[2011] UKUT 399 (TCC)

Appeal number: FTC/25/2011

REFERENCE TO COURT OF JUSTICE — compound interest — whether a breach of principles of effectiveness and equivalence that remedy must be sought in two forums — whether reference properly made — whether* Wilkins *determinative — no — reference within First-tier Tribunal's discretion — yes — appeal dismissed

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

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

- and –

GRATTAN plc **Respondent**

Tribunal: Judge Colin Bishopp
Judge Julian Ghosh QC

Sitting in public in London on 15 September 2011

Jonathan Swift QC, Peter Mantle and Philip Woolfe, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs for the Appellants

Paul Lasok QC and Rebecca Haynes, counsel, instructed by KPMG LLP, for the Respondent

DECISION

1. The appellants ("HMRC") appeal against a decision of the First-Tier Tribunal ("the FTT") to refer to the Court of Justice of the European Union ("CJEU"), pursuant to Article 267 of the Treaty on the Functioning of the European Union, a specific question which arises for decision by the FTT in the proceedings pending before it. The question relates to the issue of whether, if VAT is overpaid contrary to the provisions of EU law, EU law requires payment of compound interest on the sum overpaid (in addition to repayment of the sum overpaid itself). HMRC's appeal only concerns the FTT's decision that a reference should be made in connection with how any remedy required under EU law should be given effect in English law, assuming the existence of a right under EU law to recover compound interest on VAT overpaid contrary to the requirements of EU law ("the interest question"). Another question which the FTT has referred (relating to the period before the Sixth VAT Directive came into effect in 1978) is not the subject of any appeal by the parties.

2. The substance of the interest question is set out in Grattan's formulation at paragraph 73 of the FTT judgment and by the FTT itself at paragraph 81 of the FTT's substantive decision. Grattan's formulation was:

> "… where, due to an error on the part of the tax authorities of a Member State, a taxable person has accounted for VAT that was not VAT due from him … Is it contrary to the EU principle of effectiveness for national law to make no provision for the payment of interest in the statutory provisions governing the making of claims for the repayment of the overpaid amount and the appeals from the administrative decisions of those claim?"

3. The FTT expressed the substance of the question thus:

> "(a) whether the principle of effectiveness and/or of equivalence requires the remedy to be a single remedy for both the reimbursement of the principal sums overpaid and for the use value of the overpayment and/or interest, (b) whether, in circumstances where there are alternative remedies under domestic law, it is a breach of the principle of effectiveness and/or of equivalence for the remedy or remedies not to be in the statutory provisions governing the making of the principal reimbursement claims and the appeals from the administrative decisions on those claims and (c) whether it is breach of the principle of effectiveness and/or equivalence to require a claimant to pursue the principal reimbursement claim and the claim for simple interest in one set of proceedings before the tribunal and the balance of the remedy required by EU law in respect of the use value of the overpayment and/or interest in separate proceedings before the High Court."

4. The precise terms of the question have not as yet been formulated. But the substance of it is tolerably clear. The question asks whether it contravenes general principles of EU law (effectiveness and equivalence) to require an appellant who seeks to recover compound interest on overpaid VAT, which is to be repaid to the over-payer, to obtain the full remedy in two jurisdictions (in England before the Tax Chamber of the Tribunal, by means of the relevant appellate process and, separately, before the High Court). The circumstance arises because the Value

Added Tax Act 1994 ("VATA"), ss 78 and 80, provides only for simple interest, so that the balance of the sum sought—in effect, the difference between simple and compound interest—must be obtained by claims made in restitution, again pre-supposing that there is a right to compound interest.

5. HMRC does not submit that the answer to this question is not necessary for the FTT to reach a final decision which determines its appeal. Rather, HMRC submit that the FTT erred in the exercise of its discretion to refer this question to the CJEU, as the substance of the question does not relate to ascertaining, from the CJEU, guidelines as to the content or interpretation of EU law but instead an application of general principles of EU law which are well established (and which are not subject to further development or refinement in the context of this appeal) to the procedural rules which apply to the recovery of overpaid VAT (and ancillary interest) in the United Kingdom. In other words, HMRC argue, the CJEU can have nothing to say (and has no jurisdiction to say) anything which will answer this question. Therefore, the FTT should be invited to reconsider its decision to refer (although the FTT cannot be compelled to do so: see below). The gist of HMRC's case is that if, in allowing HMRC's appeal, the reasoning which underpins any conclusion by us that this question should not be referred to the CJEU is sufficiently coherent and persuasive, comity ought to result in the FTT changing its mind and declining to refer this question to the CJEU.

6. The respondent, Grattan plc ("Grattan") says that the FTT properly exercised its discretion in deciding to refer the question which is the subject of this appeal to the CJEU. Further, Grattan says that the substance of the question relates not to the mere application of known EU principles (effectiveness and equivalence) but rather to their content and interpretation in the context of tax appeals and the recovery of compound interest for overpaid VAT.

HMRC's submissions

7. The case for HMRC is conveniently summarised as follows:-

(i) the question of whether the EU general principles of effectiveness and equivalence are offended by a claimant enforcing EU rights, where that claimant must enforce full satisfaction of EU rights before two jurisdictions, rather than one, has been answered (the answer, say HMRC, is "No"): *Impact v Minister for Agriculture and Food and Ors* (Case C-286/06) [2008] ECR I-2483; *T-Mobile (UK) Limited v Office of Communications* [2009] 1 WLR 1565;

(ii) indeed, say HMRC, in the context of VATA, ss 78 and 80, the Court of Appeal has observed in *John Wilkins (Motor Engineers) Limited v Revenue and Customs Commissioners* [2011] STC 1371 that the interpretation and content of EU law and how they apply to the question of obtaining compound interest for overpaid VAT were viewed as settled (and did not require a reference); see in particular [21] to [27] per Etherton LJ; indeed, say HMRC, the question the FTT proposes to refer in this appeal is identical to the question which the

Court of Appeal declined to refer in *Wilkins*: see [11] of the Court of Appeal's judgment and proposed question 2(b) set out there;

(iii) thus the proposed question which is the subject of this appeal cannot, on any sensible view, say HMRC, be viewed as an enquiry or request for guidelines from the CJEU by the FTT as to the content or interpretation of EU law but rather it is a question as to how the principles of effectiveness and equivalence ought to be applied to the relevant UK procedure, which is a matter for the national courts alone (and outside the jurisdiction of the CJEU).

Grattan's submissions

8. Grattan says that the substance of the question is one which may properly be referred to the CJEU, since it is asking about the interpretation and content of these relevant EU principles which will provide guidelines for the FTT to reach its decision;

9. *Wilkins*, says Grattan, is neither here nor there and in particular the observations of Etherton LJ are heavily caveated, so that the Court of Appeal, in *Wilkins*, cannot be taken to have laid down any principle which binds us (or indeed to make an obiter observation of general application).

10. Further, says Grattan, it is simply not true that HMRC and Grattan agree as to the content and interpretation of the principles of effectiveness and equivalence, so that the answer to this question goes to the content and interpretation of EU law, rather than the application of known principles.

Decision

11. We consider the following principles relevant to our decision:-

(i) the decision of any Tribunal or court to refer a question to the CJEU is a matter of the widest discretion for the referring court, reflecting both a right and an obligation to refer "as soon as the national court perceives … that the substance of the dispute raises one of the points referred to in" art 267: see *Cartesio Okató és Szolgáltató bt* (Case C-210/06) [2008] ECR I-9641, para 88 of the judgment of the Court;

(ii) the decision to refer is appealable but even if a decision to refer is successfully appealed by a party to the relevant litigation, the discretion to refer remains with the referring court, *Cartesio*, paras 92, 93;

(iii) the exercise of discretion is not without limits: it would, for example, be a misdirection (and thus outside the scope of the jurisdiction of a referring court) to refer a question which is outside the jurisdiction of CJEU to answer; so, for example, a question as to the interpretation or effect in law of a domestic rule (whether substantive or procedural) of a Member State, or the question of whether a domestic remedy exists for a breach of EU law in that Member State as a matter of the public

law or private law of that Member State cannot be a proper exercise of discretion by a referring court; of course, the CJEU has its own procedure for declining to accept a reference and we comment on this further below;

(iv) a question which goes to the content or interpretation of EU law, as opposed to a question which goes to the content and effect of domestic law can, we consider, in all circumstances (subject to considerations of abuse of process which are not relevant in this case), be referred to the CJEU; of course the referring court should make it clear that that is what it is seeking in formulating the relevant question to avoid confusion; but subject to that caveat it cannot be said that the referring court is improperly exercising its discretion in choosing to refer a question to the CJEU;

(v) indeed, the referring court may refer (and the CJEU may accept) a reference of a question in identical terms to a question previously put to the CJEU (equally the CJEU may, of course, decline to accept the reference but that does not, of itself, mean that the reference was improperly made: *Da Costa en Schaake NV and others* (Cases 28-30/62) [1963] ECR 31).

12. In this case, we accept that the question which is the subject of this appeal is, in substance, for all material purposes identical to the question which the Court of Appeal declined to refer in *Wilkins*. However that does not mean that the FTT improperly exercised its discretion in deciding to refer this question. It may be that the CJEU declines to answer it, on the basis that it had already done so in previous case-law. But that does not mean that it is an improper exercise of discretion to have referred the question in the first place. As we have already observed it would be a misdirection if the question put to the CJEU was one which was outside the CJEU's jurisdiction to answer. But we do not consider that to be the case here. The substance of the question is whether the principle of effectiveness and/or the principle of equivalence would be offended if Grattan had to obtain (if successful in establishing a right to compound interest for overpaid VAT in the first place) part of its claim in satisfaction (to the extent of simple interest) under VATA 1994, ss 78 and 80, and the balance in a restitutionary claim before the English High Court. We consider that to be perfectly intelligibly understood to be an enquiry as to the content and interpretation of the relevant principles of effectiveness and equivalence (in the special context of tax) rather than any sort of assumption that these principles are now closed to further development and all that remains is an enquiry as to their application to United Kingdom procedural rules. And HMRC are not prejudiced in our dismissal of this appeal since if HMRC are indeed correct that no question as to the content and scope of EU law arises, it is, as we have observed, open to the CJEU to decline to accept the reference.

Disposal

13. We dismiss HMRC's appeal. In addition, the FTT unsurprisingly granted a stay of its reference of the question which is the subject of this appeal, in a decision dated 3 May 2011. We extend the stay until the FTT has received our decision dismissing this appeal by HMRC.

Colin Bishopp

Julian Ghosh QC

Upper Tribunal Judges

Release date: 28 September 2011