[2021] UKFTT 0070 (TC)

TC08055

VAT – section 80, VATA 1994 – time limits – whether or not a new claim or an amendment to a pre-existing claim – new claim – whether or not the FTT has jurisdiction in respect of HMRC's care and management powers to waive the time limit – no – whether or not a breach of Article 1 of Protocol 1 of the ECHR – no – whether or not a breach of the principles of equivalence or effectiveness – no – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2018/06634

BETWEEN

ROYAL COUNTY DOWN GOLF CLUB **Appellant**

-and-

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

TRIBUNAL: JUDGE RICHARD CHAPMAN QC

The hearing took place in public on 9 September 2020 by way of a remote video hearing using the Tribunal video platform. A face to face hearing was not held because of the Covid-19 pandemic. Further written submissions were provided on 23 September 2020 and 30 September 2020.

Mr Ciaran Harvey, Counsel, instructed by Moore (NI) LLP for the Appellant

Miss Harry Jones, litigator of HM Revenue and Customs' Solicitor's Office, for the Respondents

DECISION

INTRODUCTION

1. This appeal raises issues as to the operation of statutory time limits. It is common ground that a claim by Royal County Down Golf Club ("the Club") for repayment of overpaid VAT was, if taken on its own, made outside the statutory time limit. The Club submits that the claim was in fact an amendment to a pre-existing claim and so is within time. In the alternative, the Club submits that, if it was not an amendment to a pre-existing clam, the operation of the statutory time limit should be disapplied in the circumstances of the present case. HMRC's position is that the claim is, and should remain, time-barred.

FINDINGS OF FACT

2. I read witness statements from Dr Rosemary Peters Gallagher and Mr Ciaran McGee on behalf of the Club, both of whom were at the material times employed by the Club's external chartered accountants, Moore (NI) LLP (previously Moore Stephens (NI) LLP) ("Moore Stephens"). I also read a witness statement from Mr Trefor Jones on behalf of HMRC. Mr Jones was the decision making officer in this matter. Of the three witnesses, only Mr McGee gave oral evidence. He did so in a helpful and entirely credible manner. Dr Peters Gallagher and Mr Jones attended the hearing and verified their witness statements. However, Miss Jones and Mr Harvey took the helpful and constructive approach that there was no need for cross-examination of either of these two witnesses as the facts (as distinct from the application of those facts) were not in dispute.

3. In the circumstances, I make the following findings of fact upon the basis of the witness evidence and the documents within the hearing bundle.

4. As its name indicates, the Club is a golf club. In common with many other golf clubs, the Club charges green fees from non-members for the use of the Club's golf course. The Club historically accounted for VAT on green fees in accordance with HMRC's approach to such income and the prevailing view of the operation of the domestic legislation. This was upon the basis that the exemption for sporting services did not extend to supplies made to non-members of golf clubs.

5. On 27 March 2009, the Club (through Moore Stephens) submitted a claim to HMRC for over-declared output tax on green fees in the sum of £492,167 in respect of the VAT periods 1 January 1990 to 4 December 1996 and 1 January 2006 to 31 December 2008 ("the 2009 Claim"). This was upon the basis that the European Court of Justice had recently given judgment in *Canterbury Hockey Club and Canterbury Ladies Hockey Club v HMRC* (Case C-253/07) [2008] STC 3351 ("*Canterbury Hockey"*) relating to the scope of the sporting exemption (being the exemption from VAT for certain services linked to sport supplied to persons taking part in sport provided by Article 13(A)(1)(m) of the Sixth Directive). It was the Club's view (in common with various other golf clubs) that the sporting exemption should be extended to visiting players. The period between 1990 and 1996 was therefore a *Fleming* claim and the period between 2006 and 2008 was a voluntary disclosure within the usual time limits. Given the significance of this letter, I set out its substance as follows:

> "On behalf of the above client we hereby submit a claim under the terms of Business Brief 07/08 and s80 VATA 1994 in respect of output tax overpaid (net of the related input VAT reduction) on green fee income for the period 1 January 1990 to 4 December 1996 and from 1 January 2006 to 31 December 2008.
>
> This claim is based on the recent ruling given by the European Court of Justice in the recent case involving Canterbury Hockey Club (Case ref EUECJ C-253/07) in which the court ruled that the expression "certain

> services closely related to sport" in Article 13A(1)(m) of Sixth Directive 77/388 does not allow member states to limit the exemption under that provision by reference to the recipients of the services in question. As such we consider that the sporting exemption afforded to playing members of Royal Co Down Golf Club from 1 January 1990 should be extended to visiting players.
>
> The amount of VAT involved in this claim totals £492,167. A summary of the claim is attached and detailed calculations are available for review at our Belfast office. The club also wishes to claim statutory interest (calculated on a compound basis) on the VAT currently being reclaimed."

6. The Club also sought repayment of interest of VAT overpaid on membership subscriptions on a compound basis. This element of the claim is not in issue within the present appeal.

7. On 26 August 2009, HMRC rejected the Club's claim. This was upon the basis of HMRC's view that Canterbury Hockey had no impact upon VAT on green fees as the sporting exemption did not (on HMRC's case at that time) extend to supplies to non-members.

8. The Club requested a review on 24 September 2019. Moore Stephens disputed HMRC's interpretation of the Principal VAT Directive, maintained that the sporting exemption also applied to supplies made by non-profit making sports clubs to non-members, and suggested that the review period be extended to allow for the resolution of likely litigation involving other golf clubs on the same matter.

9. This resulted in a letter from HMRC dated 6 November 2009 upholding the decision. The review decision included the following conclusion:

> "The *Canterbury Hockey* case considered whether the term "person" should be restricted to individuals actually playing the sport or should be extended to other legal entities, such as corporate bodies. The Court's ruling was that because Article 13 does not restrict the sporting exemption to any particular category of recipient the exemption cannot be restricted to any particular legal entity.
>
> It is HM Revenue & Customs view that the ruling in Canterbury Hockey has no bearing on the fact that greens fees are consideration for a taxable supply rather than exempt supply. As Article 13(A)(2)(b) has direct effect the UK is obliged make legal provision to exclude from exemption supplies made to obtain additional income which are in direct competition with commercial enterprises.
>
> HM Revenue & Customs consider green fees are taxable because they are for the purpose of obtaining additional income and are in direct competition with commercial enterprises, not because they are charged to non-members. The decision is based on the nature of the supply and not the nature of recipient, i.e. a natural person or an organisation."

10. The Club appealed against HMRC's decision in 2010 with the appeal reference TC/2010/00896 ("the 2010 Appeal"). The 2010 Appeal was stood behind an appeal brought by another golf club, Bridport and West Dorset Golf Club Ltd ("Bridport"). The First-tier Tribunal allowed Bridport's appeal in a decision released on 1 June 2011 and reported at [2011] UKFTT 354 (TC), ("*Bridport FTT*"). HMRC appealed *Bridport FTT* to the Upper Tribunal. In a decision released on 30 July 2012 and reported at [2012] UKUT 272 (TCC), [2012] STC 2244, the Upper Tribunal stayed the proceedings and referred a number of questions to the Court of Justice of the European Union ("the CJEU") ("*Bridport (UT)*"). On

19 December 2013, the CJEU released its judgment in *Revenue and Customs Commissioners v Bridport and West Dorset Golf Club Ltd* (Case C-495/12) [2014] STC 663 ("*Bridport (CJEU)*"). For present purposes, the significant finding within *Bridport CJEU* was that the United Kingdom's treatment of green fees paid by non-members was incompatible with the Principal VAT Directive and that such fees should be exempt from VAT. Legislation was duly introduced to reflect this.

11. Throughout Bridport's litigation, the Club maintained its position that green fees paid by visiting non-members were exempt.

12. On 22 April 2014, HMRC applied for a further stay of the 2010 Appeal until 18 July 2014 on the grounds that HMRC was considering a further defence against the appeal upon the basis of unjust enrichment. This extension was granted. On 24 July 2014, HMRC applied for a further stay until 28 January 2015 upon the same grounds. I have no evidence before me as to what happened to that application or the 2010 Appeal itself. However, as set out below, HMRC agreed to repay the sums claimed in the 2010 Appeal on 18 July 2018. I infer from this that the 2010 Appeal remained stayed and was either withdrawn or compromised after 18 July 2018. In any event, there is no suggestion that the 2010 Appeal is ongoing and I am not asked by either party to determine whether or not the sums claimed within the 2010 Appeal are or were owing.

13. On 29 January 2015, Moore Stephens sought reclaims in respect of the periods from 1 January 2009 to 31 December 2013 ("the 2015 Claim"). The 2015 Claim provides as follows:

> "We enclose herewith a summary of VAT reclaim in the above case. Full workings may be inspected at our Coleraine offices, at the address shown above.
>
> The reclaim is made in light of the ECJ's decision in the case of Bridport & West Dorset Golf Club (C-495/12), in which it was decided that the UK's treatment of green fees from non-members incompatible with the exemptions provided by the Principal VAT Directive.
>
> You will note that the total amount to be claimed amounts to £746,429.
>
> The Club also wishes to claim statutory interest on the amounts overpaid, calculated on a compound basis."

14. Dr Peters Gallagher's evidence in her witness statement was that the Club and Moore Stephens both clearly understood that any figures provided to HMRC after the 2009 Claim was on the same legal and factual footing as 2009 Claim and that the 2015 Claim was seen by the Club and Moore Stephens as an amendment or update to the 2009 Claim. She also said that there was never any suggestion that the Club's practices had changed or that it was seeking to make new claims on some different basis from that applicable to the 2009 Claim. As set out above, Dr Peter Gallagher was not cross-examined. Mr McGee's evidence was to the same effect and, although he was cross-examined, was not challenged on these points. I therefore accept this evidence subject to the following riders.

15. First, I note that Dr Peters Gallagher does not say at any point that the Club or Moore Stephens informed HMRC prior to the 2015 Claim that further periods were to be added to the 2009 Claim. Similarly, Mr Harvey has not drawn my attention to any document or evidence to such effect. As such, whilst I accept that the Club and Moore Stephens took the view that further periods were to be added to the 2009 Claim, I find that there is no evidence that they informed HMRC of this or made any formal claim in respect of the Disputed Period until the 2015 Claim.

16. Secondly, Mr Harvey submitted that the evidence showed that it was clear and obvious to HMRC that the Club disputed HMRC's interpretation and that the Club was challenging the imposition of VAT on visitors' green fees. Miss Jones did not dispute Mr Harvey's submission in this regard and I accept that it was the case as a matter of fact. However, it is also clear that HMRC was not informed by the Club which periods this related to beyond the 2009 Claim, or the sums claimed for such periods, or even that a repayment claim was being made for such periods, until the 2015 Claim was made.

17. Thirdly, whether or not the 2015 Claim had the legal effect of being an amendment or an update to the 2009 Claim is a separate question to whether or not the Club or Moore Stephens envisaged it as being such an amendment or an update. I deal with the legal effect of the 2015 Claim below rather than within my findings of fact.

18. Fourthly, Miss Jones asked Mr McGee in cross-examination whether or not HMRC had ever acknowledged or agreed that the 2015 Claim was an amendment to the 2009 Claim. Mr McGee fairly accepted that there had been no such acknowledgement or agreement and that he had not described the 2015 Claim as an amendment to the 2009 Claim. I accept Mr McGee's evidence in this regard.

19. Correspondence then passed over a protracted period between HMRC and Moore Stephens in which they each set out their position in respect of the reclaims which were the subject of the 2010 Appeal and the subject of the 2015 Claim.

20. On 18 July 2018, Mr Jones made his decision on behalf of HMRC. He rejected the part of the claim covering the period 1 January 2009 to 31 December 2010 ("the Disputed Period") in the sum of £229,872, taking the view that the Disputed Period was out of time as the Club could only make a claim for the four years prior to the 2015 Claim. He also rejected the claim for the period 1 October 1996 to 31 December 1996 in the sum of £2,669 and accepted the claims in the 2010 Appeal and the 2015 Claim for all other periods.

21. By a letter dated 15 August 2018, the Club sought a review in respect of the rejection of the claim for the Disputed Period. HMRC upheld the decision by a review conclusion letter dated 26 September 2018 upon the basis that the claim for the Disputed Period was out of time. This was the first time that the time limit had been raised by HMRC.

22. The present appeal was received by the Tribunal on 24 October 2018. In essence, the Club's grounds for appeal as set out in the notice of appeal are that the Club had made it clear throughout the process of that it wished to apply what it termed the "*Bridport* treatment" to its VAT affairs to the maximum extent possible. It is common ground that the "*Bridport* treatment" is the treatment of green fees to visiting non-members as VAT exempt.

ISSUES

23. For the avoidance of doubt, the Club does not argue that the four year cap pursuant to section 80(4) of the Value Added Tax Act 1994 ("VATA 1994") is unlawful or in itself incompatible with community law. Instead, the Club argues that it is unreasonable for HMRC to rely upon the statutory time limit in the circumstances of the present case.

24. For the further avoidance of doubt, it was common ground that if the 2015 Claim is to be treated as being within time (or if the limitation period is otherwise to be applied) the Club would be entitled to the repayment claimed.

25. As such, the following issues arise for determination within this appeal:

(1) The statutory framework.

(2) Whether or not the 2015 Claim is an amendment to the 2009 Claim.

(3) The scope of the Tribunal's jurisdiction to require HMRC to apply its powers of care and management to disapply the statutory time limit.

(4) Whether or not the statutory time limit is to be disapplied by virtue of Article 1 of Protocol 1 of the European Convention on Human Rights pursuant to the Human Rights Act 1998 ("A1P1").

(5) Whether or not the statutory time limit is to be disapplied by virtue of the principles of effectiveness or equivalence.

THE STATUTORY FRAMEWORK

26. The statutory framework was not in dispute.

27. Insofar as is relevant, section 80 of VATA 1994 ("section 80") provides as follows:

> "80. Credit for, or repayment of, overstated or overpaid VAT.
>
> (1) Where a person –
>
> (a) has accounted to the Commissioners for VAT for a prescribed accounting period (whenever ended), and
>
> (b) in doing so, has brought into account as output tax an amount that was not output tax due,
>
> the Commissioners shall be liable to credit the person with that amount.
>
> …
>
> (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,
>
> …
>
> If the claim is made more than 4 years after the relevant date.
>
> (4ZA) The relevant date is –
>
> (a) in the case of a claim by virtue of subsection (1) above, the end of the prescribed accounting period mentioned in that subsection, unless paragraph (b) below applies;
>
> (b) in the case of a claim by virtue of subsection (1) above in respect of an erroneous voluntary disclosure, the end of the prescribed accounting period in which the disclosure was made;
>
> …"

28. Regulation 37 ("regulation 37") of the Value Added Tax Regulations 1995 ("VATR 1995") provides as follows:

> "37. Any claim under section 80 of the Act shall be made in writing to the Commissioners and shall, by reference to such documentary evidence as is in the possession of the claimant, state the amount of the claim and the method by which that amount was calculated."

THE STATUS OF THE 2015 CLAIM

The Parties' Submissions

The Common Ground

29. There was common ground as to the central test when considering whether a claim was a new claim or an amendment to an existing one.

30. In *Reed Employment Limited v HMRC* [2013] UKUT 109 (TCC), [2013] STC 1286 (Roth J) the Upper Tribunal treated the distinction as turning upon whether the later claim arises out of the same subject matter as the original claim, without extension to facts and circumstances that fall outside the contemplation of the earlier claim. This is a matter of fact and degree. Roth J stated as follows [32] and [33]:

> "[32] The FTT approached the question of whether a further demand is an amendment to an existing claim by adopting the test of whether it was shown to be 'in essence as one with an earlier claim': para [110]. In my judgment, there is nothing wrong with this test, but I am not sure it advances the matter significantly, and I do not think it is appropriate to add a gloss to the statutory wording. The FTT proceeded to hold as follows:
>
> > '[111] That test, in our view, will be satisfied only if the later claim arises out of the same subject matter as the original claim, without extension to facts and circumstances that fall outside the contemplation of the earlier claim. Without deciding matters outside of this appeal, we consider, for example, that this would generally include cases where a particular computation was not made at the time of the original claim, but the subject matter of the claim was sufficiently identified for such a calculation made subsequently to be related back to the original claim. Simple calculation errors would similarly be included. It should also cover, we think, cases where particular items within the category of the subject matter of the original claim are unknown or not fully identified at the time of the original claim, and would but for that fact have been included in the original claim, but only subsequently come to light.'
>
> [33] If subsequent to the submission of a claim, the taxpayer sends in the correction of a mistake, whether that be an arithmetical error or through the omission of some supplies that were clearly intended to be included, then I consider that would clearly not be a new claim but an amendment. Further, if the taxpayer making a claim says that he is not yet able to calculate the full figures and gather all the documentation as required by reg 37, but is in the course of doing so and will provide such further details as soon as possible, such further submission would not constitute a new claim but fall within the scope of the existing claim. Thus I consider that what is an amendment is very much a question of fact and degree, judged by the particular circumstances. I therefore respectfully agree with the test set out by the FTT in the first sentence of para [111]. However, of the examples given in that paragraph, I would not wish to approve in the abstract the final example: that would be for consideration on the particular facts of the case should it arise."

31. The test is an objective one. Snowden J stated as follows in *Grand Entertainments Company (A Firm) v HMRC* [2016] UKUT 209 (TCC) at [35] to [37] *("Grand Entertainments*"*):*

> "[35] As to Mr. Tack's second argument, I note that in Reed, Roth J. endorsed the point made by the FTT in the first sentence of paragraph 111 of its judgment, that the test of whether a subsequent claim should be regarded as an amendment of an original claim will be satisfied only if the later claim

> arises out of the same subject matter as the original claim, without extension to facts and circumstances that fall outside the contemplation of the earlier claim.
>
> [36] Put in those simple terms, it is clear that the Original Claim did not include and did not contemplate a repayment claim in respect of MSB, or a claim in respect of any supplies during periods prior to 1 November 1980.
>
> [37] As to a claim for MSB, the wording of the Original Claim could not have been clearer in referring only to MCB, AWP and JM. On any objective reading, the Original Claim did not include a claim in respect of MSB. Moreover, although I think that it is an objective test, it is apparent from the explanation that Mr. Deeming gave as to the advice he received before making that Original Claim and the subsequent advice he later received (I was advised that I could also claim for MSB) that no-one thought that the Original Claim did include a claim for MSB. The subsequent decision to make a claim for MSB was the product of analysis by the Appellant's advisers in light of the Revenue Briefings following the decision of the High Court in Rank in June 2009."

32. Indeed, at paragraphs [42] and [43] of *Grand Entertainments*, Snowden J went on to find that it was not enough for the supplies in a subsequent claim to be the same as the original claim if it related to different accounting periods.

> "[42] As regards the claims in respect of supplies prior to 1 November 1980, the simple fact, as identified by the FTT, was that the Original Claim was expressly made by reference to the period 1 November 1980 to 4 December 1996 and made no mention of any other accounting periods.
>
> [43] If, as I think it is, the key question is whether the Original Claim, viewed objectively, indicated any intention on the part of the Appellant to make a claim for periods prior to 1 November 1980, the clear answer is no. And for the reasons set out in paragraphs 31-32 above, even though, for VAT purposes, the nature of the supplies included in the January 2010 Claim were the same as those included in the Original Claim, it does not follow that the subsequent claim in respect of different accounting periods must be regarded as being part of, or an amendment to, the earlier claim."

33. A claim for repayment must fulfil the mandatory requirements of regulation 37, being the amount of the claim and the method by which the amount is calculated. In *HMRC v Vodafone Groups Services Ltd* [2016] UKUT 89 (TCC), [2016] STC 1064, Warren J and Judge Bishopp stated as follows at [54] to [56]:

> "[54] It is apparent from s80(1) and (2) that the taxpayer's claim must be a demand for a particular amount, namely the amount of output tax which was not due. However, the process of identification of a claim does not end there. Subsection (6) imports the mandatory requirements which are set out in reg 37. Although we agree that the regulation is primarily procedure rather than substantive, when it is read together with subs-s (1), (2) and (6) it is apparent not only that the requirements of writing, of the statement of the amount of the claim and of the method of calculation are obligatory, since without them there is no claim within the statutory meaning, but that they are also the elements which, together, identify the claim.
>
> [55] It follows that we do not accept Mr Hitchmough's argument that a claim is defined by its amount alone. The argument is not consistent with the

> statutory words: reg 37 requires the claimant to state both the amount of the claim and the method by which that amount was calculated. We do not see any basis on which it could reasonably be concluded that the first is fixed and immovable whereas the second can be changed at will, as Mr Hitchmough's argument implies. The draftsman has imposed two distinct even if interdependent requirements and there is nothing in the words used to suggest that one is more important than the other, or has a different character from the other.
>
> [56] We agree with Judge Mosedale that s80 and reg 37 carry with them an implicit requirement that a claimant should provide reasons sufficient to enable HMRC to understand why the claim has been made. We agree too with Mr Hitchmough that it would be strange if the implicit requirement of reasons were to be rigid while the mandatory requirements of reg 37 were flexible. The requirement to identify the methodology by which the amount of the claim is ascertained will, expressly or by necessary implication, identify the elements of the output tax brought into account which are said not to be output tax due. At least, we have been unable to conceive of a case where that requirement would not do so. In that sense, the reasons for the claim will be provided by the claim. But that is not the important point, which is that the requirement relating to methodology forms part of the identification of the claim, defining what the claim actually is."

34. For completeness, I note that I was also referred to the cases of *BLP Group plc v Commissioners of Customs and Excise* [1995] ECR I-1001, *HMRC v Bratt Auto Contracts Ltd* [2016] UKUT 90 (TCC), [2016] STC 1463 and *Nairn Golf Club v HMRC* [2015] UKFTT 185 (TC). I have considered these authorities but find that, in the context of the present case, they do not add anything to the principles set out above.

The Club

35. Mr Harvey submitted on behalf of the Club that in all of the returns submitted from 27 March 2009 the issue of VAT on green fees paid by visiting non-members was clearly highlighted as a live issue in dispute with the effect that the claim remained live and open to amendment. Mr Harvey also submitted that there was no specific form for a claim to be made.

HMRC

36. Miss Jones submitted that the 2015 Claim was a new claim rather than an amendment to the 2009 Claim because it relates to different prescribed accounting periods and does not modify or enhance the earlier claim.

Discussion

37. I find that the 2015 Claim was a new claim and was not an amendment or modification to the 2009 Claim. Crucially, on an objective reading of the 2009 Claim it is clear that it does not purport to relate to any period after 1 January 2009. The 2009 Claim expressly states that it is in respect of, "green fee income for the period 1 January 1990 to 4 December 1996 and from 1 January 2006 to 31 December 2008." There is no reference at all to any later period. The later periods added by the 2015 Claim are clearly an extension to the facts and circumstances in the 2009 Claim as they relate to later periods. On an objective reading, these later periods were not contemplated by the 2009 Claim.

38. Mr Harvey's reliance upon returns submitted after 27 March 2009 does not assist the Club. These necessarily post-dated the 2009 Claim and so do not have any impact upon an objective reading of what the 2009 Claim related to. Further, it is not suggested that any fresh

claims were made within these returns such that those additional claims were in time; indeed, as set out above, Dr Peters Gallagher did not say that HMRC was informed prior to the 2015 Claim that further periods were to be added to the 2009 Claim.

39. Similarly, Mr Harvey's argument as to the required form of a claim takes the matter no further as the Club has not provided any evidence that any purported claim in respect of the Dispute Period was made in *any* form until the 2015 Claim. Although Mr Harvey asserts that this was stated in the returns, the returns were not contained within the bundle (or provided in any other way), there is no evidence as to what was said in those returns, and this is not supported by any witness evidence. The Club has therefore not provided any evidence as to exactly how it is said that a claim was made between 2009 and 2015, or as to how it is said that such a claim stated the amount of the claim and the method by which that amount was calculated. The high point of the Club's case in this regard is that it was obvious that the Club was disputing the treatment of green fees to visiting non-members. However, without this being rooted in any demand for repayment in any form for a stated amount with a method of calculation, it could not be elevated into a claim for the purposes of section 80 of VATA 1994 and regulation 37 of VATR 1995.

JURISDICTION

The Parties' Submissions

The Club

40. Mr Harvey submitted that HMRC were entitled to use their care and management powers to waive the four-year time limit and that their refusal to do so was within the Tribunal's jurisdiction.

41. Mr Harvey relies upon *Oxfam v HMRC* [2009] EWHC 3078 (Ch), [2010] STC 686 *per* Sales J at [66] to [71] to argue that public law concepts can be relevant to matters within the Tribunal's jurisdiction. In particular, Sales J stated as follows at [69] and [70]:

> "[69] I cannot see any good reason for adopting a different approach to the interpretation of the jurisdiction of the tribunal in s83 of VATA. The tribunal is used to dealing with complex issues of tax law. There is no reason to think that it would not be competent to deal with issues of public law, in so far as they might be relevant to determine the outcome of any appeal. That view is reinforced by the fact that the tribunal may have to deal with complex public law arguments in relation to Convention rights when construing legislation under s3 of the Human Rights Act 1998, and is recognised by Parliament as being competent to do so.
>
> [70] Moreover, there is a clear public benefit in construing s83 by reference to its ordinary and natural meaning which strongly supports that construction. It is desirable for the tribunal to hear all matters relevant to determination of a question under s83 (here, the amount of input tax to be credited to a taxpayer) because (a) it is a specialist tribunal which is particularly well positioned to make judgments about the fair treatment of taxpayers by HMRC and (b) it avoids the cost, delay and potential injustice and confusion associated with proliferation of proceedings and ensures that all issues relevant to determine the one thing the HMRC and taxpayer are interested in (in this case, the amount of input tax to be recovered) are resolved on one occasion in one place. It seems plausible to suppose that Parliament would have had these public benefits in mind when legislating in the wide terms of s83."

42. Mr Harvey also relies on *MS (Pakistan) v Secretary of State for the Home Department* [2020] UKSC 9, [2020] 1 WLR 1373 ("*MS (Pakistan)*"), especially at [12] to [14]. Although in the different context of immigration law, Mr Harvey submitted that this decision is significant because the Supreme Court confirmed the status of the First-tier Tribunal as an important constitutional safeguard empowered by statute to arrive at its own conclusions on the evidence. In that case, the Supreme Court confirmed that a Tribunal was not fettered by a decision made by a government official.

43. Mr Harvey submitted that an exception to the requirement for a judicial review against public bodies' decisions is where the invalidity of an official decision arose as a collateral issue in a claim for infringement of a right arising under private law. He relied upon *O'Reilly v Mackman* [1983] 2 AC 237 (especially at 278) and *Roy v Kensington Family Practitioner Committee* [1992] 1 AC 624 in this regard. He also argued that public law principles should be implied into VATA 1994.

44. Bringing these authorities together, Mr Harvey submitted that the issue in the present case is the invalidity of HMRC's decision to deny repayment and so public law matters are relevant to that. He said that the logical consequence of HMRC's argument is that taxpayers are unfairly forced to fight two sets of proceedings in order to raise both substantive tax arguments and public law arguments.

45. Mr Harvey submitted that the decision to disallow the Club's claim was unjustified and disproportionate and the nature and substance of its claim has at all times been made clear to HMRC since 27 March 2009 and was a live issue in dispute.

HMRC

46. Miss Jones' central submission was that the Tribunal does not have a general supervisory jurisdiction and so cannot scrutinise the use of HMRC's care and management powers. These care and management powers are provided for by sections 5, 9 and 51(3) of the Commissioners of Revenue and Customs Act 2005:

> "5. Commissioners' initial functions
>
> (1) The Commissioners shall be responsible for –
>
> (a) the collection and management of revenue for which the Commissioners of Inland Revenue were responsible before the commencement of this section, and
>
> (b) the collection and management of revenue for which the Commissioners of Customs and Excise were responsible before the commencement of this section, and
>
> (c) the payment and management of tax credits for which the Commissioners of Inland Revenue were responsible before the commencement of this section.
>
> (2) The Commissioners shall also have all the other functions which before the commencement of this section vested in
>
> (a) the Commissioners of Inland Revenue (or in a Commissioner), or
>
> (b) the Commissioners of Customs and Excise (or in a Commissioner).
>
> (3) This section is subject to section 35.

(4) In thus Act "revenue" includes taxes, duties and national insurance contributions.

…

9. Ancillary powers

(1) The Commissioners may do anything which they think –

(a) necessary or expedient in connection with the exercise of their functions, or

(b) incidental or conducive to the exercise of their functions.

(2) This section is subject to section 35.

…

51. Interpretation

…

(3) A reference in this Act, in an enactment amended by this Act or, subject to express provision to the contrary, in any future enactment, to responsibility for collection and management of revenue has the same meaning as references to responsibility for care and management of revenue in enactments passed before this Act."

47. In Revenue *and Customs Commissioners v Hok Ltd* [2012] UKUT 363 (TCC), [2013] STC 225 ("*Hok*") the Upper Tribunal (Warren J and Judge Bishopp) made it clear that the First-tier Tribunal does not have a general supervisory jurisdiction. The Upper Tribunal stated as follows at [41] to [43] and at [52]:

> "[41] There is in our judgment no room for doubt that the First-tier Tribunal does not have any judicial review jurisdiction. That was made abundantly clear by the House of Lords in *Customs and Excise Comrs v JH Corbitt (Numismatists) Ltd* [1980] STC 231, [1981] AC 22. That case related to the Value Added Tax Tribunals rather than the First-tier Tribunal, but they too were a creature of statute with no inherent jurisdiction, and the relevant principles are identical. Lord Lane (with whom the majority agreed) said, in what remains the classic statement on the point:
>
> > 'Assume for the moment that the tribunal has the power to review the commissioners' discretion. It could only properly do so if it were shown the commissioners had acted in a way which no reasonable panel of commissioners could have acted; if they had taken into account some irrelevant matter or had disregarded something to which they should have given weight. If it had been intended to give a supervisory jurisdiction of that nature to the tribunal one would have expected clear words to that effect in the [Finance Act 1972]. But there are no such words to be found. Section 40(1) sets out nine specific headings under which an appeal may be brought and seems by inference to negative the existence of any general supervisory jurisdiction.' (See [1980] STC 231 at 239–240, [1981] AC 22 at 60–61.)

> [42] The Finance Act 1972 was at that time the statute conferring jurisdiction in VAT cases on the Value Added Tax Tribunals. A similar point was made by the High Court in *Customs and Excise Comrs v National Westminster Bank plc* [2003] EWHC 1822 (Ch), [2003] STC 1072, in the latter case, after analysis of the authorities, by adopting and endorsing what had been said by Moses J in *Marks & Spencer plc v Customs and Excise Comrs* [1999] STC 205 at 247:
>
> > '… 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.'
>
> [43] That the First-tier Tribunal has no judicial review function is, in addition, the only conclusion which can be drawn from the structure of the legislation which brought both that tribunal and this into being. The 2007 Act conferred a judicial review function on this tribunal, a function it would not have had (since it, too, is a creature of statute without any inherent jurisdiction) had the Act not done so; and it hedged the jurisdiction it did confer with some restrictions. It is perfectly plain, from perusal of the Act itself, that Parliament did not intend to, and did not, confer a judicial review jurisdiction on the First-tier Tribunal, and there is nothing in the more detailed legislation relating to tax appeals, the Transfer of Tribunal Functions and Revenue and Customs Appeals Order 2009, SI 2009/56, which points to a contrary conclusion.
>
> …
>
> [52] In our judgment neither *Wandsworth v Winder* nor *Rhondda Cynon v Watkins* offers any support to the proposition that the First-tier Tribunal is able to apply (to use the judge's terminology) 'sound principles of the common law' in order to reduce or discharge penalties imposed pursuant to statute. What was in issue in both of those cases was not whether the councils' actions were fair or reasonable, or indeed any general principle of the common law, but whether the actions they had taken had the effect for which they argued—that is, whether the rent had been validly increased, and whether the compulsory purchase order had been vitiated by a subsequent change of mind. Those questions may well have given rise to issues of public law, but they did not give rise to matters for which the only possible remedy is by way of judicial review; and they went, in each case, to the core of the individual's defence of the claims made against him."

48. In Revenue *and Customs Commissioners v Noor* [2013] UKUT 071 (TCC) [2013] STC 998 ("*Noor*") the Upper Tribunal (Warren J and Judge Bishopp) found that the proper construction of section 83(1)(c) of VATA 1994 did not confer a jurisdiction to consider legitimate expectations. The Upper Tribunal stated as follows at [29] to [31] and [87] to [89]:

> "[29] Finally, so far as what we said in *Hok* is of direct relevance to the present appeal, we also considered (see para [43] of our decision) the structure of the TCEA 2007. We considered that the only conclusion which could be drawn from the structure of the legislation which brought both the FTT and the Upper Tribunal into being was that the FTT has no judicial review function. We noted that the TCEA 2007 conferred a judicial review function on the Upper Tribunal, a function it would not have had (since it, too, is a creature of statute without any inherent jurisdiction) had the Act not

done so; and it hedged the jurisdiction which it did confer with some restrictions. We remain of the view that it is perfectly plain, from perusal of the Act itself, that Parliament did not intend to, and did not, confer a judicial review jurisdiction on the FTT, and there is nothing in the more detailed legislation relating to tax appeals, the Transfer of Tribunal Functions and Revenue and Customs Appeals Order 2009, SI 2009/56, which points to a contrary conclusion.

[30] It is clear that the TCEA 2007 does not confer a general supervisory jurisdiction. It is also the case that s 83(1) of the VATA 1994 does not confer a general supervisory jurisdiction, as Sales J recognised (see [2010] STC 686 at [73]); and there is no other provision of the 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 FTT 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 FTT 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 s 83(1)(c) of the VATA 1994, which comes down to a point of statutory construction.

…

[87] In our view, the FTT 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 s 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. Thus, if HMRC have power (whether as part of their care and management powers or some other statutory power) to enter into an agreement with a taxpayer and that agreement, according to its terms, results in an entitlement to a different amount of credit for input tax than would have resulted in the absence of the agreement, the amount ascertained in accordance with the agreement may be one arising 'under the VAT legislation' as we are using that phrase. 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 s 83. As Mr Mantle puts it, the jurisdiction of the FTT is appellate (ie on appeal from a refusal of HMRC to allow a claim). The FTT has no general supervisory jurisdiction over the decisions of HMRC. That does not mean that under s 83(1)(c) the FTT cannot examine the exercise of a discretion, given to HMRC under primary or subordinate VAT legislation relating to the entitlement to input tax credit, and adjudicate on whether the discretion had

been exercised reasonably (see eg *Best Buys Supplies Ltd v Customs and Excise Comrs* [2011] UKUT 497 (TCC) at [48]–[53], [2012] STC 885 at [48]–[53]—a discretion under reg 29(2) of the VAT Regulations). Although that jurisdiction can be described as supervisory, it relates to the exercise of a discretion which the legislation clearly confers on HMRC. That is to be contrasted with the case of an ultra vires contract or a claim based on legitimate expectation where HMRC are acting altogether outside their powers.

[88] In our view, the subject matter of s 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 the VATA 1994, reflecting the provisions of, now, EC Council Directive 2006/112 of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p 1) (the principal VAT Directive). Similarly, the crediting of an amount of input tax is a matter of statute. The appellate jurisdiction of the FTT is formulated, in the case of s 83(1)(c), by reference to those concepts. The FTT 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.

[89] Suppose then that a taxpayer had received express representations from HMRC sufficient to give rise to a legitimate expectation that certain amounts of VAT paid by the taxpayer would be allowed as input tax notwithstanding that those amounts are not input tax for which credit could be given pursuant to the legislation. Suppose that the Administrative Court were prepared to grant a remedy in order to give effect to that legitimate expectation. We are not clear precisely what such a remedy would be, but one thing it could not do would be simply to order that HMRC give credit for the input tax. Take the present case as an example. Obviously the Administrative Court could not declare the VAT on the invoices to be allowable input tax—it clearly was not. Indeed, it would not have been input tax even if Mr Noor had claimed it within the six-month time limit since it would only have been *counted* (s 24(6)(b)) or *treated* (reg 111(1)(a)) as input tax. Nor, we consider, could the Administrative Court order HMRC to authorise Mr Noor to treat the VAT on the invoices as if it were input tax for the purposes of reg 111(1): that would fly in the face of reg 111(2). What we think the Administrative Court could do is to order HMRC to treat Mr Noor as entitled to a credit of *an amount equal to the VAT* on the invoices. But that amount it not itself input tax nor is it treated as input tax. The credit which Mr Noor would receive is not a credit for input tax but is a financial adjustment to give effect to his legitimate expectation. Indeed, it is not a 'credit' within the meaning of the legislation since such a credit is only given for input tax. Instead, it is, as we have described it, a financial adjustment to be reflected in the account between the taxpayer and HMRC.

[90] We can put this point in a slightly different way. 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 s 24 or reg 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 FTT has no jurisdiction to effect that financial adjustment since its jurisdiction under s 83(1)(c) relates only to 'input tax which may be credited' to a person.

[91] Our conclusion, in the light of this discussion, is that the FTT has no jurisdiction over Mr Noor's claim to a credit in respect of VAT on the invoices. In so concluding, we disagree with and depart from the decision of Sales J. We have dealt already with the concerns which we have about his reliance on the position in relation to the contract issue and with the difficulty expressed in [2010] STC 686 at [77]. We wish to say something more, however, about his principal reason for deciding as he did, namely his perception of the 'ordinary meaning of the language' of s 83(1)(c) and the importance which he attached to the words 'with respect to'. We do not consider that the 'ordinary meaning of the language' is that which Sales J attributes to s 83(1); and we consider that the words 'with respect to' do not bear the weight with which he burdens them.

[92] For our part, we consider that the ordinary meaning of the language used in the context of the VATA 1994 as a whole is that it is concerned with the right to a credit arising under the terms of the VAT legislation (including, on one view, HMRC's care and management powers). We have already given our main reason for reaching that conclusion in our analysis of what is meant by 'input tax' and 'credit' in s 83(1)(c). Further support for our conclusion is found when it is remembered that s 83(1) concerns appeals, that is to say appeals against decisions of HMRC. That makes perfectly good sense in the context of a decision concerning the matters listed in the paragraphs of s 83(1), and in particular concerning a decision in respect of a person's entitlement to an input tax credit under the VAT legislation. In the absence of an appealable decision, there is nothing to appeal and s 83 does not come into play.

[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 s 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 s 83(1) and would be to give the FTT, 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."

49. In *Trustees of the BT Pension Scheme v Revenue and Customs Commissioners* [2015] EWCA Civ 713, [2016] STC 66 ("*BT Pension Scheme*") the Court of Appeal limited the operation of *Oxfam* to the construction of section 83(1)(c) of VATA 1994 and the jurisdiction of the Tribunal to deal with legitimate expectation in the context of input tax, rather than

granting a wider general supervisory jurisdiction. Patten LJ stated as follows at [141] to [143]:

> "[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 Revenue and Customs Comrs* 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 Sch 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 Revenue and Customs Comrs* 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."

50. I note at this stage that Mr Harvey sought to distinguish the cases relied upon by HMRC. As regards *Hok*, Mr Harvey argued that [52] distinguished the case of *Wandsworth London BC v Winder* [1985] 3 AC 361 as a case which did not give rise to matters for which the only possible remedy is judicial review. Here, Mr Harvey maintained, judicial review is not the only remedy as the issue is the validity of the decision taken by HMRC to refuse to repay VAT unlawfully imposed. Further, Mr Harvey submitted that *Noor* assists the Club, referring in particular to [31] to the effect that the Tribunal's jurisdiction can include matters of public law where necessary to do so in the context of deciding issues clearly falling within its jurisdiction. Mr Harvey submitted that *BT Pension Scheme* is to be distinguished because it related to whether or not a concession was operated in accordance with its terms, whereas the present case turns upon whether the decision to refuse repayment was proportionate, fair and compliant with Article 1 of the First Protocol of the ECHR and the EU principle of effectiveness.

Discussion

51. The principles emerging from the case law set out above are well summarised by the Upper Tribunal in *R & J Birkett v Revenue and Customs Commissioners* [2017] UKUT 89 (TCC) (Nugee J and Judge Greenbank) at [30]:

> "[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."

52. At [33] of *Birkett*, the Upper Tribunal also noted the inconsistency between the treatment of section 83(1) in *Oxfam* and in *Noor* but that ultimately this turned upon the proper interpretation of section 83(1):

> [33] However we do not read the Court of Appeal in *BT Trustees* as having laid down any general rule as to the FTT's jurisdiction applicable in all cases.

> It is noticeable that in relation to Sales J's judgment in *Oxfam* they said (at [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."
>
> That confirms that they 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."

53. I find that I have no jurisdiction in the present case to consider the exercise or otherwise of HMRC's care and management powers. This is for the following reasons.

54. First, the Club is essentially inviting the Tribunal to exercise a general supervisory jurisdiction. I take this from the fact that the Club is essentially seeking scrutiny of HMRC's general care and management powers and from his submissions as to the general relationship between judicial review and private law remedies (including his reliance upon *MS (Pakistan).* Further, Mr Harvey's submission was effectively that it was unfair for HMRC to rely upon the time limit in circumstances in which they knew what the Club's arguments were, notwithstanding that no formal claim had been made; this is an argument based upon unfairness rather than whether or not requirements of section 80 had been met. It is clear from the authorities as set out above that the Tribunal does not have any such general supervisory jurisdiction. It is also clear from the authorities set out above that the extent to which public law principles can be considered depends upon statutory construction. As such, *MS (Pakistan)* is of no assistance in the present context as it does not relate to the statutes underlying this Tribunal's jurisdiction in this case or at all.

55. Secondly, the Tribunal's jurisdiction arises from section 83(1)(t) of VATA 1994:

> "(t) a claim for the crediting or repayment of an amount under section 80 an assessment under subsection (4A) of that section or an amount of such an assessment."

56. It follows that the Tribunal's jurisdiction in this regard relates to whether or not the conditions for credit or repayment set out in section 80 are made out. Given that section 80(4) provides for the four-year time limit, this jurisdiction includes consideration of the application of that time limit to the present case. However, there is no basis for any construction of section 83(1)(t) that provides for any jurisdiction to consider whether or not HMRC should disapply the time limit within section 80(4). This is because section 80(4) is written in mandatory terms, there is no statutory power within section 80 for HMRC to disapply the time limit, and the wording of section 83(1)(t) does not provide the Tribunal with any wider jurisdiction than to consider whether or not the claim for credit or repayment is made out. Further, HMRC's power to disapply the time limit is within its care and management powers rather than section 80(4) and I note that I have not been referred to any statutory basis for these care and management powers being appealable matters.

57. Thirdly, I do not accept that jurisdiction over a failure to waive or disapply the time limit can be implied into section 80 or section 83(1)(t) of VATA 1994. This is because the proper construction of those sections (as set out above) is that a taxpayer is only entitled to a credit or repayment if it is within time and the Tribunal's jurisdiction is as to whether or not the entitlement to a credit or repayment is made out. I do not accept Mr Harvey's submission that such an implication (or construction) can be derived from his assertion that it cannot have been Parliament's intention to require taxpayers to fight two sets of proceedings in order to raise both substantive tax arguments and public law arguments. I respectfully adopt the following comments of the Upper Tribunal in *Noor* at [77]:

> "[77] In any case, we disagree with the suggestion concerning the plausibility of what Parliament can be supposed to have had in mind. There are several reasons for this, including these:
>
> a. If Parliament had intended to confer this jurisdiction on the VAT Tribunal, we would have expected it to say so clearly. Even as late as the passing of VATA 1994, *a fortiori* when the VAT Tribunal was first set up and given a statutory appellate jurisdiction, it would have been exceptional for an inferior tribunal to have a judicial review jurisdiction or an appellate jurisdiction allowing it to adjudicate on public law issues other than in the course of its statutory jurisdiction. VATA 1994 does not use words which clearly confer such a jurisdiction, reliance instead having to be placed on the words "with respect to".
>
> b. In cases where an inferior tribunal is intended to have a judicial review function, express provision has been made. See, for instance, the powers given to the newly-created (and now abolished) Charity Tribunal under section 8 Charities Act 2006.
>
> c. We have referred to the structure of the tribunal system put in place by TCEA 2007 at paragraph 29 above. Parliament decided that the F-tT should not have a judicial review function; and although the Upper Tribunal does have a judicial review function, its jurisdiction usually comes into play on the transfer of a case commenced in the Administrative Court. It is only in a very limited class of case that a judicial review application can properly be commenced in and heard by the Upper Tribunal. It is well known that there was significant opposition even to these powers being conferred on the Upper Tribunal. It is simply inconceivable that Parliament would have contemplated conferring a similar power on the F-tT notwithstanding the two factors which Sales J identified and of which legislators were well aware.
>
> d. Just as it was inconceivable that the F-tT should be given a judicial review jurisdiction, so to it was not plausible, in our view, that Parliament, when enacting section 83 VATA 1994, intended to confer a judicial review function on the VAT Tribunal.
>
> e. We are bound to say that, if it was plausible in the way which Sales J suggests, it is very surprising that the point was not raised in litigation or otherwise many years before *Oxfam* came before the court. In fact, it was not raised as a plausible result before the VAT Tribunal even in *Oxfam* itself. As Sales J acknowledged, he was departing from a widely held view, a view which, on his approach, was entirely at odds with what Parliament is to be supposed to have wished to achieve. Although Sales J describes the view as widely held (and we do not know on what he based that description) we

> ourselves know of no contrary view being promoted as a correct view prior to the decision of Sales J himself."

58. Fourthly, the Club heavily relies on *Oxfam.* However, the weight of authority (particularly *BT Pension Scheme, Hok* and *Noor*) is against its application. Even if *Oxfam* is followed, *Birkett* makes it clear that it relates to the proper construction of section 83(1)(c) and whether or not its scope included the legitimate expectation arguments before Sales J in that case. Even if section 83(1)(t) were to be treated as wide enough to include consideration of breach of legitimate expectations, no such argument as to legitimate expectations can succeed in the present case. This is because the Club has not explained how it is said that a legitimate expectation to the waiver or disapplication of the time limit arose and, as set out above, Mr McGee fairly accepted during cross-examination that HMRC did not acknowledge or accept the 2015 Claim as an amendment to the 2009 Claim and there was no evidence (or even any submission) that HMRC led the Club to expect that a claim could be made out of time in respect of the Disputed Periods. The fact that HMRC knew that the principle of the treatment of green fees was in dispute does not explain why it is said that there was a legitimate expectation that such a claim could be made out of time or that the Club should be relieved of its obligation to make a claim compliant with section 80 and regulation 37 in order to obtain repayment.

59. Fifthly, the validity of HMRC's decision does not require consideration of care and management powers. If the decision was made in accordance with section 80 then it was valid. Indeed, the very essence of the Club's argument is that HMRC should waive a valid refusal of a repayment claim.

60. It is of note, however, that it is common ground that the absence of a freestanding jurisdiction to consider HMRC's refusal to exercise its care and management powers does not preclude the Tribunal from considering whether or not the operation of the statutory time limit breaches A1P1 or whether or not it is to be disapplied by virtue of the principles of effectiveness or equivalence. I now turn to those issues.

A1P1

The Parties' Submissions

The Common Ground

61. A1P1 provides as follows:

> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
>
> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

62. The relevant sections of the Human Rights Act 1998 provide as follows:

> "3. Interpretation of legislation
>
> (1) So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.
>
> (2) This section –

(a) applies to primary legislation and subordinate legislation whenever enacted;

(b) does not affect the validity, continuing operation or enforcement of any incompatible primary legislation; and

(c) does not affect the validity, continuing operation or enforcement of any incompatible subordinate legislation if (disregarding any possibility of revocation) primary legislation prevents removal of the incompatibility.

…

6. Acts of public authorities

(1) It is unlawful for a public authority to act in a way which is incompatible with a Convention right.

(2) Subsection (1) does not apply to an act if –

(a) as the result of one or more provisions of primary legislation, the authority could not have acted differently; or

(b) in the case of one or more provisions of, or made under, primary legislation which cannot be read or given effect in a way which is compatible with the Convention rights, the authority was acting so as to give effect to or enforce those provisions.

…"

63. In *Sheldrake v DPP* [2004] UKHL 43, [2005] 1 AC 264, Lord Bingham summarised the principles relating to these interpretative obligations at [28]:

"[28] The interpretative obligation of the courts under section 3 of the 1998 Act was the subject of illuminating discussion in *Ghaidon v Godin-Mendoza* [2004] 2 AC 557. The majority opinions of Lord Nicholls, Lord Steyn and Lord Rodger of Earlsferry in that case (with which Baroness Hale of Richmond agreed) do not lend themselves easily to a brief summary. But they leave no room for doubt on four important points. First, the interpretative obligation under section 3 is a very strong and far reaching one, and may require the court to depart from the legislative intention of Parliament. Secondly, a Convention-compliant interpretation under section 3 is the primary remedial measure and a declaration of incompatibility under section 4 an exceptional course. Thirdly, it is to be noted that during the passage of the Bill through Parliament the promoters of the Bill told both Houses that it was envisaged that the need for a declaration of incompatibility would rarely arise. Fourthly, there is a limit beyond which a Convention-compliant interpretation is not possible, such limit being illustrated by *R (Anderson) v Secretary of State for the Home Department* [2003] 1 AC 837 and *Bellinger v Bellinger (Lord Chancellor intervening)* [2003] 2 AC 467. In explaining why a Convention-compliant interpretation may not be possible, members of the committee used differing expressions: such an interpretation would be incompatible with the underlying thrust of the legislation, or would not go with the grain of it, or would call for legislative deliberation, or would change the substance of a provision completely, or would remove its pith and substance, or would violate a cardinal principle of the legislation (paras 33, 49, 110-113, 116). All of these

> expressions, as I respectfully think, yield valuable insights, but none of them should be allowed to supplant the simple test enacted in the Act: "So far as it is possible to do so …" While the House declined to try to formulate precise rules (para 50), it was thought that cases in which section 3 could not be used would in practice be fairly easy to identify."

64. It was common ground that the First-tier Tribunal does not have the jurisdiction to make a declaration of incompatibility.

65. The touchstone of compliance with A1P1 is the need for interference with property rights to be proportionate. However, a wide margin of appreciation is given to legislation in respect of the repayment of overpaid tax. In *Monro v HMRC* [2008] EWCA Civ 306, [2008] STC 1815, Arden LJ stated as follows at [30] to [33] (see also Longmore LJ at [41]):

> "[30] Any interference with property rights must be proportionate but, as Mr Sherry recognises, in the field of tax the jurisprudence of the Convention gives a large margin of discretion to the national authorities in the determination of what is proportionate. He submits that this principle does not apply here because no tax was due. In any event, on his submission, the state is in a better position to bear the loss. He submits that it is not proportionate to impose the burden on individuals.
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> [31] Mr Carr submits that the taxation provisions of contracting states fall within the rule in the second paragraph of A1P1 and that this includes laws which the contracting state deems necessary to secure the payment of taxes (see generally *National & Provincial Building Society v UK* (Application 21319/93) [1997] STC 1466, (1997) 25 EHRR 127, paras 78 to 80 of the judgment). He emphasises that under Convention jurisprudence a wide margin of appreciation is allowed to member states.
>
> [32] In any event, he submits that s 33 does not violate A1P1 because it provides for the recovery of excessive payments of tax within the limits of what the legislature determines is reasonable. Moreover, the taxpayer has the right of appeal. The state has a legitimate interest in ensuring finality of fiscal transactions. Because under s 33 the error must be generally prevailing, the individual is not left to shoulder the burden of the payment. To allow for repayment where there has been a generally prevailing practice would expose the state to a large number of claims and increase the risk of disruption to public finances, shifting the burden of taxation to other groups or leading to the reimposition of the same tax on the same group in a different manner.
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> [33] I agree with Mr Carr's submissions. Legislation in relation to claims to recover payments made in error as to whether they are due as tax is subject to the same principles as the taxing legislation itself. Therefore, a wide margin of discretion must be allowed to national authorities in the determination of policy in relation to claims to recover tax. In this case, there is an obvious and rational policy explanation for the limitation in s 33(2A). I am therefore satisfied that there is no violation of A1P1."

66. Mr Harvey made it clear that the Club accepts the lawfulness of the four-year time limit itself. He fairly drew my attention to the decision of the European Court of Human Rights in *JA Pye (Oxford) Ltd v United Kingdom* (44302/02) ("*Pye*"), (2008) EHRR 45 at [68] to [69] and [84]:

> "[68] The Court has considered limitation periods as such in the context of Art.6 of the Convention in the case of *Stubbings v United Kingdom*. It held as follows:
>
> > "It is noteworthy that limitation periods in personal injury cases are a common feature of the domestic legal systems of the Contracting States. They serve several important purposes, namely to ensure legal certainty and finality, protect potential defendants from stale claims which might be difficult to counter and prevent the injustice which might arise if courts were required to decide upon events which took place in the distant past on the basis of evidence which might have become unreliable and incomplete because of the passage of time."
>
> [69] Although that statement referred to limitation periods in personal injury cases in the context of Art.6 , the Court considers that it can also be applied to the situation where limitation periods in actions for recovery of land are being assessed in the light of Art.1 of Protocol No.1. Indeed, the parties do not suggest that limitation periods for actions for recovery of land do not pursue a legitimate aim in the general interest.
>
> …
>
> [84] As to the loss for the applicant companies, it is not disputed that the land lost by them, especially those parts with development potential, will have been worth a substantial sum of money. However, limitation periods, if they are to fulfil their purpose, must apply regardless of the size of the claim. The value of the land cannot therefore be of any consequence to the outcome of the present case."

The Club

67. Mr Harvey submitted that, whilst the Club does not challenge the lawfulness of the four-year cap *per se*, in the particular circumstances of this case it is unreasonable for HMRC to apply the time limit. This was, he said, because doing so was unjustified and disproportionate in circumstances where the nature and substance of the Club's claim was made clear to HMRC on 27 March 2009, remained open, and it was made clear on each return submitted that the issue of VAT on services provided to HMRC was a live issue in dispute.

68. He said that section 80 must be read in a purposive way in order to give effect to A1P1. In oral submissions, Mr Harvey summarised this as being that the A1P1 contravention is the failure to treat the 2015 Claim as an amendment to the 2009 Claim rather than the time limit itself operating unfairly in 2015.

69. Mr Harvey also submitted that the Club's position was different to cases where the certainty of a limitation period is required as the form and substance of the claim was already well known to HMRC and the amount was readily identifiable from the returns. In such circumstances, the limitation period imposes an unreasonable and disproportionate burden upon the Club. He relied upon *Huitson v HMRC* [2011] STC 1860 in this regard, in which Mummery LJ stated as follows at [37] and [57]:

> "[37] The crunch question was whether, on Convention principles, the retrospective effect of s58 imposed an unreasonable burden on the claimant 'and thereby failed to strike a fair balance between the various interests involved': *MA v Finland* (2003) 37 EHRR DC 210. The judge concluded

> that the challenged legislation, even though retrospective, did strike a fair balance: it was proportionate and compatible with art 1 of the First Protocol.
>
> …
>
> [57] In my judgment, the judge correctly directed himself on the issue of fair balance and proportionality and fully understood the purpose and structure of the DTAs and the way in which the Isle of Man DTA was being used in the scheme for quite a different purpose than its intended double taxation purpose: to provide tax relief of UK residents. Nothing in his judgment was contrary to the true scope of the cited authorities of *Draon* and *MA v Finland*. As for *Pressos* the state in this case was not relying on purely 'financial concerns' to justify retrospective legislation and the judge did not base his decision on such concerns. He focused correctly on whether the retrospective measures achieved a fair balance between community interests and individual rights and whether they placed an unreasonable burden on the claimant. He did not give too much weight to the policy justification relied on by HMRC."

70. In the course of his oral submissions, Mr Harvey accepted that the 2015 Claim could have been made within the time limit on the face of the legislation. His argument was that the Club did not do this because it treated the 2015 Claim as an amendment to the 2009 Claim, because the issue was already before HMRC and because it would have been rejected. He said that he would not say the decision was unfair if the 2015 Claim had been made without the context of the 2009 Claim.

HMRC

71. Miss Jones submitted that there is no incompatibility between the operation of section 80 in this case and A1P1. She noted that A1P1 excludes taxes from its scope. She also makes the point that HMRC are entitled to the benefit of a reasonable time limit and there is nothing disproportionate in its operation here. Further, she noted that the time limit is strict in its operation and cannot be ignored or disapplied.

Discussion

72. I find that there is no contravention of section A1P1 by the operation of the section 80 in the present case or by HMRC's reliance upon it. This is for the following reasons.

73. First, in the context of the present case, Mr Harvey's separation out of the four-year time limit (which the Club does not say is a breach of A1P1 or otherwise unlawful) from HMRC's reliance upon it (which the Club does say is a breach of A1P1 or otherwise unlawful) is a distinction without a difference. The very nature of a limitation period is that it marks a dividing line between cases which are brought within time and so (subject to other substantive and procedural requirements) can be pursued those which are time-barred and so cannot be pursued for that reason. The rider to this is of course where there is a jurisdiction to extend the time limit, which does not arise here. It is clear from *Pye* that the impact of the application of a limitation period in any particular case does not affect the position.

74. Secondly, I do not accept that the operation of the time limit in the present case is unfair or disproportionate. There is no evidence to the effect that the Club could not have made a claim for repayment within time and Mr Harvey frankly accepted that it could have done so. The time limit was therefore not something which the Club could not have complied with. The suggested obstacles to doing so were not obstacles at all; the fact that HMRC was already alive to the existence of the dispute in principle does not mean that the Club could not have made a formal claim to repayment, the fact that the Club treated the 2015 Claim as an

amendment to the 2009 Claim does not mean that it could not have been made earlier, and the likelihood of HMRC rejecting the claim did not preclude it being made with a view to an appeal and case management alongside the 2009 Claim and the 2010 Appeal. It cannot have been a disproportionate burden for the Club simply to bring the 2015 Claim earlier as there is no evidence that it was hindered from doing so. I note that it is the Club's own case that its Chartered Accountants were in correspondence with HMRC – there was no evidence to explain why the Club's Chartered Accountants could not have made a claim for repayment on the Club's behalf in the context of such correspondence. Mr Harvey's submission that the Club thought it had made a claim or did not need to do so faces the difficulty that whilst this may be a reason why it did not make a new claim within time it does not mean that it could not have done. There is no evidence as to whether this was a mistake of the Club or its advisors, but in any event there is no evidence at all that it was a mistake caused by HMRC.

75. Thirdly, the submission that HMRC were already aware that there was a live dispute and could have calculated the sums at issue from the returns effectively amounts to an argument that the Club should be relieved of the obligation of making a regulation 37 compliant claim in the circumstances of the present case. Again, I do not accept that that it is in any way unfair or disproportionate to require the Club to make a claim for repayment and there is no evidence to substantiate any difficulty (still less any disproportionate burden) in doing so.

76. It follows that section 80 and regulation 37 are already on their face compliant with A1P1 and so there is no need for any alternative purposive construction. In any event, Mr Harvey did not explain exactly what such a construction would be. I note that it would not be possible to construe section 80 as providing for a discretion to disapply the time limit because this would be wholly inconsistent with the imposition of the fixed time limit. Similarly, it would not be possible to construe regulation 37 as providing for a discretion to dispense with the need for a claim to repayment to be made because this would be wholly inconsistent with its mandatory requirements.

EFFECTIVENESS AND EQUIVALENCE

The Parties' Submissions

The Common Ground

77. It was common ground that matters of procedure, including time limits, are matters for domestic law subject to the limits imposed by the principles of effectiveness and equivalence. These principles were summarised by the CJEU in *Marks & Spencer plc v Customs and Excise Commissioners* (Case C-62/00) ("*Marks & Spencer*"), [2002] STC 1036 at [34] to [36]:

> "[34] It should be recalled at the outset that in the absence of Community rules on the repayment of national charges wrongly levied it is for the domestic legal system of each member state to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from Community law, provided, first, that such rules are not less favourable than those governing similar domestic actions (the principle of equivalence) and, secondly, that they do not render virtually impossible or excessively difficult the exercise of rights conferred by Community law (the principle of effectiveness): see, *inter alia*, *Aprile Srl v Amministrazione delle Finanze dello Stato (No 2)* (Case C-228/96) [2000] 1 WLR 126, 148, para 18; *Dilexport* [1999] ECR I-579, 611, para 25 and *Metallgesellschaft* [2001] Ch 620, 663, para 85.

> [35] As regards the latter principle, the court has held that in the interests of legal certainty, which protects both the taxpayer and the administration, it is compatible with Community law to lay down reasonable time limits for bringing proceedings: *Aprile*, paragraph 19, and the case law cited therein. Such time limits are not liable to render virtually impossible or excessively difficult the exercise of the rights conferred by Community law. In that context, a national limitation period of three years which runs from the date of the contested payment appears to be reasonable: see, in particular, *Aprile*, paragraph 19 and *Dilexport*, paragraph 26.
>
> [36] Moreover, it is clear from *Aprile* [2000] 1 WLR 126, 149, para 28, and *Dilexport* [1999] ECR I-579, 616, paras 41 and 42, that national legislation curtailing the period within which recovery may be sought of sums charged in breach of Community law is, subject to certain conditions, compatible with Community law. First, it must not be intended specifically to limit the consequences of a judgment of the court to the effect that national legislation concerning a specific tax is incompatible with Community law. Secondly, the time set for its application must be sufficient to ensure that the right to repayment is effective. In that connection, the court has held that legislation which is not in fact retrospective in scope complies with that condition."

The Club

78. Mr Harvey again made it clear that the Club does not argue that a limitation period is incompatible with Community law. In effect, Mr Harvey adopted his submissions in relation to A1P1 in respect of the argument based upon the principles of equivalence and effectiveness; as he stated in his skeleton argument, "It is the Appellant's case that in the circumstances of this case there has been a failure to comply with A1P1, an integral part of EU law."

HMRC

79. Miss Jones submitted that *Marks & Spencer* provided a clear answer in the present case. The interests of legal certainty are served by the effective operation of a time limit, providing that such a time limit is clearly fixed in advance of the relevant accounting period.

Discussion

80. I do not accept that there is any breach of the principles of equivalence or effectiveness in the present case. This is for the following reasons.

81. First, to the extent that Mr Harvey's argument is that the principles of equivalence or effectiveness are breached by virtue of a breach of A1P1, I reject such an argument upon the basis that there has been no breach of A1P1 for the reasons that I have set out above.

82. Secondly, Mr Harvey has not provided any explanation for why he says that the circumstances of the present case offend the principle of equivalence. The Club has not made any submission or provided any evidence that section 80 or regulation 37 are less favourable than the rules governing any similar domestic actions.

83. Thirdly, I reject any suggestion that section 80 or regulation 37 render virtually impossible or excessively difficult the exercise of rights conferred by Community law for the purposes of the principle of effectiveness. For the reasons set out above, the Club could have made a claim in respect of the Disputed Periods within time and there were no obstacles in its path making such a claim impossible or excessively difficult (or, indeed, at all difficult).

DISPOSITION

84. It follows that I dismiss the appeal for the reasons set out above.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

85. 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.

RICHARD CHAPMAN QC
TRIBUNAL JUDGE

RELEASE DATE: 12 MARCH 2021