26 July 2018

PRESS SUMMARY

Totel Ltd (Appellant) v Commissioners for Her Majesty's Revenue and Customs (Respondent) [2018] UKSC 44
On appeal from [2016] EWCA Civ 1310

JUSTICES: Lady Hale (President), Lord Sumption, Lord Carnwath, Lord Hodge, Lord Briggs

BACKGROUND TO THE APPEAL

Traders who wish to appeal against assessments to Value Added Tax ("VAT") in the United Kingdom are required, by section 84 of the Value Added Tax Act 1994, first to pay or deposit the tax notified by the assessment with HMRC, unless they can demonstrate that to do so would cause them to suffer hardship. This "pay-first" requirement is a feature of the procedural regime for appealing assessments to a number of other types of tax including Insurance Premium Tax and Landfill Tax. It is not a condition for appealing assessments to Income Tax, Capital Gains Tax, Corporation Tax or Stamp Duty Land Tax. VAT is regulated by the EU VAT Directive 2016/112. An appeal against a VAT assessment is therefore a claim based on EU law.

The appellant, Totel Ltd ("Totel"), seeks to appeal a number of assessments to VAT but has been unable to demonstrate that a requirement to pay or deposit the tax in dispute would cause the company hardship. Totel claims the requirement to pay or deposit the disputed tax, as a pre-condition for an appeal, offends against the EU law principle of equivalence.

Totel first raised its challenge based upon the principle of equivalence when it successfully sought permission to appeal to the Court of Appeal. The Court of Appeal dismissed Totel's appeal.

JUDGMENT

The Supreme Court unanimously dismisses the appeal. Lord Briggs gives the lead judgment with which the other Justices agree.

REASONS FOR THE JUDGMENT

The principle of equivalence requires that the procedural rules of member states applicable to claims based on EU law are no less favourable than those governing similar domestic claims **[3]**. The principle of equivalence and its qualifying "no most favourable treatment proviso" (the "Proviso") are creations of the Court of Justice of the European Union (CJEU) jurisprudence and take effect within the general context that it is for each member state to establish its own national procedures for the vindication of rights conferred by EU law **[6]**.

The principle of equivalence requires a true comparator for it to be able to operate at all. Identification of one or more true comparators is therefore the essential first step **[7]**.

Whether any proposed domestic claim is a true comparator with an EU law claim is context specific **[9]**. The domestic court must focus on the purpose and essential characteristics of allegedly similar claims **[10]**. Of particular importance is the specific procedural provision that is alleged to constitute less favourable treatment of the EU law claim. Differences in procedural rules are frequently attributable to differences in the underlying claim **[11]**.

It is not necessary or appropriate to treat VAT claims as unique with no possibility of having a true comparator. Such a general rule would run counter to the context-specific basis which underpins the principle of equivalence. In *Reemsta Cigarettenfabriken GmbH v Ministero delle Finanze* (Case C-35/05) [2007] ECR1-2452, the CJEU considered equivalence as a mere fringe issue and, had *Reemsta* actually established such a rule, this would have provided a simple solution for the question before the CJEU in the *Littlewoods Retail Ltd v Revenue & Customs Comrs* (Case C-591/10) [2012] STC 1714 **[18-21]**.

Applying the context-specific analysis, the Court of Appeal was correct to conclude that none of the domestic taxes constituted true comparators with VAT. A trader seeking to appeal a VAT assessment is typically in a significantly different position from a taxpayer seeking to appeal an assessment to any of those other taxes **[22]**.

VAT's economic burden falls upon the consumer, but it is collected by the trader from the consumer and accounted for by the trader to HMRC. Taxpayers appealing Income Tax, for example, are being required to pay something of which the economic burden falls on them and which they have not collected from anyone else. Therefore, it is no less than appropriate that traders assessed to VAT should be required to pay or deposit the tax in dispute, which they have or should have collected **[23]**. This logical connection is sufficient to justify the conclusion that VAT is different to those other taxes in this context regardless of the actual legislative reason for the imposition of the pay-first requirement **[24]**.

Lord Briggs considered what the position would have been had any of Income Tax, Capital Gains Tax or Stamp Duty Land Tax been a true comparator for the purposes of the principle of equivalence. The Proviso is not a free-standing rule but part of the expression of the principle of equivalence and is directed to the standard of treatment which that principle imposes. Procedures should be broadly as favourable as that available for truly comparable domestic claims, rather than the very best available **[45]**. The Proviso's purpose is to prevent member states from discriminating against claims based upon EU law by affording them inferior procedural treatment than comparable domestic claims **[46]**. While reaching no final decision on this point, Lord Briggs concluded that the Court of Appeal's conclusion on this issue is therefore broadly correct **[47]**.

References in square brackets are to paragraphs in the judgment