TC02443

Appeal number: TC/2011/01731 & TC/2011/04303

VAT – Preliminary Issues; Fleming claims; time bar; group registration; effect of leaving group; effect of disbandment; whether timeous claim by a former member of group entitles the representative member to repayment; assignation of claims; whether Fleming claim, capable of assignation, existed; the nature of such a claim; whether claim lay in restitution; whether right to repayment assigned; VATA 1994 ss43, 43B and 80; Finance Act 2008 s 121

FIRST-TIER TRIBUNAL
TAX CHAMBER

TAYLOR CLARK LEISURE PLC **Appellant**

- and -

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

TRIBUNAL: JUDGE J GORDON REID QC, FCIArb
Dr HEIDI POON CA, CTA, PhD

Sitting in public at Edinburgh on 12 & 13 September 2012

Philippa Whipple QC (of the English Bar) and Philip Simpson, Advocate, on the instructions of KPMG, Manchester, for the Appellant

Andrew Young QC, instructed by the Office of the Advocate General for Scotland on behalf of HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. These two appeals have an extremely complex background. They relate to output tax overdeclared between 1973 and 1998. We are only concerned at this stage with two preliminary issues. At the heart of the first preliminary issue is whether (i) the basis of the Appellant's claim to resist the assessments to repay VAT alleged to have been paid to it in error by the Respondents (HMRC) in 2009 is unsound by reason of time-bar; and (ii) the Appellant's claims for repayment of overdeclared VAT, in relation to output tax overpaid between 1973 and 1996, made in 2007 by another company, at one time in the same VAT Group as the Appellant (of which the Appellant was the representative member), but not made by the Appellant until after 31 March 2009, are time-barred. At the heart of the second preliminary issue is the question whether, if these rights and claims or (either of them) is not time-barred, the Appellant is the correct legal person entitled to resist repayment or receive repayment.

2. We were also concerned with a *strike-out* Application by HMRC, held over from an earlier stage in the proceedings by which they contended, broadly, that there are no appealable matters competently before the Tribunal. In the event, the Application was not insisted on by HMRC.

3. A Hearing on the preliminary issues took place at Edinburgh on 12 & 13 September 2012. Philippa Whipple QC (of the English Bar) and Philip Simpson, Advocate, appeared on behalf of the Appellant, on the instructions of KPMG, Manchester. She led the evidence of Reginald Harvey, the chief executive and a director of Taylor Clark Ltd, the holding company of the Appellant, and John Dippie, the financial director and company secretary of Taylor Clark Ltd. Andrew Young QC appeared on behalf of HMRC on the instructions of the Office of the Advocate General on behalf of HM Revenue and Customs. He led no evidence. A large bundle of documents was produced, but only a few of them were referred to in the course of the Hearing.

General Legal Background to the Appeals

3. From about the inception of VAT, the Appellant accounted for VAT in full on certain revenues from bingo halls and other leisure activities, in accordance with HMRC's stated policy for such business activities and in common with other competitor businesses in the UK. In particular, the Appellant accounted for VAT on income derived from: (a) gaming machines licensed under sections 31 and 34 of the Lotteries and Amusements Act 1976 (and its predecessor legislation) ("Gaming machines"); (b) mechanised cash bingo machines licensed under section 14 of the Lotteries and Amusements Act 1976 (and its predecessor legislation) ("mechanised cash bingo"); (c) main stage bingo for cash prizes, the income from which was excluded from exemption by Note 1 to Group 4 of Schedule 9 to VATA 1994 when played on licensed premises ("Bingo participation fees"). In each case, the income from the relevant activity was commonly understood to be excluded from exemption

by Note 1 to Group 4 of Schedule 9 to VATA 1994 (and the equivalent provisions in its predecessor legislation).

4. When the bingo halls and other leisure activities were hived down to a subsidiary, then named Leisurebrite Ltd (and latterly Carlton Clubs Ltd), in 1990 (see below), the Appellant, as representative member, continued to account for tax in full on that subsidiary's turnover from these activities.

5. On 17 February 2005, the ECJ decided the case of C-453/02 *FinanzamtGladback v Linneweber* [2008] STC 1069. That case decided that income from gaming machines was exempt from VAT, whether those machines were operated privately or at licensed public casinos. HMRC did not accept that *Linneweber* was relevant to the UK, because they did not accept that the UK's tax treatment of gaming machines breached the principle of fiscal neutrality, but nonetheless invited claims.

6. HMRC's position in relation to gaming and gaming machines, as well as bingo, was challenged in a series of cases, most notably in two cases brought by Rank Group plc. HMRC lost both cases in the domestic courts and tribunals before a reference to the ECJ was made, and issued Revenue & Customs Briefs ("RCB") 40/09 and 11/10, which invited the submission of claims affected by the decisions in those cases, even though, in both cases, questions were still pending before the ECJ. The ECJ (now referred to as the Court of Justice of the European Union, "CJEU") determined both cases on 10 November 2011 (see Cases C-259/10 and C-260/10, *Rank Group plc v HMRC* [2012] STC 23). The ECJ rejected the UK's case. On 6 December 2011, the Commissioners issued RCB 39/11 accepting that claims for repayments relating to bingo would be paid subject to verification, but claims relating to gaming machines would remain contested.

7. Meanwhile, on 23 January 2008, the House of Lords decided *Fleming t/a Bodycraft v HMRC* [2008] UKHL 2, [2002] STC 324. This confirmed that the UK's capping legislation was unlawful in so far as it purported to be of retrospective effect. In consequence, section 121 Finance Act 2008 was implemented. It provided for a transitional period within which claims for overpaid output tax, in any prescribed accounting period ending before 4 December 1996, could be made until 31 March 2009. Claims made under this provision are referred to as "*Fleming claims*".

8. HMRC's liability to credit or repay an amount paid to them by way of VAT, which was not VAT due to them, is to be found in s80 VATA 1994. If the amount paid to HMRC was made more than a specified number of years before the making of the claim for repayment, HMRC are not liable to repay (s80(4)). That basic period may be different depending on various circumstances, none of which is relevant for present purposes. Until 1 April 2009, the basic period was three years (see Finance Act 2008 Schedule 39 paragraph 6). Thereafter it was and is four years. S80, as provided to us in the bundle states *inter alia* as follows (certain subsequent amendments to the section are shown in parenthesis):-

80 Recovery of overpaid VAT. [*Credit for or overpayment of, overstated or overpaid VAT*][1]

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

[*(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

(1A) Where the Commissioners-

(a) have assessed a person to VAT for a prescribed accounting period (whenever ended), and

(b) in doing so, have brought into account as output tax an amount that was not output tax due,

they shall be liable to credit the person with that amount

(1B) Where a person has for a prescribed accounting period (whenever ended) paid to the Commissioners an amount by way of VAT that was not VAT due to them, otherwise than as a result of-

(a) an amount that was not output tax due being brought into account as output tax, or

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

*the Commissioners shall be liable to repay to that person the amount so paid***][2]**

(2) The Commissioners shall only be liable to **[***credit or repay***]**[3] repay an amount under this section on a claim being made for the purpose.

(3) It shall be a defence, in relation to a claim under this section, that repayment of an amount would unjustly enrich the claimant.

(4) The Commissioners shall not be liable, on a claim made under this section, to repay any amount paid to them more than three years before the making of the claim

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[1] The words in brackets were substituted by Finance (No 2) Act 2005 with effect in any case where a claim is made on or after 26 May 2005

[2] See previous footnote

[3] See previous footnote

[*(4) The Commissioners shall not be liable on a claim under this section-*

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

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

*If the claim is made more than 4 years after the relevant date***]**[4]

(4A)Where—

(a) any amount has been paid, at any time on or after 18th July 1996, to any person by way of a repayment under this section, and

(b) the amount paid exceeded the Commissioners' repayment liability to that person at that time,

The Commissioners may, to the best of their judgement, assess the excess paid to that person and notify it to him.

(4B) For the purposes of subsection (4A) above the Commissioners' repayment liability to a person at any time is—

(a) in a case where any provision affecting the amount which they were liable to repay to that person at that time is subsequently deemed to have been in force at that time, the amount which the Commissioners are to be treated, in accordance with that provision, as having been liable at that time to repay to that person; and

(b) in any other case, the amount which they were liable at that time to repay to that person.

(4C) Subsections (2) to (8) of section 78A apply in the case of an assessment under subsection (4A) above as they apply in the case of an assessment under section 78A(1).

…

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

(7) Except as provided by this section, the Commissioners shall not be liable to repay an amount paid to them by way of VAT by virtue of the fact that it was not VAT due to them.

9. Neither party has suggested that anything turns on the changes in the terms of s80 or its statutory predecessor, s24 of the Finance Act 1989. At the hearing and in the bundle we were presented with a simplified version.

10. In spite of the length of the section, it can be seen that s80(4) contains a straightforward statutory provision which extinguishes HMRC's liability to repay if the claim is not made in accordance with the statutory timetable.

[4] See previous footnote

11. The Value Added Tax Regulations 1995 make provision for the form and manner of such claims and the documentary evidence by which such claims are to be supported. Regulation 37 provides:

> "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."

12. *Claim* is not defined in VATA but the 1995 Regulations contain the following definition in regulation 43A:

> "'claim' means a claim made … under section 80 of the Act for [credit of an amount accounted for to the Commissioners or assessed by them as output tax which was not output tax due to them], and 'claimed' and 'claimant' shall be construed accordingly."

13. Section 121 of the Finance Act 2008 provides *inter alia* as follows:-

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

Group Registration

14. Companies closely bound by financial economic and organisational links may be treated as a single taxable person for VAT purposes. S29 VATA 1983 makes provision *inter alia* for business carried on by a member of a VAT Group, to be treated as carried on by the representative member as follows:-

> "(1) Where, under the following provisions of this section, any bodies corporate are treated as members of a group any business carried on by a member of the group shall be treated as carried on by the representative member, and—
>
> (b) any other supply of goods or services by or to a member of the group shall be disregarded;
>
> and all members of the group shall be liable jointly and severally for any tax due from the representative member".

15. We were informed that the provision quoted has been amended but that the amendments are not material. The current provisions are to be found in s43 and 43B of VATA 1994 which provide i*nter alia* as follows:-

> (1) Where ….any bodies corporate are treated as members of a group, any business carried on by a member of the group shall be treated as carried on by the representative member, and-
>
> ……

(b) any supply which is a supply …..…… of goods or services by or to a member of a group [to or from a non-member] shall be treated as a supply by or to the representative member…….

43B (1) This section applies where an application is made to the Commissioners for two or more bodies corporate, which are eligible…..to be treated as members of a group.

(2) This section also applies where two or more bodies corporate are treated as members of a group and an application is made to the Commissioners-

(b) for a body corporate to cease to be treated as a member of the group,

….

(d) for the bodies corporate no longer to be treated as members of a group.

….

(4) Where this section applies in relation to an application it shall ……..be taken to be granted with effect from-

(a) the day on which the application is received by the Commissioners, or

(b) such earlier or later time as the Commissioners may allow.

16. It is common ground that the Appellant and the subsidiary, Carlton Clubs Limited, were members of such a group and that the Appellant was the representative member. An application to disband a group registration may take effect from the date of its receipt by HMRC or such earlier or later time as HMRC allow (s43B(4) VATA). Thus, disbandment can be back-dated.

17. In September 2010, HMRC issued Guidance on *inter alia Fleming* claims and group registration. It provides that:-

> "Where an overdeclaration of output tax or underdeclaration of input tax is made by a VAT group, the entitlement to claim remains with the representative member of that VAT group for as long as the group remains in existence. This applies regardless of any changes in the composition of the VAT group. Thus the only person who can make a claim for output tax overdeclared or input tax underclaimed by a member of a VAT group is the company that is the representative member of the VAT group at the time when the claim is made."

Corporate Structure and History

(a) Carlton Clubs Ltd

18. Carlton Clubs Limited was incorporated on 28 March 1990 under the name Leisurebrite Ltd as a wholly owned subsidiary of the Appellant. It changed its name to CAC Leisure PLC on 28 October 1991, to Carlton Clubs PLC in 1997 and to Carlton Clubs Ltd in December 2010. We refer, hereafter, to this company as Carlton.

(b) The Appellant

19. The Appellant was incorporated under the name Caledonian Associated Cinemas Ltd in 1935. It subsequently changed its name to CAC Leisure PLC in 1986, to Haymarket Leisure PLC in 1991 and to its current name Taylor Clark Leisure PLC in 1995. Another company, Taylor Clark PLC, was the holding company of the Appellant. We refer, hereafter, to the Appellant as Taylor. The current holding company of Taylor is Taylor Clark Limited. This appears from paragraph 2 of Mr Harvey's witness statement. That paragraph was unchallenged, although there are some inconsistencies in the references to and designations of the various companies.[5]

20. In 1973, Taylor (then trading as Caledonian Associated Cinemas Ltd) registered for VAT, and became the representative member of a statutory VAT Group. The other members of the group included Carlton from about April 1990. Carlton left the group in 1998.

21. At least from 1973, Taylor owned and operated a number of business and leisure facilities in England and Scotland including, in particular, bingo halls and cinemas. Their turnover was largely generated from a variety of bingo games and from various types of gaming machines.

22. In 1990 Taylor undertook a group reorganisation. It transferred to Carlton its business and assets to enable Carlton to take over the various bingo halls, cinemas and multi-use complexes which Taylor had previously operated as part of its own business. Carlton was included in the Taylor Clark Leisure VAT Group of which Taylor was and always had been the representative member. We make more detailed findings in fact below about the 1990 transfer. The registered number allocated to Taylor as representative member of the VAT Group was 265 7918 16. That number remained so allocated until Taylor was de-registered in 2009.

23. In 1997, Taylor transferred its shares in Carlton to Taylor Clark PLC, the parent company of Taylor. Carlton remained in Taylor's VAT Group of which Taylor remained the representative member. Taylor Clark PLC appears to have changed its name to Taylor Clark Ltd.[6]

24. In 1998, Taylor Clark PLC sold its shares in Carlton to a third party, Demure Limited. This was, in effect, a management buy-out. The sale was effected by a lengthy formal Agreement containing many clauses on a variety of matters, including a cross tax indemnity clause. Tax was defined as including *value added tax* and *input tax*. The indemnity, contained in Part 2 of Schedule 5 to the Agreement, related to the VAT liability of any vendor group company. However, the Agreement made no provision about pre-existing rights to repayment of VAT. This Agreement therefore has no bearing on the rights to repayment of overpaid output tax with which we are

[5]Sometimes a company is referred to in the documents as PLC, or Plc or plc. These differences do not matter for our purposes

[6]We take this from paragraph 2 of Mr Harvey's Statement.

concerned. As a consequence of this Agreement, Carlton ceased to form part of the Taylor Clark PLC corporate group and left the Taylor Clark Leisure VAT Group. Although Carlton left the VAT Group, the Group remained in existence (albeit differently constituted) and Taylor continued to be the Group's representative until 2009.

Procedural History

25. The procedural history of appeals taken by Taylor and Carlton is summarised in paragraphs 1-16 of the Tribunal's Note appended to its Directions dated 6 January 2012 in a related appeal by Carlton to which Taylor were, at that time, seeking to be joined as a party. Neither party took issue with the accuracy of that summary.

26. For present purposes, the important appeals are Taylor's appeals TC/2011/01731 lodged with the Tribunal on 28 February 2011, and TC/2011/04303 lodged with the Tribunal on 2 June 2011.

Taylor's Appeal TC/2011/01731

27. This appeal flows from a repayment on or about 27 April 2009 by HMRC to Taylor of the sum of overpaid VAT of £667,069 together with statutory interest of £663,300. Three original claims as "protective claims for VAT" had been lodged by Carlton in November 2007, under the separate headings of "Participation fees", "Gaming machine takings", and "Mechanised cash bingo takings", and each of the three claims cited "Taylor Clark Leisure - 265 7918 16" in the letter heading, though the claims were signed by the Finance Director of Carlton Clubs PLC. (These are the claims that formed the subject of Taylor's Appeal under TC/2011/04303, *infra* paragraphs 31-34) Following the decision in *Fleming*, the claim for "Cash bingo participation fees" was revised to the quantum of £667,069 by a letter in January 2009, though, on this occasion, both Carlton's own VAT registration and Taylor's group registration appeared in the letter head. Taylor's group registration number appears to have been used by HMRC to identify the claimant; HMRC's system processed the repayment with the consequence that Taylor was credited with the sums of £667,069 and £663,300 under the claim made by Carlton.

28. HMRC subsequently either changed their view or realised the claimant and the recipient of the repayment were not the same person, and, on 7 July 2009, issued assessments against Taylor for recovery of those sums relying on s80(4A) and s78A VATA 1994, asserting that the claim had been incorrectly paid to Taylor. Taylor sought a review of the assessment. HMRC responded on 27 October 2009 by stating that the assessments would not be enforced as they once more considered that Taylor was the correct claimant. They noted that a competing claim (by Carlton) had been made.

29. Eleven months later, however, HMRC appeared to change from the position communicated to the Appellant on 27 October 2009, and on 23 September 2010, they informed Taylor that the repayment was properly due to Carlton and the assessments dated 7 July 2009 would be upheld. Taylor requested a review on 13 October 2010.

The review confirmed the assessments on 26 January 2011. Taylor appealed to this Tribunal on 28 February 2011.

30. The original claim for repayment of overpaid output tax was made by Carlton on 16 November 2007. The claim related to additional prize money and bingo participation fees and covered the period between June 1973 and January 1998. The claim was amended on 8 January 2009. The original claim and the claim, as amended, were made by Carlton under s80 VATA 1994. Taylor has never lodged a s80 claim in relation to the sums to which their appeal relates, unless it can be said (if it needs to be said) that the claim made by Carlton, falls to be construed as a claim made by Taylor or Taylor and Carlton.

Taylor's Appeal TC/2011/04303

31. This appeal flows from the decision by HMRC dated 4 May 2011 in response to a request by Taylor that the three claims in the three Carlton appeals mentioned below should be repaid to Taylor. That decision intimated that certain claims made by Carlton would not be paid to Taylor. The original claims, at least on one view, were made by Carlton in November 2007 and related to mechanised cash bingo, amusement with prize machines (gaming machines), and main stage cash bingo. HMRC rejected these claims and this led to Carlton making three appeals to this Tribunal. We consider the claim letters in more detail below.

32. The first appeal (by Carlton) (appeal EDN/08/78) related to Mechanised Cash Bingo and sought repayment of £4,795,997.78 for the period 1973 to 1998. This appeal was withdrawn by Carlton on or about 26 January 2012.

33. The second appeal (by Carlton) (appeal EDN/08/79) related to Gaming Machines and sought repayment of £4,027,915 for the period 1973 to the beginning of 1998. The appeal was withdrawn by Notice dated 5 October 2009 but only in relation to accounting periods ending March 1997 or later. This appeal was sisted by the Tribunal by Direction dated 6 February 2012 following a Case Management Hearing on 31 January 2012, at which Carlton and Taylor were represented. The appeal remains sisted. An application by Taylor to be convened as a party in Carlton's appeal has also been sisted.

34. The third appeal (by Carlton) (appeal EDN/08/162) related to participation fees for bingo played for cash prizes and sought repayment of £2,695,614.85 for the accounting periods between 1973 and 1998. This appeal was withdrawn by Carlton on or about 26 January 2012.

35. These three appeals by Carlton (and their appeal to which Taylor's Appeal TC/2011/01731 relates) are largely all related to *Fleming* claims. All four *Fleming* claims (three of which give rise to Taylor's Appeal under the TC/2011/04303 and one under Taylor's Appeal TC/2011/01731) were made by Carlton before the cut-off date of 31 March 2009 imposed by s121 Finance Act 2008.

36. By letter to HMRC dated 8 January 2009, Carlton submitted a revised claim for overpaid output tax in respect of participation fees for bingo played for cash prizes.

The earlier claim had been made by letter dated 16 November 2007 in respect of adjustments for Added Prize Money (APM) and participation fees; that claim in turn had been based on a claim submitted on 28 March 2007. The claim submitted by Carlton on 8 January 2009 covered the period between 1973 and 1996. It was based on the view that the 1990 transfer mentioned above transferred from Taylor to Carlton the right to claim output tax previously overdeclared under s80 VATA. It also relied on the assertion that Carlton was a member of the VAT Group (of which Taylor was the representative member) between 1 April 1990 and February 1998, and Carlton was thus entitled to recover overdeclared VAT on its trading activities during that period. The letter also noted that Carlton had submitted similar claims in respect of the period between 1996 and 2003 but we are not concerned with these.

37. The first of these three appeals by Carlton was based upon a letter to HMRC also dated 16 November 2007 (headed "Claim for overpaid VAT on Mechanised Cash Bingo takings") in which Carlton submitted a claim for overpaid output tax in respect of mechanised cash bingo takings. An earlier claim had been submitted on 25 September 2006. The claim now made covered the period between June 1973 and January 1998. This has, in effect, become part of Taylor's appeal TC/2011/04303. It was at an earlier stage the subject of Carlton's appeal EDN/08/78 in the sum of about £4,795,997.98. As we have already noted, Carlton's appeal was withdrawn in January 2012.

38. By letter to HMRC, also dated 16 November 2007 (headed "Claim for overpaid VAT on gaming machine takings"), Carlton submitted a claim for overpaid output tax in respect of gaming machine takings. An earlier claim under this heading had been submitted on 22 March 2006. The November 2007 claim now made covered the period between June 1973 and January 1998. This has, in effect, become part of Taylor's appeal TC/2011/04303. It was, at an earlier stage, the subject of Carlton's second appeal EDN/08/79 in the sum of about £4,027,915. Carlton's appeal is currently sisted as already noted.

39. The third of these three appeals by Carlton was based upon a letter to HMRC also dated 16 November 2007 (headed Participation fees) in which Carlton submitted a claim for overpaid output tax in respect of "participation fees for bingo played for cash prizes". An earlier claim had been submitted on 25 September 2007. The claim now made covered the period between June 1973 and January 1998. This has, in effect, become part of Taylor's appeal TC/2011/04303. It was at an earlier stage the subject of Carlton's appeal EDN/08/162 in the sum of £2,695,614.85. As we have explained, that appeal was also withdrawn in January 2012.

40. The other appeal comprises the claims made by Carlton in their letters dated 28 March 2007, 16 November 2007 (headed Added Prize Money ("APM") and participation fees), and (in revised form) on 8 January 2009 (now the subject of Taylor's Appeal TC/2011/01731).

41. Insofar as any of the claims under either of Taylor's Appeals relate to a period after 3 December 1996 (that being the accounting period end prescribed by s121 FA2008), entitlement to repayment is unresolved and is currently the subject of other

appeals/litigation elsewhere by other taxable persons. Parties are agreed that our decision should not relate to rights to repayment in respect of any period after 3 December 1996. Notwithstanding numerous references in the documents and in this Decision to periods up to 1998, the Decision relates only to periods up to 3 December 1996.

Grounds of Appeal (Appeal TC/2011/01731) against Assessment seeking £667,069 and £663,300 allegedly paid to the Appellant in error

42. The essence of Taylor's argument is that, as Carlton made a timeous claim, Taylor, being truly entitled to these sums, can recover them relying on Carlton's timeous claim. The issue, Taylor says, is thus one of identifying the person truly entitled to repayment rather than whether the claim is time-barred.

43. Taylor say they are entitled to these sums throughout the period of the claims in issue (1973-1998 - or more accurately 3 December 1996) as they were the representative member of the VAT Group of which Carlton was a member. The Group was in existence when the *Fleming* claims were made in 2007. Moreover, the Group was still in existence when the claim to which this appeal relates was made, revised, and repaid to Taylor on or about 27 April 2009. Taylor also point out that between 1973 and 1990 (when the business transfer took place) they were the generating taxpayer.

44. Taylor also say that it is irrelevant that the VAT Group was disbanded in 2009. They further argue that the transfer of their business and assets to Carlton in 1990 did not include any claim or right to repayment of overpaid VAT, as no claim for repayment had ever been made to HMRC at that stage.

Grounds of Appeal (Appeal TC/2011/04303) the three Carlton Claims

45. The arguments for Taylor on time bar are the same as Appeal TC/2011/01731. The arguments on entitlement are also substantially the same.

HMRC Response

46. HMRC say that, as Taylor made no valid claims under s80, within the limitation period, the repayment claims are all time-barred.

47. In any event, the right to make a claim between 1973 and 1990 which was for restitution of undue tax, was, in 1990, assigned to Carlton. When the VAT Group was disbanded in 2009, the right to claim repayment reverted to the Group member which generated the output tax that formed the subject of the claim. That was Carlton from 1990. The VAT Group was de-registered as requested by Taylor, with effect from 28 February 2009. The repayment to Taylor (in relation to TC/2011/01731) was made after the effective date of disbandment. It should have been made to Carlton as the former Group member which generated the overpaid output tax.

Issues to be determined

48. By Directions dated 6 February 2012, issued following a Case Management Hearing on 31 January 2012, the Tribunal directed that the following preliminary issues be determined in each of Taylor's appeals:-

1) Whether the claims made by the Appellant in this appeal, or any of those claims, are time-barred?

2) Whether the Appellant is entitled to receive repayment of VAT overpaid between 1973 and 1998?

The first preliminary issue has been described by the parties as the *Time-Bar Issue* and the second as the *Entitlement Issue.*

Additional Facts

49. By letter dated 30 March 1990 from the directors of Taylor (then CAC Leisure PLC) to the directors of Carlton (then Leisurebrite Ltd), Taylor agreed to transfer to Carlton and Carlton agreed to accept:-

> "… the whole business, undertakings and assets of the operating units listed in the Appendix to this letter. Such transfers will be effected from the commencement of business on 1 April 1990 ('the effective date'). The assets to be transferred consist of:-
> …..
> all trade debtors and all other sums owed other than any amount owed by Carlton."

50. Neither of these companies, through its directors, gave any consideration to the question of VAT. One of the signatories was a director of both companies and signed as such. The general intention was that Taylor as representative member of the VAT Group would continue to account for VAT as it had been doing before the re-structuring. Taylor's accounts for the year to 31 March 1991, unsurprisingly, contained no reference to or provision for reclaimable VAT. Taylor continued to be the representative member of the VAT Group, which included Carlton. Mr Harvey's position in re-examination, which we accept, was that he had no recollection of the 1990 Agreement and was not aware of it until August 2009.

51. He was, however, able to give evidence about the purpose of the Agreement. He said, and we accept his evidence, that it was part of a corporate re-structuring exercise. By restructuring, the intention was to achieve a more transparent corporate structure, with different roles being performed at different levels of the structure, so that it would be clear who was accountable for successes or problems with a particular business. The idea was to streamline the executive responsibility and accounts reporting of the group. Part of that re-structuring was the creation of a wholly owned subsidiary, Carlton, to carry out the bingo and cinema businesses of Taylor. As the re-structuring was internal, external professional advice was kept to a minimum.

52. The other purpose of re-structuring was that it would allow managers of businesses currently operated by Taylor to become directors of the companies running

the businesses, while Taylor would become a holding company for the companies running the businesses.

53. The overall effect of the 1990 Agreement was to transfer various assets belonging to Taylor to Carlton at net book value. The price was to be treated as an inter-company loan.

54. Throughout 2006-2009, Carlton and its advisers submitted a number of claims to HMRC for repayment of overpaid output tax. These claims concerned various aspects of the bingo business, which Carlton had operated as part of Taylor's VAT Group from 1990 to March 1998, and thereafter under its own VAT registration number. During these periods, Taylor made no approaches to HMRC seeking to reclaim overpaid VAT in respect of the bingo business formerly operated as part of its VAT Group.

55. Taylor neither instructed nor authorised any of the voluntary disclosure letters (dated 16 November 2007 and 8 January 2009 referred to above) sent by Carlton seeking repayment under s80. These claims were made by Carlton and were not claims made by or on behalf of Taylor, or on behalf of both of them. Whether Carlton was entitled to make these claims is a different issue. Taylor has not submitted any s80 claim in its own name in relation to any of the appeals referred to above.

56. On 31 March 2009, Taylor Clark Ltd applied to HMRC, on behalf of Taylor, for cancellation of Taylor's registration for VAT and all the companies within the Group. These other companies were not identified in the application form or at the Hearing before us. The application stated that Taylor had ceased to trade on 28 February 2009. In a form completed on 28 April 2009, Taylor requested that group de-registration should take effect from 28 February 2009. The basis of the application was that all the companies had ceased to trade on 28 February 2009.

57. On or about 27 April 2009, HMRC made a payment to Taylor of the sum of £667,069 in relation to overpaid VAT, together with statutory interest of £663,300 in settlement of the one claim lodged by Carlton which HMRC at that time accepted as valid. These sums appear to have reached Taylor on or about 11 or 12 May 2009. These payments came *out of the blue* so far as Taylor were concerned as they were not aware until then that they had any potential claim under s80.

58. By letter to Taylor dated 12 May 2009, HMRC informed Taylor that the VAT Group with the registration number 265 7918 16 with Taylor as its representative member was disbanded and de-registered with effect from 28 February 2009.

Submissions

59. Both counsel produced detailed skeleton arguments which they amplified in the course of the Hearing. We have already summarised the essential arguments of the parties.

60. Miss Whipple pointed out in her textual analysis of s80 that the word *claimant* was not mentioned except in s80(3). The passive tense was used. This was said to

support the contention that the identity of the person making the claim was not important. Regulation 43A of the 1995 Regulations, which did refer to *claimant*, was not relevant. That regulation was dealing with specific reimbursement provisions. Moreover, it was wrong to construe primary legislation by reference to secondary legislation. Generally, the regulations indicated that making claims was a relatively informal procedure. Her argument was not negated by any considerations of policy. The policy was to enable taxpayers to enforce their Community rights, respecting EU principles of equivalence and effectiveness (*Marks & Spencer Plc v C&EC* [2002] STC 1036). HMRC were seeking to rely on an additional line of defence (the wrong person defence) for which the legislation did not provide. She referred to certain English rules of procedure on the substitution of one party for another, and to Rule 9 of the Tribunal's own rules. She acknowledged that, had HMRC made the payment to Carlton before Taylor asserted a right to claim the same sums, this would have made her argument more difficult.

61. As to the question whether Taylor was the person entitled to the repayment of the sums in issue in their two appeals, Miss Whipple's primary argument was that Taylor was because it was the representative member of the VAT Group between 1973 and 1998. She relied on s48 VATA and submitted that it was Taylor who accounted to HMRC (more accurately, their statutory predecessors) for the VAT at issue. She also relied on HMRC Guidance issued in September 2010 quoted above, which she said advanced a policy objective to provide a simple rule that ensures clarity and ease of administration for HMRC. Taylor's VAT Group was in existence when the claims, which are the subject of Taylor's appeal TC/2011/04303, were made in 2007. It was also in existence when the claim, which is the subject of Taylor's appeal TC/2011/01731, was made in January 2009 (in its revised form) and when the sum claimed was repaid to Taylor in April 2009. Taylor's subsequent deregistration was irrelevant.

62. With reference to the 1990 Agreement, Miss Whipple submitted that the VAT legislation did not have the effect of transferring claims for overpaid output tax to transferees of a business. Moreover, the State's relationship with a taxable person cannot be altered by private contract. There was, in any event, no reason to do anything about VAT, and in particular, no reason to transfer rights to reclaim overpaid output tax to Carlton. By reason of s80(2) & (7), liability on the part of HMRC only arose on the making of a claim. Reference was also made to the equivalent provision then in force, namely s24 of the Finance Act 1989.

63. As for the 1998 Agreement, Miss Whipple submitted that it made no express provision for the transfer of any right to reclaim VAT or to repayment of overpaid output tax. No claim had been made and so there was no debt owed by HMRC. Moreover, there was no need to imply a provision for such matters in a complex document professionally prepared and which essentially related to the sale of shares. The provisions relating to tax indemnities are not relevant as they do not purport to transfer the Appellant's rights against HMRC in respect of pre-1998 claims. Finally, she confirmed that insofar as claims in this appeal related to the period between 1996 and 1998 they should be held-over meantime.

64. Andrew Young QC for HMRC submitted that the 2007 and 2009 claims were made by Carlton on their own behalf and not on behalf of Taylor. Taylor submitted no s80 claims at all. Taylor knew nothing of the Carlton claims until 2009. He discussed the meaning of *claim* under reference to *University of Liverpool v CCE* [2001] BVC 2088 at paragraph 25, and the 1995 Regulations, regulation 43A, s80(2), s80(5) in its original form in s24 of the Finance Act 1989, *CCE v Cresta Holidays Ltd* [2001] EWCA Civ 215 at paragraph 16 (which concerned Insurance Premium tax), *Reed Employment Ltd v* HMRC [2011] UKFTT 200, and HMRC v *GMAC UK Plc* [2012] UKUT 279 paragraphs 182-183 (concerning bad debt relief). He also pointed out that the unjust enrichment defence referred to *claimant.* Time-bar provisions promote certainty; we are not concerned with retrospective legislation removing accrued rights; no principles of European law have been infringed. Under reference to s80(2), he submitted that the *purpose* of a claim was to seek repayment to the party who makes the claim. The only exception was where the Group representative made the claim but the Group was disbanded before the claim was resolved; there, payment in settlement fell to be made to the generating taxpayer. In summary, the taxpayer seeking repayment had to pass through the procedural hoop of making a s80 claim. If Taylor's argument were sound, there would be difficulties with the statutory unjust enrichment defence. Taylor's arguments are inconsistent with the general law of prescription and limitation (*Maclean v BRB* [1966] SLT 39, *Link Housing Assoc v PBL Construction Ltd* [2007] SC 39).

65. In relation to the *Entitlement Issue,* Mr Young submitted that a right to claim repayment of overpaid output tax can be assigned (*Midlands Co-Operative Society v HMRC* [2008] STC 1803). On a proper construction of the 1990 Agreement, the right to claim for overpaid output tax between 1973 and 1990 and the underlying debt was assigned to Carlton. No express words of assignation were required (*Carter v McIntosh* [1862] 24D 925 at 933). Absent the s80 procedure, there was a claim in restitution (*Woolwich Equitable BS v IRC* [1993] AC 70*; Deutsche Morgan Grenfell Group v IRC* [2007] 1 AC 558); the obligation arising on receipt of the undue tax (*FJ Chalke Ltd v HMRC* [2010] EWCA 313). The effect of the 1990 Assignation was entirely consistent with the admissible background evidence relating to re-structuring which contemplated making each of the various companies more responsible for its cash-flow and borrowing requirements. Taylor's argument that there was no debt in 1990 because no s80 (or under its statutory predecessor) claim had been made is inconsistent with the primary argument that no claim need be made by Taylor. Thus, the claim for the period between 1973 and 1990 was Carlton's. If that was wrong and the claim still had to be made by the Group representative, then that was not done.

66. Mr Young further argued that the 1998 Agreement was not relevant to the issues. Taylor was not a party to it, Taylor's shareholding in Carlton had been transferred in 1997 to Taylor's parent company, Taylor Clark PLC. Nor did the 1998 Agreement affect Carlton. It related to the transfer of Carlton shares not s80 claims. After 1990, Carlton was the generating taxpayer, but the claim for 1990 to 1998 (or more accurately 3 December 1996) ought to have been made by the Group representative ie Taylor. The retrospective effect of disbandment on 28 February 2009 meant that the claim reverted to Carlton. Payment was made after the effective date of disbandment in May 2009 to Taylor, and was therefore made in

error. Reference was made to *Proto Glazing Ltd* VTD 13410 and *C&CE v Barclays Bank Plc* [2001] EWCA (Civ) 1513.

Discussion

The Time-Bar Issue

67. The issue is whether the person making the s80 claim must be the person entitled to repayment. In our view, the claimant must normally be the person with the right to make the claim and to receive the repayment. Thus a claim may be made by the taxpayer himself, by his agent on his behalf, by his assignee, or by his successor. The only possible exception appears to be where a claim is made by a VAT Group representative but the Group is disbanded before the claim is paid. In those circumstances, the claim falls to be paid to the taxpayer member of the disbanded VAT Group who generated the supplies that give rise to the right to repayment. That view proceeds on the basis that the Group representative was the single taxpayer in a question with HMRC, but was acting as agent in a question between him and each and all of the members making up the Group. That relationship of agency terminates when the Group is disbanded and the right to receive repayment is, in effect, assigned to the tax generating group member. This possible exception may not be an exception but an illustration of a claim being made by the Group representative as an agent but paid to the principal, or possibly a deemed assignation.

68. If such a claim is not made timeously in accordance with the relevant statutory period, then it must follow that the claim is extinguished.

69. The argument that, under s80 (or its statutory predecessor), a timeous but unmeritorious claim can be made by A, and pursued after the expiry of the relevant statutory period by B, who does not fall within any of the above categories, seems to us to be counter-intuitive. There is no warrant in the language of s80 or its statutory predecessor for such a view.

70. It is obviously correct that a claim may be made by an agent of the person entitled to the repayment, or the successor or assignee of such a person. This enables professional advisers to make such claims. This also enables such claims to be made by liquidators, administrators and receivers. Whether they bring them in their own name or in the name of the insolvent company will depend on the relevant insolvency legislation. However, the relationship between Carlton and Taylor does not fall into any of these categories.

71. The language of s80, and in particular subsections (1) & (2) (with or without amendment), infers that the person making the claim (or on whose behalf it is made) is the person entitled to receive repayment (if the claim is well founded). Subsection (2) ends with the words *for the purpose.* That purpose is the purpose of repayment to the claimant of an amount paid to the Commissioners which was not VAT due to them. The language of s80(3) which relates to the defence of unjust enrichment expressly mentions *claimant* and assumes that the person entitled to repayment (if the claim is well founded) is the *claimant* and contemplates that repayment made to the

claimant would unjustly enrich *the claimant.* It is difficult to see how the enrichment defence can operate where there is a mismatch between the *claimant* and the person entitled to receive the repayment.

72. S80(4) (the time-bar provision) (with or without amendment) also supports the view that the person making the claim is the person entitled to receive the repayment. The sub-section contemplates no other person to whom the repayment is to be made. The word used is *repay.* That means paid back to the person who paid it (or on whose behalf it was paid) in the first place, on a claim being made. The claim being made is for repayment. The claim is made by a *claimant.*

73. S80(6) makes provision for regulations to prescribe how a claim should be made and what documentary evidence should accompany it. Regulation 37 of the Value Added Tax Regulations 1995 refers to documentation in the possession of the *claimant.* That provision assumes that the *claimant* is the person entitled to receive repayment as do a range of other provisions in the 1995 Regulations. Why else would it require the *claimant* to support the claim with documentary evidence in his possession and a statement of the method by which the claim was calculated? Although we accept that we should not construe primary legislation by reference to subordinate legislation (*Midlands* paragraph 18), we are, we believe, entitled to note the consistency between them if our analysis is sound, and the inconsistency if it is unsound.

74. The other provisions of s80 and its statutory predecessor are consistent with the foregoing analysis. The use of the passive tense in various places within the section, to which our attention was drawn, does not affect our analysis.

75. We were referred to a number of authorities, some of which we have found to be of limited assistance. *Liverpool* concerned a preliminary question whether a claim for residual input tax was an amendment to an earlier timeous claim, and therefore the claim as amended was timeous, or whether the claim was a new claim and therefore time-barred because of s80(4) VATA. The tribunal held, in effect, that as the earlier claim had been met and was therefore completed, the later claim was a new claim and came too late (paragraph 29). In the course of the decision, the tribunal observed that the word *claim* in s80 should be given its ordinary meaning, namely a demand for something as due (paragraph 25). This does not take us very far but it is consistent with the view that something must be due to the person making the claim, ie the claimant referred to elsewhere in the section and in the 1995 Regulations.

76. *Reed Employment* (which we were informed has been appealed to the Upper Tribunal) also concerned *inter alia* the question whether a claim was a new claim or part of or an amendment to an earlier one in the context of a series of historical claims (dating back to 1973) for repayment of overdeclared VAT under s80, which arose out of the different treatment of the sums received from Reed's customers for the services of temporary workers; these sums comprised a charge for the worker's services and Reed's commission; broadly, Reed accounted for VAT on the whole of the receipts rather than on the commission alone, hence the repayment claim. The tribunal's discussion of *claim* (at paragraphs 110-112) indicates that a claim by A could not be

treated as a claim by B. The discussion focuses on how it is determined whether a claim is a discrete, separate claim from an earlier one, and (at paragraphs 118-124) a clear exposition of the legislative history of repayment claims, time bar and the ECJ's treatment of capping legislation is set out. However, the tribunal noted (at paragraph 110) that any assertion of right to repayment must be regarded as an individual, discrete claim, separate from any other, unless it is shown to be in essence as one with an earlier claim. Implicit in that statement is the view that the person making the claim has or asserts the right to repayment. Put another way, for there to be liability on the part of HMRC under s80 to a particular taxpayer, it must be faced with a claim by or on behalf of that taxpayer, his successor or assignee, asserting the right to repayment and which has been made within the prescribed timescale.

77. *HMRC v GMAC UK Plc* [2012] UKUT 279 (TCC), concerned *inter alia* the incompatibility with EU law of the UK's VAT bad debt relief provisions applicable between 1978 and 1997. The Upper Tribunal considered that s22 VATA 1983 was the mechanism by which effect was to be given to GMAC's directly enforceable rights to bad debt relief under the relevant EU Directive (paragraph 165). The Upper Tribunal went on to consider whether, if that view were incorrect, a timeous claim had been made under s80 VATA. The Upper Tribunal quoted from the taxpayer's claim letter of 2006 and noted that it expressly stated that the claim *fell outside section 80.* Faced with that statement, the Upper Tribunal, not surprisingly, rejected the view that the claim being made could be construed as falling within s80 (paragraph 182). There was really no question of implication.

78. It was at one stage suggested by Miss Whipple that something could be made of the fact that two of the 16 November 2007 claim letters submitted by Carlton (relating to Carlton's appeals EDN/08/78 & 79 and Taylor's appeal TC/2011/04303) and the amending claim letter dated 8 January 2009 referred to Taylor in the headings of the letters. It was argued that they should be construed as having been submitted on behalf of or having arisen out of the VAT Group of which Taylor was at least until later in 2009 the Group representative. However, it is clear from the text of each of these letters that Carlton was claiming, in its own right, repayment of sums alleged to have been overpaid by way of VAT. In any event, our findings of fact preclude any conclusion that these letters were somehow submitted on behalf of Taylor in whatever capacity.

79. Of more assistance is *Cresta,* which was cited to us because of the similarity of the terms of the Insurance Premium Tax Act 1994 Schedule 7 paragraphs 8(2) and 8(6) to s80(2) &(4) VATA. One of the issues was whether Airtours could make a claim for repayment of IPT even though they paid the tax to the insurers who then paid it to the Commissioners. Lightman J held that the tribunal was wrong to entertain Airtours' appeals in relation to this aspect of the case. He held, having regard to Schedule 7 paragraph 8, that the only person who could pursue the claim was the person who had paid the tax to the Commissioners. He drew additional support from the terms of the statutory defence of unjust enrichment which is in substantially the same terms as s80(3) (paragraphs 20 and 21). This view was endorsed by the Court of Appeal. Simon Brown LJ observed, at paragraph 16, that any repayment was to be channelled through the taxpayer *who must himself initiate*

the claim. He did so under reference to Schedule 7 paragraph 8(6), which is in substantially the same terms as s80(6), and under reference to regulation 14 of the Insurance Premium Tax Regulations, which is in substantially the same terms as regulation 37 of the 1995 Regulations. It is plain from this decision that the Court envisaged that the claimant had to be the person with the right to receive repayment of the overpaid tax.

80. It was also suggested that Taylor's arguments were consistent with the underlying policy of enforcing their Community law rights while respecting the principles of equivalence and effectiveness. We accept the underlying policy and acknowledge the existence and importance of these principles. However, we do not consider that our analysis infringes either the policy or the principles. The imposition of a time bar to cut off claims is legitimate. It promotes legal and financial certainty for the administration of public finances. We are not here concerned with retrospective legislation removing accrued rights, or inadequate transitional provisions.

81. The ECJ observed in *Marks & Spencer* at paragraph 35 that, in relation to the principle of effectiveness and the interests of legal certainty, it is compatible with Community law to lay down reasonable time limits for bringing proceedings. The Court also pointed out that

> 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 (paragraph 35).

82. In a later passage (paragraph 38) (quoted with approval by Lord Reed in *Test Claimants in the FII Group Litigation* [2012] 2 WLR 1149) dealing with transitional arrangements, the Court said that such arrangements should allow an adequate period

> … for lodging the claims for repayment which persons were entitled to submit under the original legislation.

There is a clear link in these passages between the making of a claim and the person entitled to make the claim. The clear implication is that the court is considering a statutory time bar in the context of the person entitled to submit the claim and the period within which the person so entitled submits it. It follows that a person whose Community rights have been infringed but who fails to seek timeous redress will be deprived of his rights. That is the inevitable consequence of failing to make a timeous claim. The claimant suffers because of his delay and the debtor obtains a windfall. That is consistent with the underlying policies of legal certainty and the discouraging of stale claims. This is also consistent with the general law of prescription and limitation.

83. This is not the creation of an additional line of defence for HMRC as Miss Whipple argues (she described it as the *wrong person* defence). In principle, and in general, if the wrong person makes a claim, and the person entitled to repayment (if his assertion is well founded) does not make a timeous claim, the claim

is extinguished and HMRC have no liability (s80(4)). Procedural rules in different contexts, which confer a discretion to substitute one party for another, are not in point. Such discretion is not to be found in s80, with which we are concerned. The EU jurisprudence on time bar does not require such discretion to be built in. Scots law is not generally enthusiastic about such amendment and substitution. In *Maclean*, which concerned a fatal accident claim, the court refused, after the expiry of the limitation period, to allow the summons at the instance of the widow to be amended so as to include the deceased's children as additional pursuers. In *Link*, an action for damages for breach of contract, an error of substance going to the identity of the pursuer, was allowed to be corrected by amendment with the question of prescription left over for proof. Some of the authorities on this topic have been reviewed more recently in *Shetland Health Board v Kelly* [2011] CSOH 67. We doubt if these cases are of much assistance for present purposes beyond stating that, in general, the law respects statutory time limits, and if the *wrong* person makes the claim, it will be difficult to correct matters after the expiry of the time limit. Inherent in the discussion in these cases is the notion that the claimant and the person entitled to what is being claimed are one and the same person, or intended to be one and the same person.

84. Miss Whipple sought to distinguish between a right to make the claim and the right to be repaid. She does not suggest that only Taylor has the right to make the claim; rather, it has the right to be repaid the subject matter of the claim. We consider this does not properly reflect what a claim is and simply confuses matters. A taxpayer making a claim, if well founded, has a right to repayment. The making of a claim is the assertion and enforcement of a right already vested in the claimant. If well founded, the person against whom the claim is made is under an obligation to meet it. That obligation imposes liability. HMRC only come under a liability to pay the claimant when a well-founded claim is made (s80(7)). Taylor has never made a claim under s80, and says that Carlton's claims, or at least some of them, are not well founded. It is difficult to see on what basis HMRC are liable to Taylor.

85. Apart from being counter-intuitive, Taylor's argument poses a number of practical problems. Suppose A considers that he has paid too much output tax in year one. A makes a s80 claim for repayment in year three. The claim is settled in year four and HMRC close their file. In year ten B makes the same claim and is able to demonstrate that he, not A, was truly entitled to the repayment. Is B entitled to elide the capping provision because A made a timeous but bad claim? There is no warrant under the law of prescription and limitation for entitling B to take the benefit of A's timeous claim or *piggy-back* on it, as Mr Young described it in the course of his submissions. Does it even matter that HMRC settled A's claim or that it was still outstanding in year ten? We cannot think why it should. Nor would it make any difference if A abandoned its claim in year four. The principles of equivalence and effectiveness are not engaged at all. Community law rights are enforceable but only within the reasonable time limits imposed by the member state. Stale claims are cut-off. *Vigilantibus non dormientibus jura subveniunt.*

86. Our conclusion on this preliminary issue is that s80, as enacted, and as amended, (and its statutory predecessor) envisages and requires a timeous claim for repayment by or on behalf of the taxpayer claimant asserting the right to repayment or

by his assignee or successor. Taylor has never made a s80 claim. It cannot rely on the claims made by Carlton. Carlton did not make the claims in 2007 and 2009 by or on behalf of Taylor. HMRC have no liability to make repayment to Taylor of the sums claimed in either of the Taylor appeals. We therefore decide the first preliminary issue in each of the two Taylor appeals in favour of HMRC by finding that the claims made by Taylor in these two appeals are time-barred.

The Entitlement Issue

87. There are two periods to consider. The first is the period between 1973 and 31 March 1990, when Taylor was the generating taxpayer. The second period is between 1 April 1990 and 1998 (or more accurately 3 December 1996) when Taylor was the VAT Group representative and Carlton was the generating taxpayer.

88. As for the *first period*, Taylor was, throughout, the Group representative and the generating taxpayer. Carlton did not exist at that stage. The Group representative, Taylor, would have been entitled to make the claim for repayment of overdeclared output tax and receive the repayment if the right to receive repayment was well founded; firstly, while the VAT Group existed, on the basis that it was the Group representative. This flows from s43 of VATA 1994 and its predecessor s29 of VATA 1983. None of the difficulties encountered in *C&CE v Thorn* [1998] STC 725 (inter-group supplies paid in part before but delivered after supplier left the VAT group) arises.

89. The second basis upon which Taylor would have been entitled to make the claim for repayment and receive the repayment, if the right to receive repayment was well founded, would have been as the generating taxpayer, following disbandment of the VAT Group on 28 February 2009. The claim could have been made prior to 1 April 2009 (in accordance with s121(1) of the Finance Act 2008) in anticipation that their application for retrospective disbandment of the VAT Group would be granted.

90. If Taylor, in 1990, validly assigned its right to repayment of overpaid output tax between 1973 and 1990 to Carlton, as HMRC contend, then Taylor would still have been entitled to make the claim for repayment as Group representative and receive repayment if the right to receive repayment was well founded, until Carlton left the VAT Group, which they did, in 1998. We do not see how HMRC's relationship with the Group representative can be affected by an assignation (whether or not intimated to HMRC) by the Group representative in favour of a Group member. The statutory provisions (ss43 and 29) require that, as long as companies are treated as members of a Group, the business carried on by a member is to be treated as carried on by the representative member. When the Group is disbanded or a member leaves, the position changes. The member's VAT affairs can no longer be represented by the representative of the Group.

91. Thus, in *Proto Glazing* 1/5/95 No 13410 (*Chairman RK Miller CB*), the appellant, who was a member of a VAT Group, made supplies to a customer. The appellant duly accounted to the representative member of the Group for the net VAT payable. The customer did not pay. The appellant subsequently wrote off the debt in

its accounts. Thereafter, the representative member went into administrative receivership and the Group relationship ceased to exist. The appellant sought bad debt relief in its own right, having re-registered for VAT in its own name when the Group representative went into receivership. The appeal succeeded on the basis that the statutory fiction created by the VAT Group legislation should not apply after the Group ceased to exist as this would lead to an anomaly and injustice. This decision can be justified on the view that the representative member acted as the Group member's agent in a question between member and Group representative (in a question with the Commissioners, the Group representative is regarded as the single taxable person; the business and supplies of the members are treated as the business and supplies of the Group representative); agency ceased when the member left the Group or on disbandment, and any outstanding claims could be pursued by the former Group member. The legislation then in force does not exclude this analysis and the result achieves the purpose that the loss arising from such bad debts should be shared between the taxpayer and the Commissioners. Recovery by the administrator or liquidator of the Group representative would not necessarily enure for the benefit of the Group member taxpayer; it may go into the pot available for the general body of creditors. Moreover, it may be questionable on what basis the administrator or liquidator might claim the refund if the VAT Group was disbanded at the time or as a consequence of his appointment.

92. When Carlton left the Taylor VAT Group in 1998, it is difficult to see how Taylor could have been entitled to make a claim for repayment and receive such payment, the rights to which (on the hypothesis under discussion) had been assigned to Carlton. Carlton was no longer part of the VAT Group with the representative member of which HMRC dealt. Taylor had no authority to make claims on behalf of Carlton or to receive repayment on their behalf. On the hypothesis that the right to repayment had been assigned to Carlton, Taylor had no entitlement on which to base any claim for repayment.

93. The foregoing analysis raises three questions. The first is whether the right to repayment can be assigned. The second question is whether that right existed as at 1990. The third question is whether the right to repayment was assigned by the 1990 Agreement.

94. In our view, *Midlands Co-Operative Society Ltd* v *HMRC* [2008] STC 1803 requires us to answer all three questions in the affirmative. It establishes that a right to repayment under s80 VATA may be validly assigned and that the assignee is entitled to claim repayment from HMRC (paragraphs 9, 14, 31). Scots law would, essentially for the same reasons, permit assignation of a s80 claim. In *Midlands* another Co-Operative Society transferred its whole stock, assets and property to Midlands in 1995 (paragraph 3(8)). The terms of the transfer were general; no mention was made of assignation of rights to reclaim overpaid VAT; such a claim may not have been considered. Nevertheless, the Court of Appeal held that the right to repayment of VAT was assignable and was included in the transfer. In *Midlands*, it was the assignee (Midlands) who acquired the right to repayment and subsequently made the claim. This was not an assignation of a pre-existing claim already made. As in the present case, the right to repayment dated back many years. Midlands' s80

claims were submitted in 2003 and related to periods between 1973 and 1999; they were prompted by certain decisions of the ECJ in the late nineties. The court thus held that the right to make a s80 claim had been transferred to Midlands, even although no claim had been made, and the right was not specifically mentioned in the document of transfer.

95. The terms of transfer contained in the 1990 Agreement were broad and, like the terms in *Midlands*, were apt to include such rights. Such a right to repayment is an asset. The fact that HMRC's liability is only triggered when a claim is made is not relevant. An un-asserted right is nevertheless capable of enforcement in due course subject to the law of prescription and limitation. That must be so whether the right is classified as a statutory or Community law right to repayment or a restitutionary right. There is no reason to conclude that such rights are un-assignable. A debt repayable on demand is assignable whether or not a demand has been made. A right to damages may be assigned, even although the damages have yet to be quantified. It would therefore not seem to matter that the right to repayment was of an unquantified amount of overdeclared VAT when it was assigned. We therefore conclude that the right to repayment was capable of assignation and was assigned to Carlton by the 1990 Agreement. Intimation to the debtor was effected by the January 2009 claim letter to HMRC, in which the 1990 Agreement was expressly mentioned.

96. On this view of the assignation, Taylor, as Group representative, would nevertheless have been entitled to make the repayment claim and receive repayment up to 1998, when Carlton left the VAT Group. Thereafter, Taylor had and has no entitlement to repayment. We refer also to paragraphs 102 and 103 below.

97. Accordingly, Taylor's argument, that there was no such right to transfer on the basis that no claim had been made under s80 or its statutory predecessor as at 1990, cannot be accepted. It is inconsistent with *Midlands.* It also seems inconsistent with their primary argument, which seeks to elide the absence of a s80 claim by Taylor.

98. Moreover, *Fleming* claims arise from tax levied but not due. They must therefore fall within the *San Giorgo* principle (1983 ECR 3595) which states, essentially, that where tax has been levied in breach of Community law, the Member State is bound to make restitution to the taxpayer by paying full compensation for the loss and damage sustained. We are not concerned with the vexed question of simple or compound interest. While common law claims can be excluded by statute providing a comprehensive code, Community law rights cannot be excluded by domestic legislation; if domestic legislation purported to do so, it would be disapplied. Reasonable limitations can be placed on the time within which such Community law rights may be exercised. It has been held that the Community law obligation to make restitution arises on receipt of the undue tax (*FJ Chalke Ltd v HMRC* [2010] STC 1640 at paragraphs 28-40). It is clear from the discussion about interest in *Chalke* that (whatever else may remain obscure and unresolved) the obligation to make restitution arose when the undue tax was paid, and that interest in some shape or form was payable while the undue tax remained in the hands of the tax authorities. We recognize this whole area has since been explored in even greater detail in *Test Claimants;* see for example paragraph 210.

99. In Scots law, similar principles of restitution, and in particular repetition, will apply (*Morgan Guaranty Trust Co v Lothian Regional Council* 1995 SC 151). As *Morgan* followed the approach in England in *Woolwich*, it seems likely that Scots law will follow the developments thus far in *Test Claimants.* Differences between the law of prescription and limitation in the two jurisdictions will have to be resolved. Nevertheless, the Community law right to repayment in the present case must be taken to have arisen by 1990 and was then capable of being assigned. The enforcement of that right through a s80 claim (or its statutory predecessor) is a separate issue.

100. If we are wrong and the 1990 Agreement did not transfer the right to repayment for the first period, then, as we have explained, that right and entitlement remained with Taylor until 31 March 2009. Thereafter, Taylor's right to repayment became time-barred because they had made no timeous claim under s80 VATA.

101. As for *the second period*, namely 1 April 1990 to 1998 (more accurately 3 December 1996), Carlton was the generating taxpayer throughout. It left the Group in 1998, when its shares were sold to a third party. The 1998 Share Purchase Agreement is of no importance for present purposes. Neither Taylor nor Carlton was a party to it. It related to the sale of Carlton's shares by Taylor Clark PLC, which was Taylor's holding company.

102. The *second* period is not affected by the 1990 Agreement. Accordingly, when Carlton left the VAT Group in 1998, they became entitled to make a claim for repayment and receive such payment. They were the generating taxpayer throughout that period. From 1998, Carlton was no longer part of the VAT group and so Taylor could no longer represent them. As from 1998, Taylor had no right to claim repayment of overdeclared output tax generated by Carlton. Taylor, as we have already noted, have made no s80 claim. HMRC have, however, conceded that the fact, that Carlton left Taylor's Group in 1998, *did not remove the section 80 claim for the period from 1st April 1990 to 1998 from the appellant.* That concession is in accordance with HMRC's published guidance but it does not necessarily represent a correct statement of the law.

103. If our analysis is wrong, and applying HMRC's concession, then Carlton became entitled to make a claim for repayment and receive such payment when the VAT Group was effectively disbanded on 28 February 2009. They, in fact, made s80 claims in 2006, 2007 and January 2009. It is not necessary for us to decide their validity, but it seems to us that their right to claim insofar as relating to the second period would be perfected by the consequential effect of disbandment of the VAT Group on 28 February 2009. From that point if not before, Taylor had no right to make a claim for repayment or receive such payment. They could not claim in a representative capacity, and they were not the generating taxpayer. They did not, as we have already noted, make a s80 claim.

Disbandment of Group Registration

104. As our findings of fact show, Taylor applied for retrospective disbandment with effect from 28 February 2009. Taylor had ceased business by that date. Between the date of application for disbandment and the subsequent granting of the application in May 2009, the payments which are the subject of appeal TC/2011/01731 were made by HMRC to Taylor.

105. S43B(1)(d) & (4) VATA 1994 enable HMRC to grant disbandment retrospectively on an application being made to them. Disbandment (the word used by counsel at the Hearing) is shorthand for the bodies corporate which have been treated as members of a VAT group, no longer to be so treated. Taylor argues that this is purely an administrative exercise and the fact is that Taylor was still the group representative when the payments were made.

106. This argument is unsound. In the first place, it is common ground, as can be seen from the Skeleton Arguments, that in 1998 Carlton ceased to be part of the Taylor Clark Leisure VAT Group. In the second place, the Taylor Clark Leisure VAT Group continued to exist until February 2009 but without Carlton as one of its constituent members. From 1998 the business carried on by Carlton could no longer be treated as carried on by the group representative (Taylor). In the third place, the 2009 application for disbandment could only relate to two or more bodies corporate that were, at the date of the application, treated as members of the VAT group. That could not have included Carlton. It seems to us, therefore, that Carlton was entirely unaffected by the disbandment. They were no longer part of the Taylor VAT Group and could no longer be represented by Taylor.

107. However, if we are wrong, then the disbandment must be given effect from the date specified by HMRC under s43B(4). That is a deeming provision which must receive effect in accordance with its terms. The Group VAT registration was cancelled with effect from 28 February 2009 as requested, and with it Taylor's VAT registration. According to the correspondence produced, the intention was to cancel the VAT registration of all the companies in the VAT Group. That could not have included Carlton. The deeming effect cannot be brushed aside for some purposes but not for others. Taylor had by then ceased trading and presumably wished to avoid the need to submit VAT returns and to account for any VAT after 28 February 2009.

108. Even if disbandment somehow only takes effect from the date on which HMRC intimated the grant of the application (12 May 2009), whatever right Taylor may have had to receive the payments made to them in 2009, that right was removed by the disbandment. They never made a s80 claim. They assigned their rights to repayment in 1990 for the period from 1973 to 31 March 1990. They were not the generating taxpayer for the period from 1 April 1990 to 3 December 1996. They have not represented Carlton for any purpose since 1998 when Carlton left the VAT Group. It is therefore difficult to see on what basis they can resist the assessments which are the subject of appeal TC/2011/01731.

Summary

1 S80 (and its statutory predecessor) envisages and requires a timeous claim for repayment by or on behalf of the taxpayer claimant asserting the right to repayment or by his assignee or successor. Taylor never made a s80 claim. They cannot rely on the claims made by Carlton. Carlton did not make the claims in 2007 and 2009 by or on behalf of Taylor. HMRC have no liability to make repayment to Taylor of the sums claimed in either of the Taylor appeals. We therefore decide the first preliminary issue in each of the two Taylor appeals in favour of HMRC by finding that the claims made by Taylor in these two appeals are time-barred.

2 An unquantified right to repayment under s80 VATA 1994 is an asset, whether or not it has been made the subject of a statutory claim, and may be validly assigned. The assignee is entitled to claim repayment from HMRC.

3 Taylor's right to repayment for the first period was capable of assignation and was assigned to Carlton by the 1990 Agreement. Intimation to the debtor was effected by Carlton by the January 2009 claim letter to HMRC in which the 1990 Agreement was expressly mentioned.

4 If their right to repayment in respect of the first period was not so assigned then, at best for Taylor, their right to repayment became time-barred because they made no timeous claim under s80 by 31 March 2009.

5 Carlton, at the latest, became entitled, in respect of the second period, to make a claim for repayment and receive such payment when the VAT Group was effectively disbanded on 28 February 2009. From that point if not before, Taylor had no right to make a claim for repayment or receive such payment. They could not claim in a representative capacity, and they were not the generating taxpayer. They did not make a s80 claim.

6 Section 43B(4) of VATA 1994 is a deeming provision which must receive effect in accordance with its terms. The deeming effect cannot be brushed aside for some purposes but not for others.

7 Whatever right Taylor may have had to receive the payments made to them in 2009, that right was removed by the disbandment. They never made a s80 claim. They assigned their rights to repayment in 1990 for the period from 1973 to 31 March 1990. They were not the generating taxpayer for the period from 1 April 1990 to 3 December 1996. They have not represented Carlton for any purpose since 1998 when Carlton left the VAT Group.

8 We therefore decide the second preliminary issue in each of the two Taylor appeals in favour of HMRC by finding that Taylor is not entitled to receive repayment of VAT overpaid between 1973 and 3 December 1996.

Further Procedure

109. We have decided both preliminary issues in favour of HMRC. At the conclusion of the Hearing, Taylor indicated that they still had a legitimate expectation argument to advance. For their part, HMRC indicated that they intended to make a strike-out application in respect of that argument. We therefore direct parties to submit, within 28 days of the release of this Decision, their proposals for further procedure in each appeal.

110. 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.

J GORDON REID QC, FCIArb
TRIBUNAL JUDGE

RELEASE DATE: 19 December 2012