enforceable Community rights of nationals of any member state of the EEC.'

…

25. Disapplication is called for only if there is an inconsistency between national law and EU law. In an attempt to avoid an inconsistency the national court will, if at all possible, interpret the national legislation so as to make it conform to the superior order of EU law: Pickstone v Freemans plc [1989] AC 66; Litster v Forth Dry Dock & Engineering Co Ltd (in receivership) [1990] 1 AC 546. Sometimes, however, a conforming construction is not possible, and disapplication cannot be avoided."

41. Section 2(1) European Communities Act 1972 referred to by Lord Walker provides as follows:

> "(1) All such rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the Treaties, and all such remedies and procedures from time to time provided for by or under the Treaties, as in accordance with the Treaties are without further enactment to be given legal effect or used in the United Kingdom shall be recognised and available in law, and be enforced, allowed and followed accordingly;"

42. At [9], Lord Hope stated:

> "9. … the guiding principle is that of effectiveness. Account must also be taken of the principle of protection of legitimate expectations: see Marks and Spencer II, para 47. The principle of legitimate expectations is infringed by the retrospective introduction of a time limit for the making of claims retrospectively. But this will not be in breach of EU law so long as transitional arrangements are included which allow an adequate period for the lodging of claims which persons were entitled to submit under the original legislation: Marks and Spencer II, para 38. Sufficient notice of these transitional arrangements must be given to ensure that the exercise of those accrued rights is not rendered virtually impossible or excessively difficult. Unless this is done there will be a breach of the principle of effectiveness."

43. The question for the House of Lords was how to make good the absence of any transitional provisions. In particular, whether the court could go further than disapplying the offending provision and itself make good the defect which led to the disapplication. In other words, whether the court could read transitional provisions into the legislation. It held by a majority that it was not a case where the court could itself introduce transitional provisions.

44. Mr Firth submitted that in Fleming, breach of the EU law principle of legitimate expectation was a fundamental part of the unlawfulness of the time limit. The provision therefore fell to be disapplied. The case originated as an appeal against a decision of the VAT & Duties Tribunal and therefore the House of Lords was overturning the decision of the Tribunal not to disapply the time limit. In other words, the Tribunal itself ought to have applied the principle of legitimate expectation and disapplied the time limit. He submitted that in applying EU law, there was no carve out which prevented a Tribunal from applying the EU law principle of legitimate expectation or required a tribunal to ignore section 2(1) ECA 1972 in the context of the principle of legitimate expectation.

45. The second case relied on by Mr Firth was the ECJ decision in Marks & Spencer II which I have also mentioned above. The case concerned the statutory provision introduced in 1997 to reduce the time period for making claims under section 80 for repayment of overpaid output tax to 3 years. The UK Government contended that in construing procedural rules governing claims for recovery of overpaid VAT, the principle of legitimate expectation was

not relevant. Domestic law was subject only to principles of equivalence and effectiveness. The ECJ rejected that submission as follows:

> "44. In that connection, the Court has consistently held that the principle of the protection of legitimate expectations forms part of the Community legal order and must be observed by the Member States when they exercise the powers conferred on them by Community directives…
>
> …
>
> 47. … the reply to the question referred must be that national legislation retroactively curtailing the period within which repayment may be sought of sums paid by way of VAT collected in breach of provisions of the Sixth Directive with direct effect, such as those in Article 11A(1), is incompatible with the principles of effectiveness and of protection of legitimate expectations."

46. The third case relied upon by Mr Firth was *HM Revenue & Customs v Pendragon Plc* [2015] UKSC 37 where Lord Sumption stated as follows:

> "27. … National VAT regimes fall to be applied not just according to the letter of the national law, but in accordance with a number of general principles of EU law whose origin is the jurisprudence of the Union rather than the constitutive treaties or legislation made under them. These include the principle of respect for fundamental rights, the principle of proportionality, the principle of legal certainty with its concomitant doctrines of legitimate expectation and good faith, and the principle of abuse of law. Their application is not excluded because some particular feature of the national legal regime applying an EU tax has its origin in a domestic legislative choice rather than in a member state's obligation to implement a Directive.
>
> 28. Thus, although remedies for breach of an EU obligation are a matter for domestic law, in *Test Claimants in the FII Group Litigation v Revenue and Customs Commissioners* (Case C-362/12) [2014] AC 1161, the principle of legal certainty and the doctrine of legitimate expectations were applied to the United Kingdom's legislative choices about remedies for recovering overpaid VAT…"

47. The fourth case relied upon by Mr Firth was a decision of the FTT (Judge Berner) in *BAT Industries Plc v HM Revenue & Customs* [2017] UKFTT 558 (TC). That case is not binding, but Mr Firth said it illustrated circumstances where the FTT had no qualms about arguments based on applying the EU law principle of legitimate expectation. The case concerned a tax charge on "restitutionary interest" payable on overpaid tax and the lawfulness of certain primary legislation making provision for that tax charge. The principle of legitimate expectation is considered at [200] – [207], although in the end the tribunal found that there had been no breach of the principle. The FTT recognised an overlap between the principle of legitimate expectation and the principle of effectiveness on the facts of that case. In the absence of any breach of the principle effectiveness, there could be no breach of the principle of legitimate expectation (see [205] and [207]). Also, as Mr Puzey points out, there was no discussion as to whether the FTT could give a remedy for breach of the principle of legitimate expectation in the absence of a breach of the principle of effectiveness.

48. In these appeals the appellants invite me to construe the law as to what is a claim and when a claim is to be treated as closed in such a way that it is consistent with the appellants' EU law legitimate expectations. Failing that, to disapply the domestic law which requires the appellants' claims to be treated as closed. Mr Firth submitted that *Fleming, Marks & Spencer II*, *Pendragon* and *BAT Industries* all recognise that the tribunal must construe a procedural rule consistently with the EU law principle of legitimate expectation, or disapply that rule. He submitted that it was nonsensical to suggest that the FTT must apply all the general principles of EU law, except the principle of legitimate expectation.

49. There is force in Mr Firth's submissions. However, they do come up against a number of authorities relied on by Mr Puzey. First and foremost is the decision of the Upper Tribunal

in *HM Revenue & Customs v Noor* [2013] UKUT 71 (TCC). In that case the taxpayer had appealed against HMRC's refusal to allow credit for input tax on pre-registration supplies he had received. The tax point on those supplies was more than six months before his date of registration and input tax credit was therefore disallowed by HMRC. Mr Noor contended that he had been told by HMRC's national enquiry service that he could reclaim the input tax within 3 years. The FTT had concluded that he had an enforceable legitimate expectation that he could recover input tax on the supplies and allowed his appeal.

50. The Upper Tribunal gave close consideration to a decision of Sales J, as he then was in *Oxfam v HM Revenue & Customs* [2009] EWHC 3078 (Ch). In that case, it was held that as a matter of statutory construction, section 83(1)(c) VATA 1994 gave jurisdiction to the VAT Tribunal to consider the taxpayer's arguments based on legitimate expectation. The Upper Tribunal held that Sales J had been wrong to reach that conclusion and refused to follow Oxfam.

51. At [30] and [31] the Upper Tribunal said as follows:

> "30. It is clear that [the Tribunals, Courts and Enforcement Act 2007] does not confer a general supervisory jurisdiction. It is also the case that section 83(1) VATA 1994 does not confer a general supervisory jurisdiction, as Sales J recognised (see Judgment [73]); and there is no other provision of VATA 1994 (or indeed any other legislation) which confers such a jurisdiction in relation to the legitimate expectation on which Mr Noor seeks to rely.
>
> 31. It does not follow from the analysis above that the F-tT can never take account of or give effect to matters of public law, and in particular legitimate expectation. There are many examples in the authorities of a court or tribunal with no judicial review function giving effect to public law rights. Examples are given by Sales J in Oxfam and we will identify them when addressing his judgment. It would, however, be open to the F-tT to consider public law issues only if it was necessary to do so in the context of deciding issues clearly falling within its jurisdiction. The central question in the present case is whether it was open to the Tribunal to consider Mr Noor's case based on his legitimate expectation in deciding an issue within its jurisdiction. The answer to that question turns on the extent of the jurisdiction which is conferred by section 83(1)(c) VATA 1994, which comes down to a point of statutory construction."

52. At [87] - [93] the Upper Tribunal said as follows:

> "87. In our view, the F-tT does not have jurisdiction to give effect to any legitimate expectation which Mr Noor may be able to establish in relation to any credit for input tax. We are of the view that Mr Mantle is correct in his submission that the right of appeal given by section 83(1)(c) is an appeal in respect of a person's right to credit for input tax under the VAT legislation. Within the rubric "VAT legislation" it may be right to include any provision which, directly or indirectly, has an impact on the amount of credit due but we do not need to decide the point … In contrast, a person may claim a right based on legitimate expectation which goes behind his entitlement ascertained in accordance with the VAT legislation (in that sense); in such a case, the legitimate expectation is a matter for remedy by judicial review in the Administrative Court; the FtT has no jurisdiction to determine the disputed issue in the context of an appeal under section 83.
>
> 88. In our view, the subject matter of section 83(1)(c) ("the amount of input tax which may be credited to a person") is the input tax which is ascertained applying the VAT legislation. Input tax is a creature of statute under VATA 1994, reflecting the provisions of, now, the principal VAT Directive (2006/112/EC). Similarly, the crediting of an amount of input tax is a matter of statute. The appellate jurisdiction of the F-tT is formulated, in the case of section 83(1)(c), by reference to those concepts. The F-tT is not, expressly at least, given jurisdiction under this

provision to decide the amount of something which is not input tax and which is not to be credited in accordance with the statutory provisions.

…

90. …The amount of input tax (or of any other VAT which can be treated as input tax) which may be credited to a person is, *prima facie*, to be determined in accordance with the statutory provisions. If the taxpayer has a legitimate expectation to be credited with input tax of a different amount, he may be given a remedy by the appropriate court or tribunal to reflect that legitimate expectation in financial terms. But that right does not affect what is "input tax" (or what can be counted or treated under the legislation as input tax *eg* under section 24 or Regulation 111) or what can be "credited" for input tax in accordance with the statutory provisions. The financial adjustment sits outside the amount of "input tax which may be credited" to a person. The F-tT has no jurisdiction to effect that financial adjustment since its jurisdiction under section 83(1)(c) relates only to "input tax which may be credited" to a person.

…

93. So far as concerns the words "with respect to", we do not agree that those words are wide enough "to cover any legal question capable of being determinative of the issue of the amount of input tax which should be attributed to a taxpayer" at least not in relation to the "amount of input tax" which should be attributed to a taxpayer. As we have said, we do not see any financial credit to which Mr Noor may be entitled by way of recognition of his legitimate expectation as "input tax". But clearly Sales J is including such financial adjustment within the phrase "amount of input tax". On that basis, Sales J's reading goes too far, in our view. It departs from the natural meaning of section 83(1)(c) which, reading the subsection as a whole, is focused on the large number of decisions on rights and obligations under the VAT legislation which HMRC have to make and in respect of which a specialist tribunal is provided. Quite apart from that, Sales J's reasoning applies to all of the paragraphs of section 83(1) and would be to give the F-tT, as we have said, an extensive if not comprehensive judicial review jurisdiction. For reasons already given and with respect to Sales J, we do not consider that it is plausible to suppose that that is what Parliament intended"

53. Mr Firth did not take issue with what the Upper Tribunal said in paragraphs [88] and [90], but he maintained that the VATA 1994 must be construed in accordance with section 2(1) ECA 1972. He sought to distinguish Noor on the basis that everything said by the Upper Tribunal was with reference to the domestic public law remedy based on legitimate expectation, and not the application of the EU law principle of legitimate expectation. The taxpayer was not represented in Noor and the Upper Tribunal made no reference whatsoever to the EU law principle of legitimate expectation, or to the authorities relied upon by Mr Firth.

54. I must therefore consider whether Noor is binding on me as regards the appellants' reliance on the EU law principle of legitimate expectation.

55. Mr Puzey submitted that as a matter of statutory construction there was no distinction between section 81(3)(t) and section 81(3)(c). He relied in particular on what the Upper Tribunal said at [87] and submitted that Noor was determinative of the jurisdiction issue in these appeals because it was binding on the FTT as such. He also referred me to what the Court of Appeal said in *Metropolitan International Schools Limited v HM Revenue & Customs* [2019] EWCA Civ 156. In that case the Court of Appeal was concerned with an appeal on the basis that section 84(10) VATA 1994 effectively enabled taxpayers to advance legitimate expectation claims in appeals to the FTT rather than by way of judicial review. Section 84(10) VATA 1994 provides as follows:

"(10) Where an appeal is against an HMRC decision which depended upon a prior decision taken in relation to the appellant, the fact that the prior decision is not within section 83 shall not prevent the tribunal from allowing the appeal on the ground that it would have allowed an appeal against the prior decision."

56. The Court of Appeal noted at [19] as follows:

"19. …the School's interpretation of section 84(10) of the VATA would appear to imply that public law arguments could routinely be advanced in appeals to the FTT. That would clearly be the case where HMRC had rejected a legitimate expectation claim in advance of the decision under appeal, but other public law arguments could presumably also be put forward. Where, say, it had been suggested to HMRC that it should take a particular matter into account, and HMRC had announced before making an assessment that it did not consider it appropriate to do so, it could be suggested that the assessment depended on a prior decision that could be impugned on public law grounds."

57. The Court of Appeal rejected the taxpayer's argument and said as follows:

21. [Counsel for the appellant] did not attempt to persuade us that the UT was wrong in *Noor*. Were, however, his contentions as to the ambit of section 84(10) of the VATA well-founded, it would seem that the FTT had, after all, a wide jurisdiction to rule on public law issues and, in particular, legitimate expectation claims. The jurisdiction would, moreover, have been conferred through a provision introduced in response to the *Corbitt* decision (viz. section 84(10)) ("by the back door", as Miss Mitrophanous would say), rather than under section 83, the main appeals section. Further, legitimate expectation (and, seemingly, other public law) arguments could be raised in the FTT without any need to satisfy the requirements as to obtaining permission and time limits that govern applications for judicial review (see CPR 54.4 and 54.5). It is highly improbable that Parliament intended this when it enacted what has now become section 84(10).

58. In the context of Noor and Oxfam, Mr Firth also relied on passages from the Court of Appeal decision in *Trustees of the BT Pension Scheme v HM Revenue & Customs* [2015[EWCA Civ 713 and the Upper Tribunal in *Birkett v HM Revenue & Customs* [2017] UKUT 0089 (TCC).

59. BT Trustees was concerned with the validity of direct tax closure notices. In outline, one of the taxpayer's arguments was that HMRC had wrongly failed to apply an extra-statutory concession (ESC B41). The Court of Appeal held that the concession did not apply on the facts. However, it referred to the basis on which the Upper Tribunal had decided the matter, namely that a challenge to HMRC's refusal to apply ESC B41 was a public law challenge which should be brought by way of judicial review. As in Noor, the Upper Tribunal had refused to follow the decision of Sales J in Oxfam.

60. The Court of Appeal dealt with this as follows:

"141. We have heard no argument about s.83(1) VATA and therefore express no view about the correctness or otherwise of the judge's interpretation of that section. But, in agreement with the Upper Tribunal, we do not consider that the decision in *Oxfam v HMRC* should be treated as authority for any wider proposition and we reject the suggestion that the reasoning of Sales J can or should be applied to the jurisdiction of the FtT and the Upper Tribunal to determine the appeals in this case.

142. The statutory jurisdiction conferred upon the FtT by s.3 TCEA 2007 is in our view to be read as exclusive and the closure notice appeals under Schedule 1A TMA do not extend to what are essentially parallel common law challenges to the fairness of the treatment afforded to the taxpayer. The extra-statutory concession is, by definition, a statement as to how HMRC will operate in the circumstances there specified and its failure to do so denies the legitimate expectation of taxpayers who had been led to expect that they would be treated in accordance with it. We are not concerned as in these statutory appeals with the direct application of the

taxing instrument modified, or otherwise, by any relevant principles of EU law. The sole issue in relation to ESC B41 is whether it was fairly operated in accordance with its terms.

143. We therefore consider that the reasoning of Sales J in *Oxfam v HMRC* has no application to the statutory jurisdiction under s.3 TCEA 2007 in the sense of giving to the FtT and the Upper Tribunal jurisdiction to decide the common law question of whether HMRC has properly operated the extra-statutory concession. The appeals are concerned with whether the Trustees are entitled under s.231 to claim the benefit of the credits on FIDs and foreign dividends. Not with what is their entitlement under ESC B41. This reading of TCEA 2007 is strengthened by s.15 TCEA 2007 which gives the Upper Tribunal jurisdiction to decide applications for judicial review when transferred from the Administrative Court. It indicates that when one of the tax tribunals was intended to be able to determine public law claims Parliament made that expressly clear. There are no similar provisions in the case of the FtT."

61. Mr Firth relied on the distinction made by the Court of Appeal between general common law challenges and the application of a taxing statute modified by relevant principles of EU law. Mr Puzey suggested that the Court of Appeal in *BT Trustees* pointedly declined to approve *Oxfam*, and also indicated at the end of [143] that where a tax tribunal is intended to have jurisdiction in relation to a public law claim, Parliament makes that expressly clear.

62. Mr Firth submitted that the Upper Tribunal decision in *Birkett* took a more nuanced approach than it had taken in *Noor*. In *Birkett* the Upper Tribunal was concerned with the jurisdiction of the FTT to consider a taxpayer's claim of legitimate expectation in the context of an appeal against penalties for non-compliance with an information notice under schedule 36 Finance Act 2008. The Upper Tribunal considered *Oxfam*, *Noor* and *BT Trustees* and summarised the relevant principles as follows:

"30. The principles that we understand to be derived from these authorities are as follows:

(1) The FTT is a creature of statute. It was created by s. 3 of the Tribunals, Courts and Enforcement Act 2007 (**"TCEA"**) "for the purpose of exercising the functions conferred on it under or by virtue of this Act or any other Act". Its jurisdiction is therefore entirely statutory: *Hok* at [36], *Noor* at [25], *BT Trustees* at [133].

(2) The FTT has no judicial review jurisdiction. It has no inherent jurisdiction equivalent to that of the High Court, and no statutory jurisdiction equivalent to that of the UT (which has a limited jurisdiction to deal with certain judicial review claims under ss. 15 and 18 TCEA): *Hok* at [41]-[43], *Noor* at [25]-[29], [33], *BT Trustees* at [143].

(3) But this does not mean that the FTT never has any jurisdiction to consider public law questions. A court or tribunal that has no judicial review jurisdiction may nevertheless have to decide questions of public law in the course of exercising the jurisdiction which it does have. In *Oxfam* at [68] Sales J gave as examples county courts, magistrates' courts and employment tribunals, none of which has a judicial review jurisdiction. In *Hok* at [52] the UT accepted that in certain cases where there was an issue whether a public body's actions had had the effect for which it argued – such as whether rent had been validly increased (*Wandsworth LBC v Winder* [1985] AC 461), or whether a compulsory purchase order had been vitiated (*Rhondda Cynon Taff BC v Watkins* [2003] 1 WLR 1864) – such issues could give rise to questions of public law for which judicial review was not the only remedy. In *Noor* at [73] the UT, similarly constituted, accepted that the tribunal (formerly the VAT Tribunal, now the FTT) would sometimes have to apply public law concepts, but characterised the cases that Sales J had referred to as those where a court had to determine a public law point either in the context of an issue which fell within its jurisdiction and had to be decided before that jurisdiction could be properly exercised, or in the context of whether it had jurisdiction in the first place.

(4) In each case therefore when assessing whether a particular public law point is one that the FTT can consider, it is necessary to consider the specific jurisdiction that the FTT is exercising,

and whether the particular point that is sought to be raised is one that falls to the FTT to consider in either exercising that jurisdiction, or deciding whether it has jurisdiction.

(5) Since the FTT's jurisdiction is statutory, this is ultimately a question of statutory construction."

63. The Upper Tribunal went on to say at [33]:

"33. … [The Court of Appeal in BT Trustees] viewed the question whether Sales J was correct on s. 83(1) VATA as a question of interpretation of that section. His view that s. 83(1) was wide enough to include the question of public law argued before him (had HMRC acted in breach of a legitimate expectation?) is to be contrasted with the view of the UT in *Noor* that the jurisdiction of the FTT under s. 83(1) was limited to the amount of input tax as a matter of the VAT legislation. Like the Court of Appeal in *BT Trustees* we do not propose to express a view on the jurisdiction of the FTT under s. 83(1), which does not arise in the present appeal; but it can be seen that what is in issue is the correct interpretation of that provision."

64. In the event the Upper Tribunal held that Schedule 36 did not as a matter of statutory construction given the FTT any jurisdiction to decide the legitimate expectation argument raised by the taxpayer.

65. Turning back to the four principal authorities relied on by the appellants. It is not disputed that where a statutory provision is inconsistent with the EU law principle of legitimate expectation, that provision must be either construed in such a way as to make it consistent or disapplied. The question of jurisdiction which arises on these appeals is whether the FTT has jurisdiction to consider that issue and provided a remedy.

66. Mr Puzey submitted that the only examples of courts and tribunals applying the EU law principle of legitimate expectation were courts and tribunals which already had a public law jurisdiction. Hence, in Fleming he submitted that the VAT & Duties Tribunal (Dr Avery-Jones) appeared to conclude that the appellant did have a legitimate expectation that he could claim input tax credit without time limit. However, it did not grant a remedy because it considered that HMCE had a discretion to refuse the claim and it would not be unreasonable for it to do so. It was on that basis that it dismissed the appeal. On appeal to the High Court neither party sought to uphold the reasoning of the VAT Tribunal in relation to the discretion of HMCE. Further, Evans-Lombe J had inherent jurisdiction to grant a public law remedy and the appellant had issued judicial review proceedings. The taxpayer's appeal was dismissed. When the matter came to the House of Lords, it too had inherent jurisdiction to grant a public law remedy. All that is true, but it is clear that Evans-Lombe J dealt with the matter as an appeal from the VAT Tribunal. His conclusion on the appeal meant that the judicial review proceedings also fell to be dismissed.

67. In *Fleming*, neither the VAT Tribunal nor the appellate courts gave consideration to the question of jurisdiction. It does not appear that HMRC took any point as to the jurisdiction of the VAT Tribunal, either before the VAT Tribunal or on the subsequent appeals. It appears to me that the matter was dealt with as an appeal from the VAT Tribunal rather than pursuant to a judicial review application which Mr Fleming had made. Evans-Lombe J in the High Court described that application as having been made "from an abundance of caution". Given the existence of the judicial review application the point might be described as academic in the context of *Fleming*.

68. Mr Firth also observed correctly that in the appeal of *Conde Nast v HM Revenue & Customs*, which was heard by the Supreme Court together with Fleming, there were no such judicial review proceedings. It was a straightforward appeal from the VAT Tribunal and HMRC did not take any jurisdiction point. The Supreme Court could have had no greater jurisdiction than the VAT Tribunal.

69. In Marks & Spencer II, the ECJ was not concerned with any question as to the which UK courts and tribunals were designated as having jurisdiction to consider issues of EU law. It does not take matters any further in relation to the jurisdiction issue I must determine.

70. Pendragon was a case about abuse of law, and not legitimate expectation. Further, on my reading it does not suggest that all tribunals can grant a remedy for any breach of EU law principles. Hence the reference in the opening line of [28], that remedies for breach of an EU law obligation are a matter for domestic law. The availability of such remedies by way of judicial review or otherwise would still be subject to the principles of effectiveness and equivalence. It is no part of the appellants' case that limiting the jurisdiction of the FTT to deal with the EU law principle of legitimate expectation would breach the principles of effectiveness or equivalence.

71. Mr Puzey referred me to a decision of the ECJ in *Impact v Ministry of Agriculture and Food* Case C-268/06 where the European Court of Justice stated:

> "The Court has consistently held that, in the absence of Community rules governing the matter, it is for the domestic legal system of each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from Community law"

72. Mr Puzey also referred to the decisions of the ECJ in *SpA Salgoil v Italian Ministry of Foreign Trade* [1968] ECR 453 and *Köbler v Republic of Austria* Case C-224/01. Mr Firth rightly observed that *Köbler* was a case concerning "Francovitch damages". He did not seek to challenge the principle described in *Impact*.

73. The fourth cases relied on by Mr Firth was *BAT Industries*. Again, no issue was raised about jurisdiction, and in any event the FTT decided the case by reference to the principle of effectiveness and not the principle of legitimate expectation.

74. Mr Firth gave a further example of the FTT applying EU law principles in *Total Technology (Engineering) Limited v HM Revenue & Customs* [2014] UKUT 418 (TCC). In that case the FTT held that a penalty under the VAT default surcharge regime was disproportionate and set it aside. HMRC's appeal was allowed by the Upper Tribunal, but in doing so it did not suggest that the FTT had no jurisdiction to apply the EU law principle of proportionality. However, it is not disputed that the question of proportionality is one of the EU law principles which can be applied by the FTT.

75. Mr Firth submitted that the EU law principle and the domestic public law principle of legitimate expectation involve different tests. Even if jurisdiction for the public law principle was excluded from the FTT, there was no reason to exclude the EU law principle. It was a different test with different remedies.

76. I was referred by Mr Firth to the following descriptions of the EU law principle of legitimate expectation in two decisions of the ECJ:

> "32. As regards the principle of protection of the legitimate expectations of the beneficiary of the favourable conduct, it is appropriate, first, to determine whether the conduct of the administrative authorities gave rise to a reasonable expectation in the mind of a reasonably prudent economic agent (see, to that effect, Joined Cases 95/74 to 98/74, 15/75 and 100/75 Union nationale des coopératives agricoles de céréales and Others v Commission and Council [1975] ECR 1615, paragraphs 43 to 45, and Case 78/77 *Lührs* [1978] ECR 169, paragraph 6). If it did, the legitimate nature of this expectation must then be established."
>
> (Elmeka NE v Ipourgos Ikonomikon C-181/04 to C-183/04)

> "59. According to settled case-law, the right to rely on the principle of legitimate expectations extends to any person in a situation in which an EU institution has caused him to entertain justified expectations. Information which is precise, unconditional and consistent, in whatever form it is given, constitutes such an assurance. By contrast, a person may not plead infringement of that principle unless he has been given precise assurances"
>
> (Domestic Sweden AB v European Union IPO Case T-235/17)

77. Mr Puzey submitted that the UK law and EU law principles of legitimate expectation were not substantially different. He compared the statement of the EU law principle in Elmeka to the following statement of the domestic public law principle in *United Policy Holders Group v A-G of Trinidad and Tobago* [2016] UKPC 17 where Lord Neuberger described it as follows:

> "37. In the broadest of terms, the principle of legitimate expectation is based on the proposition that, where a public body states that it will do (or not do) something, a person who has reasonably relied on the statement should, in the absence of good reasons, be entitled to rely on the statement and enforce it through the courts. Some points are plain. First, in order to found a claim based on the principle, it is clear that the statement in question must be "clear, unambiguous and devoid of relevant qualification", according to Bingham LJ in *R v Inland Revenue Comrs, Ex p MFK Underwriting Agents Ltd* [1990] 1 WLR 1545, 1569, cited with approval by Lord Hoffmann in R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs *(No 2)* [2009] AC 453, para 60."

78. The passage to which I was referred does not in fact deal with all the elements relevant to the public law principle of legitimate expectation. However, there are well-established authorities as to the circumstances in which taxpayers can challenge the application of HMRC guidance by way of judicial review. I was referred to *HM Revenue & Customs v Hely Hutchinson* [2017] EWCA Civ 1075, where the Court of Appeal was concerned with a judicial review in which it was alleged that the taxpayer had a legitimate expectation that HMRC would be bound by certain guidance it had issued in connection with his entitlement to tax losses. The essential question was whether HMRC could resile from the view they had expressed in the guidance. The approach was stated at [45] as follows:

> "45. I now turn to the situation where HMRC issues a policy or guidance but later comes to the view that its policy or guidance was wrong in law. Legitimate expectations are not unqualified: see, for example, *United Policyholders*, above. If HMRC finds that they need to resile from guidance, a taxpayer can only rely on the legitimate expectation that the guidance created where, having regard to the legitimate expectation, it would be so unfair as to amount to an abuse of power."

79. I was also referred to a decision of the Court of Appeal in *Samarkand Film Partnership No 3 v HM Revenue & Customs* [2017] EWCA Civ 77. I note that the Court of Appeal endorsed the approach taken by the Upper Tribunal in that case which had summarised the principles of legitimate expectation by reference to the following passage from the decision of Leggatt J in *R (GSTS Pathology LLP & Ors) v Revenue and Customs Commissioners* [2013] EWHC 1801 (Admin) at [72]:

> "72. The principle that legitimate expectation should be protected is now well established as a ground for judicial review. For this principle to apply, the general requirements are: (1) the claimant has an expectation of being treated in a particular way favourable to the claimant by the defendant public authority; (2) the authority has caused the claimant to have that expectation by words or conduct; (3) the claimant's expectation is legitimate; (4) it would be an unjust exercise of power for the authority to frustrate the claimant's expectation. Although it has sometimes been said to be a requirement also that the claimant has relied to its detriment on what the public authority has said, the law now seems to be clear that such detrimental reliance

> is not essential but is relevant to the question of whether it would be an unjust exercise of power for the authority to frustrate the claimant's expectation…"

80. It is clear, as one would expect that the EU law principle of legitimate expectation is very similar to the UK domestic public law principle. It is not necessary for me to say whether the principles are identical in practical terms. In the absence of detailed submissions, I prefer not to do so. It also seems to me that the remedy, on the present facts would also be the same. HMRC would be required to treat the appellants' claims as open or to disapply the time limit for new claims on whichever basis the appellants put their claim. Whether that is by applying a conforming construction, disapply the offending procedural provision or directing HMRC to treat the claim as open makes no difference to the parties.

81. Mr Puzey pointed to the procedural requirements must be satisfied before judicial review proceedings can be brought to enforce a public law remedy. In particular, domestic law requires permission to bring a claim, places time limits on bringing a claim, and requires detailed disclosure of the grounds of claim and the grounds of objection to the claim. Those are the requirements referred to by the Court of Appeal in *Metropolitan International Schools* at [21] as one reason why as a matter of statutory construction Parliament cannot have intended section 84(10) VATA 1994 to give jurisdiction to the FTT in relation to claims based on legitimate expectation. The same might be said in relation to the construction of section 83(1)(t).

82. Mr Firth submitted that there was no reason to have any jurisdictional distinction between a claim based on legitimate expectation and a claim based on equal treatment. HMRC do not challenge the jurisdiction generally in relation to equal treatment, and yet the EU principle of equal treatment also has a public law equivalent in the form of consistent treatment and rationality. It is not clear to me that such claims are comparable and I had no detailed submissions as to the extent to which they may be considered comparable.

83. In Marks & Spencer II, the VAT Tribunal had considered the question of jurisdiction but the issue fell away when the matter reached Moses J (as he then was) in the High Court reported at [1999] STC 205. The VAT Tribunal had found that it did not have jurisdiction to consider a claim based on equal treatment or a claim based on legitimate expectation. Moses J made the following observations on these findings:

> "If Marks and Spencer had mounted sufficient evidence to establish that the provision in s 80(4) was discriminatory and thereby impeded competition then I would have thought it was within the jurisdiction of the tribunal. However in so far as the complaint is not focused upon the consequences of the statute but rather upon the conduct of the commissioners then it is clear the tribunal had no jurisdiction. Its jurisdiction is limited to decisions of the commissioners and it has no jurisdiction in relation to supervision of their conduct. It is unnecessary to develop my reasoning any further. No submission was advanced before me in oral argument as to the commissioners' conduct. No submission in writing was made in relation to the commissioners' conduct giving rise to legitimate expectations over and above the arguments, in law, in relation to legal certainty."

84. It is clear therefore, that Moses J did not consider that the VAT Tribunal had any jurisdiction in relation to arguments based on the EU law principle of legitimate expectation, certainly where what was being challenged was the conduct of the commissioners, which is the challenge in the present appeals. I acknowledge that he did not set out his reasoning for that conclusion, but it remains persuasive.

85. This is a difficult issue, and as I have said there is force in Mr Firth's submissions. Those submissions were not put forward in *Noor*, indeed the Upper Tribunal in *Noor* acknowledged that their decision was reached without the benefit of full argument on behalf of Mr Noor. I am satisfied however that I am bound by the decision in *Noor*. In the light of

Noor, and what has been said by the Court of Appeal in *Metropolitan International Schools* and by Moses J in *Marks & Spencer II*, I do not consider that section 83(1)(t) gives the FTT jurisdiction to consider and give effect to the EU law principle of legitimate expectation. The appellants' remedy for any breach of that principle must be pursued by way of judicial review.

(2) Did the appellants have a legitimate expectation?

86. I have found that I do not have jurisdiction to entertain the appellants' grounds of appeal to the extent that they assert a breach of the EU law principle of legitimate expectation. Those claims must proceed by way of judicial review. However, in case I am wrong on that issue I shall consider whether the appellants have established a legitimate expectation, and if so the nature of that legitimate expectation.

87. I understand from the parties' submissions that there is very little authority in the context of tax as to what is required to establish an EU law legitimate expectation. *Elmeka* was a case concerning liability to VAT and I have already set out the approach indicated by the ECJ in that case. Marks & Spencer II did not contain any detailed analysis of the principle. It seems from *Elmeka*, and from *Domestic Sweden AB* which was a patent case, that I should approach the question of legitimate expectation in these appeals by considering the following:

> (1) Did the publication of the Italian Tables give rise to a reasonable expectation in the mind of a reasonably prudent motor trader, and if so what expectation.
>
> (2) Was any such expectation legitimate, in particular did the Italian Tables amount to a precise, unconditional and consistent assurance, and if so what assurance.

88. Mr Puzey submitted that the situation in the present appeals could not be described as an abuse of power, in the sense described in *Hely Hutchinson*. Mr Firth submitted that this test was not relevant to the EU law principle of legitimate expectation. It is not clear to me that the test described in Hely Hutchinson forms part of the EU law principle of legitimate expectation. I shall however assume for the benefit of the appellants that it is not part of the test.

89. Mr Puzey criticised the appellants' formulation of their legitimate expectation which he said had evolved from RT Rate's grounds of appeal through Robinson's grounds of appeal, Mr Firth's skeleton argument and Mr Firth's oral submissions. I accept that there has been some slight variation in the terms used to describe the legitimate expectation, but I am satisfied that the substance of the appellants' case has remained the same. Mr Firth acknowledged that it was important to be clear in identifying the reasonable expectation said to arise from the Italian Tables. I shall take the relevant formulation from Mr Firth's oral submissions in which he identified the reasonable expectation as an assurance by HMCE in the following terms:

> "The profit margin figures in the original Italian Tables were materially correct as averages or typical figures for the industry, and therefore that claims would be made and closed on such a materially correct basis."

90. Mr Firth emphasised that the appellant's reasonable expectation was that the Italian Tables were correct as average or typical figures for the motor trade generally. He submitted that it could not seriously be suggested that the Italian Tables contained no representation as to the accuracy of the typical figures. That is how HMRC intended the Italian Tables to be perceived. He acknowledged that the Italian Tables were not intended to be specific to the appellants. The appellants' case was that the original Italian Tables were materially incorrect

as averages because they did not take into account the effect of the abolition of car tax on front-end profits.

91. It is common ground that the input required of motor traders using the Italian Tables was limited to ascertaining and evidencing the number of eligible vehicles in each trade category in each year. By trade category, I refer to whether a dealership operated a prestige, volume or other franchise. Once the number of vehicles in a trade category was ascertained, HMCE would accept a claim for repayment of output tax based on the typical gross profit margin on sales of those vehicles. Having said that, it was always open to a motor trader to adduce evidence that there was a different gross profit margin per unit. Mr Firth suggested that most motor traders would not be in a position to adduce evidence of a different gross profit margin. There was no evidence before me to that effect, although it is not suggested that the appellants might have been in a position to adduce such evidence.

92. Mr Puzey submitted that HMRC's guidance issued in 2003 made clear that the figures used in the tables were estimates and that traders also had to use their own recollection and records to support a claim. He submitted that the only legitimate expectation that the appellants had was that their claim would be dealt with in accordance with the Italian Tables. HMRC were never in any position to give an assurance that figures in the Italian Tables were correct.

93. Mr Puzey submitted that the assurance or representation relied on by the appellants, that the gross profit margins in the Italian Tables were "materially correct" was too vague. He suggested that there was no measure by reference to which the accuracy of the figures could be judged. Further, there was no indication of how many "bites of the cherry" a trader might get if the figures turned out to be incorrect. Motor traders could not have a legitimate expectation that their claims would remain open indefinitely. Overall, the appellants' case relied on representations which were the antithesis of precise, unconditional assurances.

94. Clearly, identifying whether the tables were materially correct involves an element of judgment. However, I do not consider that an assurance that the figures were materially correct would be insufficiently precise. There may be difficulty at the margin, but if for example the figures were understated by 25% then that would be significant. It could not be said that the figures were materially correct.

95. In order to establish the appellants' reasonable expectation, Mr Firth relied upon [7] of the 2003 guidance which directed traders making claims using the tables to "follow these instructions…". That was an unconditional direction. Use of the Tables required evidence of the number of eligible cars. Once that was established the Tables applied a fixed profit per unit to each eligible car. Again, he submitted that the profit per unit was not conditional. He accepted that it was open to traders to make higher claims supported by evidence, but in those cases the Tables would not be used. Traders without such evidence were entitled to rely on the accuracy of the Tables.

96. The Italian Tables were prepared by HMRC based on information received from trade bodies. They were made publicly available and traders were required to provide evidence as to the number of eligible vehicles sold in relation to each trade category. Traders were not required to use the tables, and could for example provide their own evidence of the gross profit per unit on sales of vehicles in each year. It is not suggested that HMRC were in any better position than the appellants or motor traders generally to identify any errors in the tables. The question is whether HMRC was implicitly giving traders an assurance that the Italian Tables were correct, or as the appellants put it, they were not materially incorrect. The 2003 guidance note does not contain any express assurance to that effect. I do not consider that it would be reasonable for the appellants to expect that HMCE was giving an assurance

as to the accuracy of the tables. Even if the appellants did have a reasonable expectation that the Italian Tables were correct, I do not consider that they would have a reasonable expectation that if the tables turned out to be incorrect then HMCE would permit closed claims to be re-opened. Still less, that closed claims could be re-opened at any time in the future.

97. It seems to me that the purpose of the Italian Tables was to provide traders with an alternative to adducing their own evidence as to the extent to which they had overpaid VAT on sales of demonstrators going back over many years. Mr Firth acknowledged that if a taxpayer relied on the Italian Tables to make a claim and subsequently found evidence to suggest that it could have claimed more, for example because it had underestimated the number of demonstrators sold in any particular year, a closed claim could not be re-opened on that basis. In my view the position is the same in relation to the gross profit per unit set out in the Italian Tables. The trader has adopted what were known to be estimates acceptable to HMCE in calculating the gross profit per unit in each year. Those estimates took the place of evidence adduced by the appellants. They were based on information supplied by the trade associations. The tables could be incorrect for any number of reasons. The trade bodies may have provided inaccurate or unclear information. HMCE may have misunderstood the information provided by the trade bodies. HMCE may simply have made an error in preparing the tables. In all the circumstances I do not accept that the appellants would have a reasonable expectation that HMCE was giving an unconditional assurance as to the accuracy of the tables.

(3) Are the appellants' claims out of time?

98. This issue is essentially concerned with what remedy should be available to the appellants where their legitimate expectations have been frustrated. For the reasons given, the appellants did not have a reasonable expectation that the Italian Tables were accurate, so the question of remedy does not arise. However, having heard the parties' submissions I shall set out my view as to what if any remedy the appellants might have if they had a reasonable expectation that the Italian Tables were not materially incorrect.

99. Mr Firth submitted that the existence of the error in the Italian Tables was not in doubt. The effect of the abolition of car tax was described in the guidance for Elida claims in October 2006. Mr Jarvis confirmed in his evidence that revised Italian Tables were agreed with various advisers. Mr Rate's evidence was that his understanding through his advisors was that front-end profits were materially higher before November 1992 because they did not take account of the change in apportionment of dealer's profit between front-end profit and back-end profit in 1992.

100. Mr Rate's understanding of what his advisors told him is not sufficient or reliable evidence for me to conclude that there was any error in the Italian Tables or to draw any conclusion as to the nature of any error.

101. Mr Puzey submitted that the appellants had not adduced any evidence that the Italian Tables were incorrect. He also submitted that Mr Jarvis's evidence did not go so far as to establish that the original Italian Tables were materially incorrect. The extent of his evidence was that there were some tables issued in 2003. Different tables were agreed with various advisers in 2012/13 which led to traders with open claims being repaid further amount of VAT. Otherwise he could not comment on the differences. This did not establish that the Italian Tables were materially incorrect, but simply that traders with open claims had produced alternative evidence as to the amount of overpaid VAT which had been accepted by HMRC.

102. I do not accept Mr Puzey's submissions. I have found on the basis of the evidence that amended tables were agreed between Mr Myton and Ms Fraser for use by Mr Myton's clients. The tables showed a significant increase in the profit per unit of eligible vehicles sold prior to November 1992. In light of the evidence as a whole, including guidance in relation to the Elida tables, I am satisfied that the Italian Tables were materially incorrect because they failed to take into account the incidence of car tax.

103. Mr Firth submitted that the appropriate remedy for the appellants would be to treat their original claims as still open, not as new claims which are time-barred. This would have the effect that the domestic procedural rule defining when a claim is closed would be disapplied in the same way that the transitional provisions were disapplied in Fleming. Further, the rule whereby the original claims are treated as closed should be disapplied without limitation, such that there would be no time limit for the appellants to make claims relying on their legitimate expectations. As in Fleming, it was open to Parliament to subsequently set a time limit.

104. Mr Puzey submitted that even if the appellants' could establish and rely on a claim of legitimate expectation, that should not cause me to disapply the time limit for bringing a claim. The effect of that would be to give the appellants an open-ended opportunity to make claims for repayment of VAT. Parliament had already introduced a time limit in section 121 FA 2008. The ECJ held in Marks & Spencer II at [35] and [36] that member states could set time limits for the bringing of claims. If the appellants did have a right to make a claim based on legitimate expectation, then it did not extend beyond 31 March 2009 which was several years after the original claims had been settled.

105. Mr Firth submitted that this was the time limit for new claims. The appellants were not making a new claim. They were seeking to disapply the procedural rule whereby their claims were treated as closed. Even if section 121 was relevant, he relied on what was said by Lord Neuberger in Fleming at [86]:

> "86. In other words, from the perspective of Community law, I consider that the Commissioners' solution to the problem fails on the very grounds that the problem exists, namely that it breaches the principles of effectiveness and legitimate expectation. One year of disapplication expiring in May 1998 would come to an end before, indeed years before, it was established that (a) the absence of a transitional provision meant that there had been a breach of Community law principles (*Marks & Spencer II*, in July 2002), (b) there was nonetheless at least the possibility of a period of disapplication (*Grundig II*, in September 2002), and (c) contrary to the firmly expressed opinion of the Commissioners, the claims fell within regulation 29 (*University of Sussex v Customs and Excise Commissioners* [2004] STC 1, in October 2003). While the third point may not be significant, the first two points establish, at least to my satisfaction that accepting the submission of the Commissioners would involve hardly more than paying lip service to the important principles of effectiveness and legitimate expectation."

106. Mr Firth noted that it was only established in 2013 that the original Italian Tables were incorrect. In those circumstances HMRC could not rely on the time limit in section 121, otherwise it would simply pay lip-service to the principles of effectiveness and legitimate expectation.

107. There was no evidence before me as to when it was first suggested that the original Italian Tables were incorrect. In any event, I accept Mr Puzey's submissions. If the appellants had a legitimate expectation that they could still make a claim, I do not accept that such an expectation would include an expectation that Parliament would not enact legislation to put a time limit on claims under section 80(1). The effect of section 121 was to put a time limit of 1 April 2009 on making claims for the repayment of VAT. It is no answer for the

appellants to say that these are not new claims, but existing claims which they are permitted to re-open. It is clear that Parliament intended to put a final time limit for the making of claims relating to accounting periods prior to 4 December 1996. Once section 121 was enacted, the appellants cannot have had a reasonable expectation that their claim could be re-opened after 1 April 2009.

(4) Equal treatment

108. In support of the appellants' claim based on equal treatment, Mr Firth referred me to the decision of the ECJ in *Marks & Spencer v HM Revenue & Customs Case C-309/06*. That case concerned the different treatment of traders who were reclaiming overpaid tax pursuant to section 80. In particular whether payment traders and repayment traders could be treated as having different rights to repayment in the context of unjust enrichment as a defence to a claim to repayment pursuant to section 80(3) VATA 1994. The ECJ held as follows:

> "54. … although the principles of equal treatment and fiscal neutrality apply in principle to a case such as that in the main proceedings, an infringement of those principles is not constituted merely by the fact that a refusal to make repayment was based on the unjust enrichment of the taxable person concerned. By contrast, the principle of fiscal neutrality precludes the prohibition of unjust enrichment from being applied only to taxable persons such as 'payment traders' and not to taxable persons such as 'repayment traders', in so far as those taxable persons have marketed similar goods. It will be for the national court to determine whether that is the position in the present case. Furthermore, the general principle of equal treatment, the infringement of which may be established, in matters relating to tax, by discrimination affecting traders who are not necessarily in competition with each other but are nevertheless in a similar situation in other respects, precludes discrimination between 'payment traders' and 'repayment traders', which is not objectively justified."

109. The application of this test was described by Advocate General Sharpston in her opinion in *Lindorfer v Council of the European Union* Case C-227/04P. The following principles emerge, which are not in dispute in these appeals:

> (1) Traders in a comparable situation must not be treated differently unless that different treatment is objectively justified.
>
> (2) An assessment of whether situations are comparable and the justification for any different treatment must be based on characteristics which are relevant to determining the nature or terms of the treatment in question

110. Where there is a breach of the principle of equal treatment, the remedy is to grant persons within the disadvantaged category the same advantages as those enjoyed by persons within the favoured category (see *Caballero v Fondo de Garantía Salarial (Fogasa)* Case C-442/00 at [42] and [43]). This may include setting aside any discriminatory provision of national law.

111. In the present case we are not concerned with a discriminatory provision of UK domestic law. We are concerned with what is alleged to be the discriminatory conduct of HMRC in agreeing to make repayments to KAP when, it is alleged, KAP was in a comparable situation to the appellants. The appellants contend that KAP made claims based on the Italian Tables and then made further claims which were outside the statutory time limits and which were refused on that basis. HMRC then agreed to pay the additional Principal Amount as defined in the KAP Agreement. Mr Firth submitted that those facts were identical for all material purposes to the claims made by the appellants. The existence of the KAP Agreement in itself made out at least a prima facie case that there was breach of the principle of equal treatment. Further, HMRC had offered no argument or justification as to

why the appellants should be treated differently to KAP. There was therefore a breach of the principle of equal treatment.

112. Mr Puzey submitted that the appellants could not simply compare themselves to the treatment of a single trader. He submitted that the principal of equal treatment does not extend to investigating the reasons why a single trader's appeal is settled but others are contested. There could not be a breach of the principle of equal treatment on the basis of a single instance of a settled claim. He submitted that the principle operates at a "higher level", as illustrated by Marks & Spencer. The rationale for the principle meant that it was necessary to establish unequal treatment by reference to a group of traders rather than a single trader. The principle of equal treatment would be unworkable if HMRC was required to address the terms of settlements made with individual taxpayers. It was akin to saying that following a decision of the FTT, every comparable case must be decided in the same way.

113. Mr Puzey illustrated his submission. He said that the KAP settlement may have been right or wrong as a matter of law on the facts. If it was right, it did not tell us anything about the claims being made by the appellants. If it was wrong, why should HMRC be forced to repeat their mistake. In this context he relied on what the Court of Appeal said in Hely Hutchinson at [45]:

> "45. There are two important corollaries of HMRC's duty of fairness. First, HMRC's duty does not mean that it has to ensure that all taxpayers are charged with tax, if it appears that the facts bring them within a particular statutory charge, as there may be all sorts of reasons why it is not practical in the interests of good management to do so: *R (on the application of Weston) v HMRC* (2004) 76 TC 207 at [8] – [10] per Moses J. Second, in *R (o/a Esterson) v HMRC* (2005) 77 TC 629 at [40], Davis J, applying Weston concluded that the fact that some other taxpayers benefitted from a policy does not require that the claimant taxpayer should, as a matter of public law fairness, do so if that involves the perpetuation of the mistake or misapprehension that led to the adoption of the policy."

114. I was not referred to any authorities relevant to Mr Puzey's submission that the principle does not apply to ensure equality of treatment with a single trader, but operates at a higher level. Equally, I was not referred to any authority where the principle of equal treatment has been found to operate at the level the appellants say it should operate in this case. I can see that difficulties would follow where a decision in relation to one taxpayer, for whatever reason, is inconsistent with a decision in relation to another taxpayer in comparable circumstances. What is the position if there are two different decisions relating to two comparable taxpayers, and the unfavourable decision is not challenged? Can a third taxpayer rely on equal treatment with the taxpayer treated favourably? What about a decision of the FTT in favour of a taxpayer which is not appealed. Does that decision effectively become binding in relation to taxpayers in comparable situations?

115. It seems to me that there must be some limitation on the principle of equal treatment, as there is with the public law principle described in *Hely Hutchinson*. I doubt whether it can apply in relation to an isolated decision which treats a single taxpayer more favourably than others in the absence of some legislative or policy basis for the unequal treatment. However, I do not need to decide this point. Mr Puzey submitted, correctly in my view that the burden was on the appellants to satisfy the tribunal that HMRC had breached the principle of equal treatment. The appellants have not made out that case. Simply establishing that HMRC had settled a claim made by KAP is not sufficient. The appellants could and should have adduced evidence as to the circumstances of KAP's claims and the circumstances of the settlement. They have not done so. The KAP Settlement simply evidences that KAP made an Italian claim on 16 June 2003, HMRC paid the Guidance Amount in accordance with their published guidance, and additional Italian claim was made at some stage which HMRC considered was

outside the required timescales and refused. That refusal was appealed and the appeal was settled by way of payment of the Principal Amount. I accept that these facts are at least consistent with the case of the appellants in the present appeals. However, I cannot be satisfied on the basis of those facts that KAP's claim shares all the relevant characteristics of the appellants' claims. There is no reference in the KAP Agreement to the Italian Tables, the date on which KAP made its additional Italian claim or the basis on which the additional Italian claim was calculated. In particular, whether the additional Italian claim was calculated using an uplifted gross profit per unit due to the effect of the abolition of car tax. Indeed, the KAP Settlement refers to the payment of the Guidance Amount on KAP's original claim as "taking into account the specific circumstances of Kent Auto Panels Ltd". There is no evidence what those specific circumstances were.

116. It is not for HMRC to justify the KAP Agreement when the appellants have not put forward any real case that the appellants are in a comparable position to KAP.

117. In the circumstances I am not satisfied that there has been a breach of the EU law principle of equal treatment.

CONCLUSION

118. For the reasons given above these appeals are dismissed.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

119. 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 CANNAN
TRIBUNAL JUDGE
RELEASE DATE: 07 OCTOBER 2020

Annex

Appellant	Appeal Ref	Claim Amount
R.T. Rate Limited	TC / 2017 / 02046	£ 98,832.55
Beadles Aylesford Limited	TC / 2019 / 00558	£ 3,103.93
Beadles Dartford Limited	TC / 2019 / 00564	£ 41,938.57
Beadles Sidcup Limited	TC / 2019 / 00566	£ 41,507.72
DS Dalgleish & Son (Hawick) Ltd	TC / 2019 / 00581	£ 5,336.20
F Troop and Son Limited	TC / 2019 / 02418	£ 14,761.72
F Twells and Son Limited	TC / 2019 / 02419	£ 9,471.42
Helston Garages	TC / 2019 / 03942	£ 76,690.00
North Street Garages	TC / 2020 / 00439	£ 19,169.79
Pilling Motor Group	TC / 2017 / 06771	£ 227,292.99
Robinsons Autoservices Ltd (Boroughbury)	TC / 2019 / 02065	£ 60,522.13
Robinsons Autoservices Ltd (Borocars)	TC / 2019 / 02064	£ 15,984.09
Addison Motors Limited	TC / 2019 / 02142	£ 311,928.12
Barretts of Canterbury	TC / 2019 / 03272	£ 37,706.81
Bluebell Crewe Limited	TC / 2019 / 02144	£ 15,685.09
S Jennings Limited	TC / 2019 / 02146	£ 36,838.34
Caffyns Plc	TC / 2019 / 05074	£ 543,575.44
Ancaster Group Limited	TC / 2020 / 02056	£ 115,753.32