TC03228

Appeal number: TC/2010/08435

VAT – assessments under s 80(4A) and s 78A(1) VATA to recover VAT and interest said to have been overpaid by HMRC to appellant – whether payments were made to appellant under a compromise agreement – whether the compromise agreement was void as being outside the powers of HMRC – whether, if there was a valid compromise agreement, HMRC nonetheless had power to assess under s 80(4A) and s 78A(1)- whether HMRC acted unlawfully in exercising a discretion to make the assessments

FIRST-TIER TRIBUNAL
TAX CHAMBER

SOUTHERN CROSS EMPLOYMENT AGENCY LIMITED **Appellant**

- and -

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

TRIBUNAL: JUDGE ROGER BERNER
CHRISTOPHER JENKINS

Sitting in public at 45 Bedford Square, London WC1 on 17 – 18 December 2013

Peter Mantle, instructed by Crowe Clarke Whitehill LLP, for the Appellant

Jessica Simor QC, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. This appeal raises the question whether HMRC were entitled, in the circumstances of this case, to raise assessments, for VAT under s 80(4A) of the Value Added Tax Act 1994 ("VATA"), and for interest under s 78A VATA. The dispute is not on whether the supplies in question were indeed taxable supplies, on which in the normal course VAT would have been chargeable, but whether the assessments are precluded by what the Appellant, Southern Cross Employment Agency Limited ("Southern Cross"), says was a binding agreement with HMRC in April 2010 compromising a claim for repayment of VAT, and associated interest, made by Southern Cross on 30 March 2009, which resulted in payment to Southern Cross of the sum of £637,296 and interest of £734,232.

2. The claim made by Southern Cross was a Fleming claim under s 80 VATA for repayment of sums paid by way of VAT in the years 1993 to 1997 together with statutory interest. The supplies in question were those of dental nurses made by Southern Cross. The basis of the claim at that time was that the supplies were exempt. It was later determined, however, that supplies of that nature were indeed taxable (see *Sally Moher v Revenue and Customs Commissioners* [2012] STC 1356). Southern Cross accepts for the purpose of this appeal that its supplies were taxable at the standard rate.

3. The appeal resolved itself around three main issues, and an alternative argument on the part of Southern Cross. The three main issues are:

(1) Did Southern Cross and HMRC enter into a binding compromise agreement?

(2) If the parties did enter into a compromise agreement, was that agreement *ultra vires* because HMRC had no power to enter into such an agreement with Southern Cross?

(3) If there was a valid compromise agreement, was HMRC entitled under s 80(4A) and s 78(1) VATA to make the assessments under appeal to recover the sums paid?

Leaving aside the alternative argument, Southern Cross has to succeed on all three of these issues if it is to be successful in this appeal

4. If Southern Cross fails to succeed on any of the main issues, it puts forward an alternative argument that HMRC acted unlawfully in exercising a discretion in making the assessments.

The facts

5. There was no dispute on the underlying facts. We had a bundle of documents and an unchallenged witness statement of Mr Kieran Smith, a senior manager in the VAT department of Crowe Clark Whitehill LLP. At the relevant time Mr Smith was

a manager in the predecessor firm of Horwath Clark Whitehill, and in that capacity was involved in the March 2009 claim by Southern Cross. As Mr Smith's witness statement was unchallenged, we accept it so far as it relates to factual matters. Where, however, Mr Smith expresses a view on a matter which falls to us to determine, whilst we accept as a fact that he held that view at the material time, we will reach our own conclusions on a consideration of the evidence as a whole.

Background

6. On 18 July 2001 Horwath Clark Whitehill ("HCW") wrote to HMRC[1] on 18 July 2001 setting out the background to the supplies by Southern Cross of dental nurses to dental practices, along with an analysis of the law, and seeking HMRC's confirmation that the supply of dental nurses by Southern Cross as principal was exempt from VAT under Item (2) and Note (2) of Group 7 of Schedule 9 VATA.

7. HMRC replied on 2 August 2001 confirming that those supplies by Southern Cross were exempt.

8. In consequence, in 2001 Southern Cross made a number of voluntary disclosures for periods between 1998 and 2000 that were, at that time, within the statutory limitation period. Correspondence around those disclosures indicates that there was a question of pricing, which must (and this is confirmed by Mr Smith's evidence) have related to whether the claim should be restricted to the extent that it would unjustly enrich Southern Cross (s 80(3) VATA).

9. Payment in full in respect of those voluntary disclosures and claims by Southern Cross was made in 2004. In accepting all the then outstanding claims, HMRC said, in a letter to HCW dated 21 May 2004:

> "I am still of the opinion that your clients [sic] comments do indicate that not all VAT was absorbed otherwise prices would have exactly matched those of Temp Dent and other competitors and turnover would not have been affected. However I do not doubt that prices were set with the company's competitors in mind. The difference is therefore perhaps insignificant in the context of the overall amount of VAT incorrectly charged."

The 2009 claim

10. Following the acceptance by HMRC that the three-year limitation period that had been introduced with retrospective effect on 18 July 1996 was unlawful, and the introduction of a transitional period for claims made before 1 April 2009, HCW submitted the claim for repayment of sums paid by way of VAT, and interest, in periods between 1973 and 1997, on the basis that the supplies of dental nurses had been treated as standard-rated but should have been exempt. The claim was made by

[1] At that time the relevant department was HM Customs and Excise, but for ease of reference we shall refer throughout to HMRC.

letter dated 30 March 2009 which referred to the 2001 correspondence and to the payment by HMRC of the 2001 claim.

11. In its letter HCW acknowledged that, due to the historical nature of the claim, primary records were not available. The claim was accordingly based on Southern Cross's accounts for the relevant period and information retained since 2001. Certain standard-rated supplies, in relation to permanent placements, were taken into account, both as respects output tax and input tax recovery, and input tax was restricted in relation to the supplies now classified as exempt.

12. In a letter of 2 December 2009, which had followed certain other correspondence and telephone conversations with HCW, Mr Barry Knight, a VAT officer for HMRC, wrote to Mr Smith of HCW raising the issue of unjust enrichment in relation to the claim. It was suggested that Southern Cross would have passed the VAT it had charged onto its clients.

13. Mr Smith replied on 9 December 2009, disputing the basis of the suggested unjust enrichment, and referring to a technical argument, based on the earlier 2001 claim and the statement in HMRC's Business Brief 05/09 to the effect that unjust enrichment would not be applied to claims made before 26 May 2005, that the unjust enrichment defence would not have been available to HMRC in any event, even though the 2009 claim had been made after that date, because of the illegality of the three-year cap.

14. Mr Knight's reply of 10 January 2010 took issue with the points raised by Mr Smith on unjust enrichment. He concluded:

> "It seems that there is doubt whether your client would benefit by being wholly or partly unjustly enriched if the repayment of the claim of 30th March 2009 was made in full. In view of this doubt, and in the light of my comments above, perhaps you could demonstrate how your client suffered a loss as result of passing the VAT on for the period of this claim. I would be happy to meet to discuss this further."

In relation to the argument based on the illegality of the three-year cap, Mr Knight wrote separately on 21 January 2010 to say that the March 2009 claim would be treated as a new claim, and thus outside the scope of the Business Brief.

15. A meeting took place on 29 January 2010 between Mr Smith, Mr Knight and Mr Knight's manager, Ms Senaka Attygalle. Following the meeting, Mr Knight wrote to Mr Smith on 16 February 2010. He explained that he had been looking at past papers, as a result of which he had concluded that Southern Cross's main competitors were, for most of the period of the claim, accounting for VAT in the same manner as Southern Cross itself. That would mean that, to that extent, Southern Cross could not be said to have suffered a loss. Southern Cross would therefore, at least to an extent, be unjustly enriched by the payment of the claim.

16. Mr Smith responded on 9 March 2010. He set out a detailed rebuttal of the conclusions reached by Mr Knight, asserting that VAT-free competition had existed

in the period before 1996, and that those competitors therefore had a significant VAT advantage. The letter argued that this meant that Southern Cross's profits were reduced by having to charge VAT, and that there was no difference between the current claim and the 2001 claim that had, after consideration of unjust enrichment, been accepted by HMRC.

17. In his letter of reply dated 26 March 2010, Mr Knight commented that it seemed to him that there was agreement that, to the extent there was VAT-free competition in Southern Cross's market for the relevant period, the company would have suffered loss by having charged VAT. He distinguished the earlier 2001 claim on the basis that it was clearer in the period covered by that claim that Southern Cross had suffered VAT-free competition. In view of the fact that the competition comprised businesses making supplies on both an exempt and standard-rated basis, Mr Knight made the following proposal:

> "On the basis of the preceding points I suggest, on a 'without prejudice' basis, that we come to a compromise solution. Without sufficient information and given the date of the period of the claim it is difficult to suggest quite what this would amount to. I would, however, propose that 50% of the claim is due."

18. There then followed an email exchange between Mr Knight and Mr Smith. On 1 April 2010, Mr Smith wrote to Mr Knight to enquire what the effect of Mr Knight's proposal was in financial terms. He said:

> "In order for our client to make a decision in respect of the offer in your letter of 26 March can you please provide me with the total payment (VAT plus interest) that would be made to [Southern Cross], as if the claim was paid on the date of your response."

On 6 April 2010 Mr Knight replied with the relevant figures.

19. Having taken the instructions of Southern Cross, Mr Smith wrote again to Mr Knight on 14 April 2010. He made the initial point that HCW remained of the opinion that Southern Cross would not be unjustly enriched by full payment of the amount claimed. He went on:

> "However, in order to attempt to bring this to a conclusion speedily our client is willing to negotiate."

Mr Smith continued by saying that HMRC had "agreed" to pay 50% of the VAT plus interest but had offered no rationale for the 50% restriction that had been applied. He then made a different proposal:

> "Given that the evidence obtained by The Commissioners in the course of this exercise indicated that competitors were applying VAT to their margin (commissions), we propose that in order to reach settlement we treat the claim as if all competition was applying VAT to the margin throughout the period of the claim.

> If we treat the industry margin as being that obtained by [Southern Cross] for the period of the original claim … which was 26%, our client would be willing to restrict its original claim by this amount.
>
> In conclusion, [Southern Cross] would accept a proposal from HMRC to repay 74% of the VAT plus interest but does not accept that payment of the claim in full would result in [Southern Cross] being unjustly enriched."

In this respect, at this stage, we would only comment that we consider that the first reference in the second paragraph of this passage must mean the 2001 claim, but that the second reference was clearly intended to refer to the claim at issue, namely the 2009 claim.

20. Mr Knight replied on 29 April 2010 as follows:

> "I can confirm that the Commissioners will accept that 74% of the claim of £861,212 will be repaid. The VAT repayment will amount to £637,296.60 and together with the appropriate interest … I will arrange for authorisation of this sum next week."

Following this payment was arranged to be made, and Mr Knight confirmed this in a letter to Mr Smith on 5 May 2010. Neither the letter of 29 April 2010 nor that of 5 May 2010 contained any offer of a review or any notice of a right to appeal to the Tribunal.

Change in HMRC's position

21. It was shortly afterwards, on 23 July 2010, that Mr Knight wrote again to Southern Cross, through HCW, to explain that he had been advised by colleagues in VAT policy that the claim should not have been paid. As Mr Knight explained the position, as part of a wider review HMRC had received legal advice to confirm that supplies of staff are not care or medical care, and that HMRC's published guidance at that time amounted to an "informal concession" that had been in place since 1973. However, because Southern Cross had charged VAT on its supplies in the relevant period they had been correct to do so and so could not avail themselves retrospectively of the "concession". The letter notified Southern Cross of the assessments to recover the incorrect payment of VAT and statutory interest made on the same date. Both the decision letter and the notification of assessments contained notice of Southern Cross's right to a review and its right to appeal.

22. A request for a review was made by HCW on 19 August 2010. The conclusion of the review was contained in a letter to Southern Cross dated 28 September 2010, which referred to the 2009 claim as having been considered by Mr Knight and "following lengthy correspondence was finally settled" in the sums paid. The review made the following points:

(1) The "ruling" given in August 2001 reflected HMRC's view at that time.

(2) On conducting a later review of concessions, HMRC received legal advice that supplies of staff were not "care" or "medical care". The published guidance at that time therefore amounted to an "informal concession".

(3) Southern Cross had been right to charge VAT on its relevant supplies in the relevant period. The returns were correct in law and adjustment was not appropriate.

(4) Mr Knight had made an error in processing Southern Cross's claim as he had not been aware of the detailed legal advice received by HMRC's policy unit.

(5) No retrospective application of the "concession" was allowable as there was no error of law in charging VAT on the supplies.

(6) There had been no overpayment of output tax in law, and a claim under s 80 VATA was not appropriate. The amounts paid to Southern Cross had therefore been paid in error.

(7) The assessments would be upheld in full.

The review letter included notice of the right of Southern Cross to appeal to this Tribunal.

Appeal

23. The appeal was made by notice of appeal dated 22 October 2010. It is that appeal that is now before us.

Issue (1): Was there a compromise agreement?

24. It is Southern Cross's case that the payment of an amount in respect of repayment of VAT and associated interest made by HMRC to Southern Cross was made in consequence of a binding agreement that compromised the claim of Southern Cross. Not so say HMRC. The process which led to the payment being made was nothing more than a standard process of assessment of a claim, involving a genuine attempt to ascertain what, if anything, was due to the taxpayer. There was no agreement to pay more than HMRC considered was due, and no agreement on the part of Southern Cross not to make a further claim or to appeal to the Tribunal.

25. To determine this question, we must apply ordinary principles of contract law. Mr Mantle referred us in this connection to the judgment of the Court of Appeal in *R (on the application of DFS Furniture Co plc) v Customs and Excise Commissioners* [2003] STC 1. In that case, after HMRC had decided to defer accepting a voluntary disclosure made by DFS, and following an appeal to the VAT tribunal, DFS had written to the commissioners on 11 November 1996, following a tribunal decision to this effect, to state that there was no basis in law for further delay. After the High Court had reached a similar decision, DFS had on 20 November 1996 written further to the commissioners. On 22 November 1996 HMRC had issued a business brief stating that agreed claims that had been deferred would be paid, but reserving the right of recovery if Parliament approved the three-year cap. The payment to DFS was

authorised, and this was confirmed by HMRC to DFS in a telephone conversation of 25 November 1996 and in writing on 26 November 1996.

26. Subsequently, the three-year cap was approved, and HMRC assessed DFS, which paid the amount assessed. On a judicial review of the decision of HMRC not to repay that amount to DFS, Moses J (as he then was) in the High Court ([2002] STC 760) concluded that there had been an agreement between HMRC and DFS to settle the appeal by DFS to the tribunal, and that since the settlement had the effect, under s 85 VATA, of a judicial determination, HMRC were not entitled to claw back the repayment under the equivalent statutory provisions to what is now s 80(4A).

27. The Court of Appeal allowed the appeal of the commissioners, finding that the letter of 11 November 1996, read in context and according to its ordinary and natural meaning, did not make any offer to the commissioners, which was capable of acceptance by them, so as to lead to a concluded agreement to settle the pending appeal. The letter was not worded as an offer nor as an invitation to agree that the decision under appeal was invalid and to treat it as discharged or cancelled. In the absence of such an offer or invitation, no oral acceptance had been possible on 25 November 1996 or at any other time. In the absence of an offer and an acceptance, there had been no meeting of minds and no agreement, either within the meaning of s 85 or at common law.

28. In the High Court, at [58], Moses J, in describing the appropriate test for establishing whether an agreement had been reached, referred to what Lord Keith of Kinkel had said in *Scorer (Inspector of Taxes) v Olin Energy Systems Ltd* [1985] STC 218 in the context of settlements under s 54 of the Taxes Management Act 1970 ("TMA"):

> "The situation must be viewed objectively, from the point of view of whether the inspector's agreement to the relevant computation, having regard to the surrounding circumstances including all the material known to be in his possession, was such as to lead a reasonable man to the conclusion that he had decided to admit the claim which had been made."

29. Although deciding the question differently, the Court of Appeal adopted the same approach. In his judgment Mummery LJ, with whom Keene and Laws LJ agreed, held (at [42]) that the absence of an offer and acceptance meant that there was no meeting of minds, and that was fatal to DFS's case. In making this finding, Mummery LJ agreed with the observations of Jonathan Parker J in *Schuldenfrei v Hilton (Inspector of Taxes)* [1999] STC 821, at [44], that:

> "… the notion of parties having 'come to' an agreement plainly implies not merely that they are of the same mind in relation to a particular matter, but also that their minds have met so as to form a mutual consensus, and that that meeting of minds, that mutual consensus, has resulted from a process in which each party has to some extent participated. On that footing it is, in my judgment, both legitimate and helpful (as both sides have accepted) to approach the question whether the Revenue and the taxpayer have made a s 54 agreement in the

> instant case by applying common law principles of offer and acceptance."

30. It is, as Mummery LJ pointed out at [43], possible that an agreement to settle a claim or an appeal may be inferred from the conduct of the parties and from the surrounding circumstances, relying, for example, on a refund followed by a withdrawal of an appeal. But those events need not be referable to a prior agreement between the parties; there may be a non-contractual explanation, as was the case in *DFS* itself, where the Court of Appeal found that the true explanation for the refund was that it was made in consequence of a unilateral reversal by the commissioners of the deferral policy that had been declared unlawful. The refund was made by the commissioners without the need to come to an agreement with DFS to settle the appeal.

31. There are, of course, differences between this case and the facts of the cases we have referred to. *Olin Energy Systems* and *Schuldenfrei* were cases concerning s 54 TMA, and *DFS* with the analogous VAT provision, s 85 VATA. Each of those provisions operates only in the context of an outstanding appeal, and is concerned with the effect of an agreement on the appeal itself. Although both include provisions requiring certain formalities in the case of agreements not in writing to be complied with before the section is to apply, neither prescribes what is required for an agreement to be reached. The sections are concerned with the effect of an agreement, once made, and not with the making of an agreement itself.

32. Accordingly, the particular statutory context of those cases does not affect the application of the principles they describe to the issue of whether a compromise agreement was reached between Southern Cross and HMRC, in a case where no appeal had at the relevant time been made by Southern Cross. That is the issue with which we are concerned at this stage. The effect of any such agreement as regards HMRC's powers to recover by assessment is a matter for Issue (3).

33. With these principles in mind, we turn to the submissions of the parties on the facts. Both Mr Mantle and Ms Simor relied on the language in the correspondence we have outlined. Mr Mantle submitted that HMRC's letter of 26 March 2010 amounted to either an offer to Southern Cross or an invitation to treat by HMRC. He argued that HCW's letter of 14 April 2010 amounted to a counter-offer to HMRC by Southern Cross, or an offer to settle the claim in return for payment of 74% of the principal amount claimed, together with statutory interest on that sum, and that this offer was accepted by HMRC in its letter dated 29 April 2010, which expressly accepted the proposal made by Southern Cross.

34. Mr Mantle submitted that there had been a meeting of minds to form a mutual consensus that 74% of the claim, but no more than that percentage, should be payable by HMRC to Southern Cross. He based this submission on the language used in the correspondence, arguing that:

> (1) HMRC's letter of 26 March 2010 referred to the parties coming to a "compromise position" and stated that discussions should be "without prejudice", a term appropriate to negotiations with a view to settlement. It did

not suggest a limited compromise on any technical or specific point, but an overall compromise on the basis that 50% of the claim was due from HMRC.

(2) In Mr Smith's email of 1 April 2010, he referred to "the offer in [HMRC's] letter of 26 March". The reply, by email from Mr Knight, did not dissent from the use of that description.

(3) HCW's letter of 14 April 2010 expressly referred to Southern Cross being "willing to negotiate", and being prepared, despite maintaining that Southern Cross would not be unjustly enriched by full payment of the claim, to negotiate "in order to attempt to bring this to a conclusion speedily". Southern Cross, by that letter, plainly offered to accept payment of 74% of the principal amount clamed plus statutory interest to bring about a mutually agreed settlement of its claim.

(4) HMRC's response in their letter dated 29 April 2010 is clear and expressly made in the language of offer and acceptance: "[HMRC] will accept that 74% of the claim of £861,212 will be repaid … together with the appropriate interest …"

35. Mr Mantle submitted that both the pattern of the correspondence and the specific wording used in it was consistent with an intention to compromise and conclude a compromise agreement, but not with a unilateral voluntary decision on the claim by HMRC.

36. Mr Mantle also emphasised the absence, in the relevant correspondence, of notification to Southern Cross of any right of statutory review under s 83A VATA, or any right of appeal under s 83G. This, he argued, was consistent only with there having been a binding compromise agreement in respect of the claim; the offer of a statutory review would have been required if the failure on the part of HMRC to pay the claim in full had been a unilateral decision of HMRC.

37. Ms Simor submitted that there was in this case no compromise agreement. What took place was nothing more than the standard process of assessment involving an attempt on the part of HMRC to ascertain what was due to a taxpayer as a matter of law. There was no agreement to pay more that was due; nor was there any agreement on the part of Southern Cross not to make a further claim for the amount not paid, or to litigate the issue.

38. Ms Simor argued that, contrary to the submissions of Mr Mantle, a fair reading of the correspondence was that Southern Cross had made a claim, and that HMRC had acceded to it in part. It was about HMRC establishing the entitlement of Southern Cross, and it was irrelevant what Southern Cross believed the process to be. Ms Simor submitted that the correspondence supported this conclusion, arguing that:

(1) The proposal made by Mr Knight in his letter of 26 March 2010 was neither an offer nor an invitation to treat. That letter was concerned with what was due to Southern Cross, having regard to the available defence (in s 80(3) VATA) of unjust enrichment. The proposal for a compromise position was itself expressed as a proposal that 50% of the claim "is due".

(2) The letter from HCW dated 14 April 2010 was neither a counter-offer, nor an offer. It described both the proposal made by HMRC, and Southern Cross's own proposal as an agreement or proposal by HMRC to "repay", and not to settle. In suggesting that the amount due could be calculated by reference to the industry margin to which competitors could be treated as having applied VAT, HCW, in saying "our client would be willing to restrict its original claim by [the relevant industry margin of 26%]", was using the language of claim, rather than of settlement.

(3) HMRC's letter of 29 April 2010 was not an acceptance of a compromise, but an acceptance that 74% of the claim would be repaid. This again significantly used the language of claim rather than of compromise.

(4) None of the correspondence uses language of full and final settlement, and there is nothing to prevent a further claim by Southern Cross. The absence of such language is strongly indicative, if not determinative, of a conclusion that this was not a compromise agreement but an agreement to pay what was properly due.

39. Ms Simor argued that an agreement would require consideration, and that there was in this case no consideration in any sense. HMRC were not paying less that what was due to Southern Cross, and Southern Cross was not giving anything up.

40. As regards the matter of the absence of the offer of a review or the notification of rights of appeal, Ms Simor argued that this was consistent with the restriction of Southern Cross's claim to the amounts that were paid. As HMRC had paid those modified claims in full, there would have been no need to offer a review or refer to any appeal rights. In any event, submitted Ms Simor, the failure on the part of HMRC to include such language would be nothing more than a breach of its statutory duties, and would not indicate that a compromise agreement had been entered into.

41. In our view, the correspondence and the course of dealing between Southern Cross and HMRC amounted to a compromise agreement by which the original claim of Southern Cross was compromised to the lesser amount of 74%, with the intention that this agreement would be binding on both parties. Although there was no express language of full and final settlement, that was the effect of what was agreed. We agree with Mr Mantle that the language of the correspondence supports this analysis. We consider that the proposal made by Mr Knight in the letter of 26 March 2010 was an offer to settle at 50%, capable of acceptance by Southern Cross, that the 74% proposal made in HCW's letter dated 14 April 2010 was a counter-offer, and that this offer was accepted by HMRC by the letter from Mr Knight of 26 April 2010.

42. With respect to the elegantly expressed contentions of Ms Simor, we do not consider that the correspondence can support a conclusion that this was simply a case of HMRC seeking to ascertain the amount properly due. It is plain that such particularity would have eluded both HMRC and Southern Cross. There was no clear evidence of the effect of competition on the issue of unjust enrichment. Mr Knight's proposal that the claim be paid as to 50% can only be regarded as an unscientific attempt to reach a compromise, and the counter-proposal of Southern Cross as an

offer to settle at an amount based on a proxy for evidence that was not available to calculate a correct amount.

43. Nor do we consider that the fact that the area of disagreement, and those of compromise, was centred on the potential effect of a defence of unjust enrichment, and not on the question whether the supply was standard-rated or exempt, can prevent there being established an agreement settling the whole matter of Southern Cross's entitlement and HMRC's liability. In any negotiation there are bound to be areas of initial concurrence as well as areas of dispute. What matters is not the particular area of dispute which may itself be compromised or conceded, but whether in the circumstances taken as a whole there has been a meeting of minds that the question of liability (whether liability of the taxpayer to pay or liability of HMRC to repay) has been settled. On the facts of this case we have concluded that there was such a meeting of minds, and that it was a meeting of minds on the whole question of liability to pay.

44. In our view the agreement reached between HMRC and Southern Cross compromised the original claim of Southern Cross. It is evident from the correspondence that Southern Cross did not accept, as a matter of law, that the amount due to it should be reduced on the basis of unjust enrichment, but that in spite of that position it was willing to accept a reduced amount. In our view Southern Cross agreed to give up 24% of its original claim in order to achieve a settlement; that was consideration for the agreement on the part of HMRC to pay that reduced amount. The agreement was in full and final settlement, and it was not necessary for there to have been express wording to that effect. There was, as a result, no scope for Southern Cross to make a further claim in the same respect, or to appeal to the tribunal in relation to the 24% of the original claim that was unpaid.

45. We accept that the absence of notification of an offer of review or a right of appeal is equally consistent with the payment in full of an amended, and reduced, claim as it is with the making of a compromise agreement. However, we do not consider that the references to the claim, particularly that by HWC in its letter of 14 April 2010 which referred to a willingness to restrict the original claim, negate the presence of a compromise agreement. In our view, the restriction of the claim to 74% of its original amount was not a recognition of the correct amount of the claim, but was a mechanism to give effect to the compromise put forward by Southern Cross were it to be (as it was) accepted by HMRC. It was the means to effect the agreement that was reached, and does not detract from the existence of that agreement.

46. We find therefore, in relation to issue (1), that the payment made by HMRC to Southern Cross was made pursuant to a compromise agreement entered into by them.

Issue (2): Was the compromise agreement void as being outside the powers of HMRC?

47. HMRC are responsible for the collection and management of revenue, including VAT (s 5 of the Commissioners for Revenue and Customs Act 2005). By para 1, Sch 11 VATA, HMRC are responsible for the collection and management of VAT.

48. The extent of such powers has been described, by Lord Diplock in *IRC v National Federation of Self-Employed and Small Businesses Ltd* [1981] STC 260, at p 269b-c, as conferring a "wide managerial discretion as to the best means of obtaining for the national exchequer from the taxes committed to their charge the highest net return that is practicable having regard to the staff available to them and the cost of collection." Any exercise by HMRC of their powers, or refraining from exercising those powers, other than for reasons of good management would be *ultra vires*.

49. The power of HMRC to enter into back duty agreements was confirmed by the Court of Appeal in *IRC v Nuttall* [1990] STC 194. In that case an investigation into the tax affairs of the taxpayer was concluded by an agreement relating to unpaid income tax for certain past years. The taxpayer undertook to pay a certain sum in return for the Revenue taking no proceedings in respect of income tax, penalties or interest. The taxpayer subsequently sought to argue that the agreement was *ultra vires* as it was entered into by the Revenue in excess of its statutory powers. The Court of Appeal held that the power to enter into such agreements, even in the absence of assessment and appeal, was a power necessary for the carrying into operation of the relevant statutory legislation.

50. In his judgment, at p 203b, Ralph Gibson LJ made it clear that the commissioners have no power to agree to take a smaller sum for tax than is lawfully due on the information available to the commissioners. They can, however, make a decision in their management functions as to the extent of the information they can reasonably expect to get and then make an agreement on that basis as to the tax payable. Ralph Gibson LJ went on, at p 203h, to accept the submission of counsel to the Crown that where a sum is agreed to be paid under a contract of compromise, the commissioners are bound by that contract and cannot in respect of the year or years covered by the contract pursue any claims to tax, interest or penalties. The sum payable under the contract can only be recovered by proceedings at law for debt.

51. In the same vein, Bingham LJ said, at p 205b, that although a power to make agreements with taxpayers for the payment of back duty was to be exercised with circumspection and due regard to the Revenue's duty to collect the public revenue, if in an appropriate case the Revenue reasonably considers that the public interest in collecting taxes will be better served by informal compromise than by exercising the full rigour of its coercive powers, such compromise would fall well within its powers of care and management. Furthermore, Parker LJ, at p 200h, observed that:

> "If there is a power to enforce there must also necessarily be a power for good consideration to accept some lesser sum. The Revenue of course have no power to refrain from collecting tax which is due, but these agreements are all made in a situation where the actual tax recoverable has not been quantified."

52. The case of *Al Fayed and others v Advocate General for Scotland (representing the Inland Revenue Commissioners)* [2004] STC 1703, in the Court of Session, concerned the validity of forward tax agreements. It was held that there was no power for the Revenue to contract with a taxpayer as to his future liability. In his judgment,

the Lord President (Lord Cullen of Whitekirk) summarised the position as regards the Revenue's powers generally, in the following terms (at [69]):

> "The authorities clearly show that the respondents have a managerial discretion, and that there are circumstances in which they have power to enter into an agreement with the taxpayer for the payment of a sum of money in respect of the taxpayer's tax liability, even where it may be said that they have foregone the collection of some part of the total amount of tax which was due. They can properly take into account the extent of the information which is likely to be obtainable, and the difficulty involved in identifying the extent of the exact sum which is due."

53. The Lord President went on to reject an argument for the claimants based on other practices of the Revenue, including those in relation to back duty agreements. In that regard, he said (at [76]):

> "A back tax agreement relates to a situation in which the taxpayer has already incurred the tax liability, but its amount has not been determined. Fundamental to the legality of such an agreement is that the respondents have the power to require the taxpayer to pay what is due. As an alternative means to the same end they are regarded as having the power, in the exercise of their managerial discretion, to enter into a contract with the taxpayer for a payment in satisfaction of that liability. In that context they have power to arrange a compromise with the taxpayer, taking into account such factors as may be relevant."

54. Finally, in considering extra-statutory concessions, the Lord President, at [78] – [80], said that the authorities made it plain that it is not lawful for the Revenue to make a concession where to do so would be in conflict with their statutory duty. Thus, as Lord Templeton had said in *Preston v IRC* [1985] STC 282, 291, the Revenue could not bind themselves in advance not to pursue their statutory duty at a later date. Even if forward tax agreements were not *ultra vires*, such an agreement would on its terms be *ultra vires* unless it ensured that no sum was payable under it unless it was a genuine and realistic approximation of the actual liability of the taxpayer.

55. The case of *R (on the application of Wilkinson) v IRC* [2006] STC 270, in the House of Lords, was concerned with the extent to which the care and management powers of the Revenue under s 1 TMA enabled the Revenue to grant an extra-statutory concession. It was held that the discretion given to the Revenue by the TMA enabled them to formulate policy in the interstices of tax legislation, dealing pragmatically with minor or transitory anomalies, cases of hardship at the margins or cases in which a statutory rule was difficult to formulate or its enactment would take up a disproportionate amount of parliamentary time. The powers could not be construed so widely as to enable the commissioners to concede, by extra-statutory concession, an allowance (in that case it was the widow's bereavement allowance that did not extend to widowers) which Parliament could have granted but had not granted, and on grounds not of pragmatism in the collection of tax but of general equity between men and women (see, per Lord Hoffmann, at [21]).

56. The discretion inherent in HMRC's duty of management was also alluded to by Lord Wilson in *R (on the application of Davies and another v Revenue and Customs commissioners; R (on the application of Gaines-Cooper) v Revenue and Customs Commissioners* [2011] STC 2249, in the Supreme Court, cases which concerned published Revenue guidance on the meaning of "residence" and "ordinary residence". At [26] Lord Wilson said:

> "The primary duty of the Revenue is to collect taxes which are properly payable in accordance with current legislation but it is also responsible for managing the tax system: see s 1 of the Taxes Management Act 1970. Inherent in the duty of management is a wide discretion. Although the discretion is bounded by the primary duty (see *R (on the application of Wilkinson) v IRC* [2005] UKHL 30 at [21], [2006] STC 270 at [21], [2005] 1 WLR 1718 per Lord Hoffmann), it is lawful for the Revenue to make concessions in relation to individual cases or types of case which will, or may, result in the non-collection of tax lawfully due provided that they are made with a view to obtaining overall for the national exchequer the highest net practicable return: see *IRC v National Federation of Self-Employed and Small Businesses Ltd* [1981] STC 260 at 268, [1982] AC 617 at 636 per Lord Diplock. In particular the Revenue is entitled to apply a cost-benefit analysis to its duty of management and in particular, against the return thereby likely to be foregone, to weigh the costs which it would be likely to save as a result of a concession which cuts away an area of complexity or likely dispute."

57. More recently, in *R (on the application of UK Uncut Legal Action Ltd) v Revenue and Customs Commissioners* [2013] STC 2357, the claimant, a campaign group, challenged a decision of HMRC to enter into a settlement agreement, and a subsequent decision to ratify that agreement, under which HMRC agreed to forgo any interest on unpaid NICs. The agreement had been made under the mistaken impression that there was a barrier or potential barrier to HMRC recovering interest. At a subsequent meeting to approve the settlement, HMRC's High Risk Corporates Programme Board retrospectively approved all the elements of the agreement, except the concession to forgo interest. The taxpayer took the view that there had been a concluded deal, and that HMRC could not resile from the agreement. The agreement was then approved and endorsed by two commissioners.

58. For the claimant it was argued that the alleged agreement breached HMRC's Litigation and Settlement Strategy. In the High Court, Nicol J rejected that argument. In doing so, however, he referred (at [37]) to what he regarded as fundamental problems with the original agreement, including the misunderstanding of HMRC's representatives as to the legal position regarding interest. This gave rise to the need for there to be a further decision, and it was the final decision by the two HMRC commissioners that was operative. These were factors that were outside the scope of the Strategy (see [38]).

59. There was no contention on the part of the claimant that the agreement did not give taxpayers value for money. The commissioners had believed that was the case, and this had been confirmed in a report by the Comptroller and Auditor General,

following advice from a retired High Court judge. The waiver of interest could not be regarded as an over-generous approach to one taxpayer which correspondingly increased the burden on all other taxpayers (see [41]).

60. It is accepted that if the compromise agreement was *ultra vires*, or outside the powers of HMRC, then it will be void. We therefore need to decide whether, in the context of HMRC's management powers, and the discretion afforded to HMRC by those powers, the agreement reached between HMRC and Southern Cross went outside the boundaries of those powers and that discretion.

61. Ms Simor argued that, if there was an agreement in this case, it was one that was based on a mistake of law. Contrary to what Mr Knight had thought at the relevant time, Southern Cross was not as a matter of law entitled to payment of any part of its claim. That had been confirmed in *Moher*, and was accepted by Southern Cross. Furthermore, Mr Knight had also been unaware of the view taken by HMRC at the relevant time, based on legal advice. A mistake renders an agreement unlawful, and the good faith of the parties is irrelevant.

62. We accept that a mistake may, depending on the circumstances, render an agreement outside the powers of HMRC, and thus as void. We do not consider that *UK Uncut* can be relied on by Mr Mantle as indicating to the contrary. It is clear from the judgment of Nicol J that the original decision to enter into the agreement, based as it was on mistake, particularly as regards the ability to recover interest, was not the operative decision. The operative decision was that ratifying the agreement, at which stage the commissioners knew the correct position as regards interest.

63. We do not consider, however, that the lack of knowledge of Mr Knight as to the advice received by HMRC, or HMRC's own view on the issue of the correct VAT treatment of the relevant supplies, amounts to a mistake such as to render the action taken by Mr Knight in reaching a compromise agreement with Southern Cross outside the powers of HMRC. Although it has turned out that Southern Cross had no entitlement to the VAT it had claimed, that conclusion is reached with the benefit of hindsight. *Moher* had not been decided at the time the agreement was made; different views of the law were held at that time.

64. Ms Simor submitted that HMRC cannot settle a case (or make a payment in response to a voluntary disclosure) where HMRC has no liability to the taxpayer. She argued that it would be a manifestly unlawful exercise of HMRC's powers for it to make a payment to a taxpayer in order to avoid litigation in circumstances where it did not believe that the taxpayer had even an arguable entitlement to that money or that there was any risk that the tribunal would find such an entitlement.

65. We do not accept that argument, either as a matter of principle or by reference to the facts of this case. On the question of principle, it is clear that the discretion of HMRC in the exercise of their powers of management is a wide one, albeit bounded by their primary duty to collect taxes that are properly due. Concessions may be made that result in non-collection of tax lawfully due provided that they are made with a view to obtaining overall for the national exchequer the highest net practicable

return. That has been shown to be the case, not only in relation to concessions, but more generally in the case of back duty agreements, again provided that HMRC do not agree to take a smaller sum for tax than is lawfully due on the information available to them. HMRC may, however, make a decision in the exercise of their management functions as to the extent of the information they can reasonably expect to get and then make an agreement on that basis as to the tax payable. Although HMRC have no power to refrain from collecting tax which is due, it does have the power to compromise where the actual tax recoverable has not been quantified.

66. In our judgment the agreement reached between HMRC and Southern Cross falls into this category. At the material time there was no clarity as to the correct VAT treatment of the supplies in question. HMRC may have had a view that Mr Knight was not aware of, but that view was evidently not universally shared. The agreement that was made was a genuine and realistic approximation of the actual amount due to Southern Cross, made after detailed discussion and negotiation, and in the absence of available information that showed that the amount was not due. Following *Moher*, Southern Cross accepts that it was not entitled as a matter of law to the repayment, but that does not render unlawful an agreement made at a time when that position had not been determined.

67. We do not consider that an agreement that was made with a view to reaching a genuine and realistic approximation of the amount due, whether to HMRC or to the taxpayer, can be rendered unlawful if, in the event, it is later discovered that the deal was not a good one for HMRC. Were that to be the case, and leaving out of account special cases such as those where the taxpayer has withheld information from HMRC, it would render HMRC's power to compromise claims virtually worthless. There is, as the cases demonstrate, a clear public interest in HMRC being able to resolve the tax position of a taxpayer without resort to enforcement powers, provided that they do so within the boundaries of the management powers vested in them.

68. In this case, for the reasons we have given, we conclude that the compromise agreement made between HMRC and Southern Cross was within those boundaries, and accordingly was not outside the powers of HMRC or *ultra vires*. It was therefore, we find, a valid compromise agreement.

Issue (3): Given a valid compromise agreement, did HMRC nonetheless have power to assess to recover the amount repaid?

69. The assessments under appeal were made, in the case of the principal amount, under s 80(4A) VATA, and in the case of interest under s 78A(1).

70. So far as is material, s 80 provides:

> (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.

…

(4A) Where—

(a) an amount has been credited under subsection (1) or (1A) above to any person at any time on or after 26th May 2005, and

(b) the amount so credited exceeded the amount which the Commissioners were liable at that time to credit to that person,

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

71. Section 78A(1) makes analogous provision with respect to interest:

(1) Where—

(a) any amount has been paid to any person by way of interest under section 78, but

(b) that person was not entitled to that amount under that section,

the Commissioners may, to the best of their judgement, assess the amount so paid to which that person was not entitled and notify it to him.

72. Section 78, so far as is material, provides:

(1) Where, due to an error on the part of the Commissioners, a person has—

(a) accounted to them for an amount by way of output tax which was not output tax due from him and, as a result, they are liable under section 80(2A) to pay (or repay) an amount to him,

…

then, if and to the extent that they would not be liable to do so apart from this section, they shall pay interest to him on that amount for the applicable period, but subject to the following provisions of this section.

73. The question, therefore, is one of statutory construction. So far as s 80(4A) is concerned, the issue is whether the principal sum paid to Southern Cross "exceeded the amount which [HMRC] were liable … to credit" to Southern Cross. The same issue arises in respect of s 78A(1). The question there is whether Southern Cross was entitled to the interest under s 78, which in turn, by s 78(1)(a), is resolved around the same question of whether HMRC were liable to pay the principal sum to Southern Cross. As the question is the same in each case, and in common with the way in which the argument was presented to us, we shall refer only to s 80(4A).

74. If s 80(4A) is to be construed as entitling HMRC to make an assessment based purely on the liability in law to make the repayment of VAT to Southern Cross, then it would follow that the assessment would be valid. Although at the time the repayment was made to Southern Cross the strict legal position was open to doubt that was only

subsequently resolved by *Moher*, the result is that at the time of the repayment Southern Cross was not as a matter of VAT law entitled to it (as it had correctly accounted for VAT on the relevant supplies) and HMRC were not liable as a matter of VAT law to credit Southern Cross. The question is whether s 80(4A) should be construed such that the liability to repay must also take into account the effect of the compromise agreement.

75. In submitting that the question of liability to repay for s 80(4A) purposes should take account of the compromise agreement, Mr Mantle sought to derive support from two cases which have considered whether, in given circumstances, the conditions of s 80(4A) (or earlier statutory provisions to the same effect) are satisfied.

76. The first case is *R v Customs and Excise Commissioners, ex parte Building Societies Ombudsman Co Ltd* [2000] 892 ("*BSOC*"). That case was another which arose out of the introduction of the three-year cap on claims, and the unlawful deferral of repayments and consequent payments made pending the introduction of the cap. One issue was whether there had been a determination of the taxpayer's appeal by the VAT tribunal, by means of a consent order. The Court of Appeal held that there had, and that this had determined HMRC's liability to repay. The question then was whether the amended s 80, and the introduction of the clawback provisions now found in s 80(4A), could apply where there had already been a judicial decision as to the amount of HMRC's repayment liability.

77. As well as finding that s 80 did not contemplate that the retrospectivity of the three-year cap extended so far as to permit HMRC to use the new clawback powers to override a prior judicial decision (see [107]), Rix LJ, giving the leading judgment in the Court of Appeal, also considered an alternative argument for HMRC, one not dependent on retrospective effect, based on similar wording to that in s 80(4A), which raised the question as to what was the amount HMRC were liable to repay to the taxpayer at the date of payment. Rix LJ held, at [119], that the judicial decision had established the amount of HMRC's liability at that time.

78. The second case is one that we have already considered, that of *DFS*. In this context, however, we are not so much concerned with the judgment of the Court of Appeal (which overturned the decision of Moses J in the High Court on the question whether there was an agreement to settle), but to that part of the judgment of Moses J which considered the effect of an agreement under s 85 VATA.

79. In the High Court it was accepted by HMRC that if an appeal had been brought by a taxable person and has been settled by an agreement within s 85 VATA and the conditions of s 85 are satisfied, then by virtue of s 85(1) the like consequences would ensue as if a tribunal had determined the appeal. Those consequences were that, as determined by *BSOC*, HMRC could not rely on s 80(4A). Moses J held that there was an agreement, and that it fell within s 85. Accordingly, there was a settlement of the appeal which had the effect of a judicial determination, and s 80(4A) did not permit HMRC to claw back sums paid as part of that settlement.

80. At [61] Moses J explained why his findings would not deprive s 80(4A) of all effect:

> "Section 80(4A) operates whenever there has been a voluntary payment in response to a claim under 80(2), but sub–s (4A) does not operate where a payment has been made in settlement of a dispute which has given rise to an appeal settled within the meaning of s 85. The distinction finds support at para 106 in *BSOC* (see [2000] STC 892 at 921–922). It is true that there was no intervention of a judicial determination as in *BSOC*, but s 85 has the same effect as the intervention of a judicial determination."

81. The taxpayer in *DFS* had also argued that it would be sufficient if there was an agreement to settle at common law, in other words without the deeming effect of s 85. Moses J declined to determine that point saying only that: "Whatever my doubts about that submission I have no need to reach any conclusion. Very different considerations apply if DFS cannot rely on s 85 and in particular it falls for consideration elsewhere as to whether s 85 ousts or merely augments the common law rule."

82. The effect of an agreement outside s 85 is, of course, is the very question before us. Mr Mantle submitted that a compromise agreement compromising a dispute before an appeal should be treated in the same way as a determination, or deemed determination, of the tribunal. Firstly, he argued, it is the compromise itself, once made, that governs the legal relationship between the parties. HMRC became liable to pay the amount agreed in the compromise. He referred us to *Foskett*, "The Law and Practice of Compromise", Seventh Edition, Chapter 8, p 156:

> "The purpose of a compromise is to put an end to the disputation in which the parties had hitherto been engaged. Such cause or causes of action as each had, or may have had, prior to the conclusion of the agreement are discharged and if the compromise is embodied in a consent judgment those causes of action become merged in the judgment. New causes of action arise from the existence of the compromises …"

83. Secondly, argued Mr Mantle, the inevitable consequence is that, once a valid compromise agreement is made, it is the compromise agreement that establishes HMRC's liability, including for the purposes of s 80(4A). Accordingly, HMRC were liable to pay the amounts of principal and interest to Southern Cross when the payment was made. This conclusion, Mr Mantle submitted, was logical and supported by public policy, in not requiring taxpayers to make appeals in order to establish certainty, in encouraging settlement of disputes and in permitting HMRC to deal with matters administratively in exercise of their management powers.

84. Ms Simor submitted that there was every difference between, on the one hand, the effect of a judicial determination, and the like effect of a statutory provision such as s 85, and on the other, a common law agreement. Both *BSOC* and *DFS* had drawn a clear distinction between payments made pursuant to actual and deemed judicial determinations and other payments. The context of s 80(4A) and the clear intention

of Parliament was that the question of liability was settled only by judicial decision and not by agreement.

85. Ms Simor relied in particular on the following passage from the judgment of Rix LJ in *BSOC* (at [104] – [106]), where, after remarking that, in the circumstances of that case, if Government, with the support of Parliament, wished to execute a policy of retrospective removal of valid claims, then it must do so meticulously and clearly, he said:

> "104. The question remains whether it has done so. I cannot agree that the revisiting of a payment by the commissioners is the same thing as the administrative overthrowing of a prior judicial determination. Against the background of the announcement of 18 July 1996, it is one thing for the commissioners to say to a taxpayer: 'I agree that as the law now stands I must repay you six years' overpayment, but when the law has been changed so as to introduce the new cap retrospectively, I will exercise my rights to recoup the difference.' But it seems to me that it is quite another thing for the commissioners to litigate with the taxpayer as to the extent of their liability, to find that judgment goes against them or to concede that it must, and then seek to say by administrative fiat that their 'repayment liability' was something else than it has been judicially determined to be. If Parliament wishes to legislate that prior judicial determinations can be overthrown in this way, especially in a statutory context which is all about the making of claims, then in my judgment it must say so expressly, as it could easily have done.
>
> 105. Suppose that, contrary to the facts of this case, there had been a real possibility of a defence of unjust enrichment being run. Could it be said that the statute contemplates that a tribunal decision might be given against the commissioners prior to 4 December 1996 for a repayment liability of £x, and that the commissioners could thereafter seek to say that under the terms of amended s 80(3A)–(3C) they were now in a position to prove that their repayment liability was some different and lesser sum? I think not.
>
> 106. Not only is the whole context of ss 80 and 47 that of claims made rather than judicial determinations delivered, but the retrospective aspects of s 80(4A) and (4B) are written in terms of the commissioners' repayment liability at the time of the commissioners' *payment*. That makes sense where the commissioners are merely paying a claim without the intervention of a judicial determination. Where, therefore, the commissioners have paid a claim after 18 July 1996, they are given the power to recoup that part of the payment which exceeds their liability under the three-year cap. Where, however, the amount of the repayment liability has been determined judicially, it does not follow that the commissioners should be able to recoup administratively what they have been adjudged liable to pay, nor is there any logic in focusing on the time of payment as distinct from the time of the judicial decision."

86. Ms Simor described Mr Mantle's arguments based on *BSOC* and *DFS* as "classic bootstraps" in seeking to extend principles applicable to actual and deemed

judicial determinations to compromise agreements. She argued that this was a paradigm case where s 80(4A) was intended by Parliament to apply. HMRC had made a mistake in making the repayment to Southern Cross and had realised its mistake within a very short period. There was no procedural prejudice to Southern Cross, as it could have lodged an appeal and sought an agreement under s 85. It would not be right in the circumstances for Southern Cross to be allowed to retain a windfall to which it had never been entitled.

87. In our view, the significance of *BSOC* and *DFS* is in demonstrating, first, that the question of liability to repay is to be examined at the time of the payment, and not at some later stage when it may be established that there was in fact a different liability, or no liability at all, and secondly that "liability" is not confined to what might be discovered to be the right answer as a matter of law, but can extend to judicial determinations, or agreements having the like effect under s 85, even though those might subsequently be shown not to have corresponded to the actual liability in law.

88. We consider that the authorities draw a distinction, not between judicial determinations (or agreements treated by s 85 as having the same effect) and common law agreements outside s 85, but between actual and deemed judicial determinations and voluntary payments made by HMRC; as we have described, that was the scope of s 80(4A) referred to by Moses J in *DFS*, at [61]. We have found that the payment made by HMRC in this case was not simply a voluntary payment in response to a claim under s 80. The claim was the starting-point, but the payment was made because liability to make that payment had been established under a valid and enforceable compromise agreement. That agreement was, like the judicial determination described by Rix LJ in *BSOC*, at [106], an intervening event which itself created a liability, in a way that the mere payment of a claim, or payment of part of a claim, would not. That is the relevant distinction, not as between judicial determinations and everything else, but between cases where HMRC is liable, whether under the statute, by judicial determination, deemed judicial determination under s 85 or a valid and enforceable agreement, to repay an amount at the date of payment and cases, such a voluntary payment of a claim, where they are not so liable, because the liability has not arisen as a matter of law.

89. That analysis is, in our view, supported by the authorities, which we discussed earlier in relation to Issue (2), on the power of HMRC to enter into agreements settling tax disputes. We referred to the submission of counsel to the Crown in *Nuttall*, which was accepted by Ralph Gibson LJ at p 203h, that HMRC are bound by a contract of compromise and cannot for the years in question pursue any claims to tax, interest and penalties. Ralph Gibson LJ went on to conclude that s 54 TMA had not abolished the power of HMRC to make valid enforceable back-duty agreements, holding that there was no such necessary implication to be derived from the express words of s 54. By the same token, we do not consider that the language of s 80 (or s 85) can permit HMRC to raise an assessment in respect of a matter compromised by common law agreement outside the scope of s 85, and where the liability (of the taxpayer or HMRC) is enforceable according to the terms of that agreement. For the

reasons we have given, the proper construction of s 80 does not permit such an assessment.

90. We conclude therefore that, having regard to the valid and enforceable compromise agreement between Southern Cross and HMRC under which the payment of both the principal amount and interest were made, HMRC had no power to assess to recover the amounts repaid under s 80(4A) or s 78A(1) VATA.

Alternative argument: Did HMRC act unlawfully in exercising a discretion to make the assessments under s 80(4A) and s 78A(1) VATA?

91. In view of our conclusions on Issues (1), (2) and (3), we do not need to determine the alternative argument of Southern Cross, that even if HMRC had power to make the assessments in this case, they had a discretion to do so (or not to do so), and that it was unlawful for HMRC to exercise their discretion to make the assessments. However, in view of the arguments before us, and in the circumstances we shall describe, it might be helpful if we add a few observations.

92. The circumstances are that, as well as instituting the present appeal, Southern Cross has commenced a judicial review claim in the Administrative Court of the High Court, on a protective basis. That claim asserts that the decision by HMRC to exercise their discretion to assess and uphold the assessments was *Wednesbury* unreasonable, unfair and an abuse of power. It is claimed that in the circumstances of the "ruling" of 2 August 2001 and/or the compromise agreement it was unfair and/or an abuse of power by HMRC to make and uphold the assessments.

93. Permission to apply for judicial review was refused on 16 March 2011 by HH Judge Sycamore (sitting as a Deputy High Court Judge), on the ground that the appeal to this tribunal afforded an adequate alternative remedy. An application on the part of Southern Cross to renew its application has since been stayed pending the release of this decision.

94. Before us, the parties agreed that, having regard to *Revenue and Customs Commissioners v Noor* [2013] STC 998, no question of legitimate expectation would be argued. This very soon gave rise to difficulty: submissions on the argued failure of HMRC properly to take account of the "ruling" and compromise agreement or, as Mr Mantle put it, "compromise position" quickly strayed into legitimate expectation territory.

95. That, in our view, demonstrates the limitations of this Tribunal's jurisdiction in the circumstances of this case. As *Noor* has confirmed, the Tribunal is a creature of statute, and its jurisdiction is defined by statute. In this case, the relevant statutory provisions are s 83(1)(t) and (sa) VATA. Whilst there can be no doubt that the jurisdiction under these provisions extends to the question of construction of s 80(4A) and s 78A(1), and to findings as to the making and validity of a compromise agreement in order to apply those sections as so construed to the facts of a particular case, we do not consider that the VATA provides a jurisdictional base for examining the lawfulness of the administrative exercise of any power to assess under those

sections. It seems to us that there is a jurisdictional dividing-line, and that arguments that look to the policy of HMRC and the factors which HMRC should, or should not, have taken into account in deciding to assess fall, along with arguments whether HMRC should not have refused to withdraw the assessments, on the judicial review side of that line.

96. We should add that, although it was not referred to before us, we have considered the recent decision of the First-tier Tribunal in *Hollinger Print Ltd v Revenue and Customs Commissioners* [2013] UKFTT 739 (TC), where the Tribunal decided that the wording of s 83(1)(p) VATA in relation to an assessment under s 73 did give the Tribunal jurisdiction on arguments of unfairness.

97. We are not of course bound by *Hollinger*. But as we have reached a different conclusion, we consider it appropriate to explain why we have not been deflected by that decision from our own view in this case.

98. Unlike the position in *Hollinger*, there is authority, in the High Court in *Customs and Excise Commissioners v National Westminster Bank plc* [2003] STC 1072, in the context of one of the particular provisions with which we are concerned in this case, s 83(1)(t), that this Tribunal has no jurisdiction in relation to the supervision of HMRC's conduct. Although the focus in *National Westminster Bank* was not on an assessment, but on the refusal of the commissioners to pay a claim under s 80, and the court did not expressly consider the jurisdiction in s 83(1)(t) over both "an assessment" and "the amount" of an assessment (similar wording to that in s 83(1)(p) which the Tribunal in *Hollinger* regarded as decisive), we regard the tenor of the judgment in *National Westminster Bank* as pointing clearly against this Tribunal having jurisdiction over the exercise of discretion by HMRC in the making of an assessment under s 80(4A).

99. As Lord Lane (with whom Lord Diplock, Lord Scarman and Lord Simon of Glaisdale agreed) said in *Customs and Excise Commissioners v J H Corbitt (Numismatists) Ltd* [1980] STC 231, at p 239, clear words would be necessary to give the Tribunal a supervisory jurisdiction. With respect to the Tribunal in *Hollinger*, we do not consider that either s 83(1)(t) of s 83(1)(sa), notwithstanding the references in those provisions to "assessment" as well as to "the amount" of the assessment, do provide such clear words.

100. Our conclusion on each of s 83(1)t) and s 83(1)(sa), therefore, is that the Tribunal does not have jurisdiction to consider the exercise of discretion of HMRC in relation to the making of an assessment under s 80(4A) or s 78A(1) VATA.

101. In view of our conclusion in this respect, our findings on the other issues before us and the fact of the stayed judicial review proceedings, we do not consider it would be appropriate for us to comment further on the arguments addressed to us in this respect.

Decision

102. In light of our conclusions that Southern Cross has succeeded on Issues (1), (2) and (3), and for the reasons we have given, we allow this appeal.

Application for permission to appeal

103. 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.

ROGER BERNER
TRIBUNAL JUDGE

RELEASE DATE: 17 January 2014