Neutral Citation Number: [2025] EWCA Civ 166

Case No: CA-2024-000855
CA-2024-000856

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL (TAX AND CHANCERY CHAMBER)
MR JUSTICE RICHARD SMITH AND JUDGE JONATHAN CANNAN
[2024] UKUT 23 (TCC)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 25/02/25

Before:

LORD JUSTICE ARNOLD
LADY JUSTICE FALK
and
SIR LAUNCELOT HENDERSON

- -

Between:

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS ("HMRC")	**Appellants/ Respondents**
- and –	
THE APPLICANTS/APPELLANTS IN THE POST PRUDENTIAL CLOSURE NOTICE APPLICATIONS/APPEALS GROUP LITIGATION ("TAXPAYERS")	**Respondents/ Appellants**

- -
- -

David Ewart KC, Barbara Belgrano and Laura Ruxandu (instructed by **HMRC Solicitor's Office and Legal Services**) for **HMRC**
Jonathan Bremner KC (instructed by **Joseph Hage Aaronson LLP**) for the **Taxpayers**

Hearing dates: 21, 22, 23 and 24 January 2025

- -

Approved Judgment

This judgment was handed down remotely at 10.00am on 25 February 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

....

Lady Justice Falk:

Introduction

1. Those with some knowledge of tax litigation might be forgiven for thinking that there cannot be much more to say in the very long-running dispute about the non-compliance of some aspects of the UK corporation tax regime with EU law. They would be wrong. This court very recently heard an appeal concerning some aspects of the law as it stands following Supreme Court decisions in test cases arising out of two sets of group litigation, *Prudential* and *FII*: see *AXA Sun Life plc v HMRC* [2024] EWCA Civ 1430 ("*AXA Sun Life*"). This is another such appeal. The most obvious difference is that this case concerns statutory appeals and applications to the First-tier Tribunal ("FTT"), rather than aspects of common law claims in restitution governed by a group litigation order ("GLO").

2. As in the *Prudential* litigation and *AXA Sun Life*, the appellants and applicants in this case (the "Taxpayers") held "portfolio" investments in other companies, a term used to refer to shareholdings of less than 10% of the paying companies' share capital (or more strictly, 10% of the voting power). Most of the Taxpayers are investment funds. The dispute relates to the corporation tax treatment of dividends received from the Taxpayers' investments prior to 2009, when the tax rules changed.

3. It is now well established that, before the 2009 changes, the tax treatment of non-UK source dividends breached EU law. In contrast to the exemption that generally applied to UK-source dividends, non-UK source dividends were taxable, usually under Schedule D Case V. In the case of dividends from portfolio holdings this was subject to double tax relief ("DTR") only for any withholding tax suffered. No additional relief was generally available to reflect tax on the profits out of which the dividends were paid (underlying tax relief), whether in respect of any tax actually paid or, crucially (as it turned out), for tax at the nominal rate at which tax was chargeable in the foreign jurisdiction (the foreign nominal rate, or "FNR"). In contrast, for shareholdings of 10% or more DTR was available for both withholding tax and actual underlying tax, but not for tax at the FNR.

4. Although we were not provided with the details, it is understood that a significant proportion of the Taxpayers are members of the same GLO for which *Prudential* was a test case, namely the CFC and Dividend Group Litigation Order (the "CFC/Dividend GLO"). However, the relevant Taxpayers joined the GLO after 31 March 2010. As such they are members of "class 8" of that GLO. The date is important because of a change with effect from 1 April 2010 to the statutory claims procedure in paragraph 51 of Schedule 18 to the Finance Act 1998 ("FA 1998"). In broad terms, in relation to claims made on or after 1 April 2010 the revised regime ousted certain common law claims in favour of statutory claims: see *AXA Sun Life* at [167]-[169]. Unlike the decision in *AXA Sun Life*, so far as paragraph 51 is relevant to this decision we are concerned with the version that was in force up to 31 March 2010.

5. Four preliminary issues affecting the class 8 claimants in the CFC/Dividend GLO were decided by the then Chancellor, Sir Geoffrey Vos, in *Claimants Listed in Class 8 of the Group Register of the CFC and Dividend GLO* [2019] EWHC 338 (Ch), [2019] 1 WLR 5097 ("*Class 8*"). The appeal to this court in *Class 8* has been stayed pending this appeal.

6. In broad terms the Taxpayers in these appeals seek to rely on their statutory rights under the tax legislation, as interpreted to conform with EU law requirements, to generate tax refunds or reliefs as an alternative to common law claims in restitution. The disputes largely (but not exclusively) concern the applicable procedural mechanisms. Some of the Taxpayers appealed to the FTT against closure notices and decisions refusing repayments of tax, and others applied to the FTT for directions that HMRC should issue closure notices in respect of open enquiries. Eight test cases were selected for determination by the FTT from 177 appeals and 129 closure notice applications.

7. Both parties appealed the FTT's decision ([2021] UKFTT 459 (TC), Judge John Brooks) to the Upper Tribunal ("UT"). Both parties now appeal again to this court, with the permission of the UT, from the UT's decision ([2024] UKUT 23 (TCC), Richard Smith J and Judge Jonathan Cannan).

8. The Appendix to our judgments sets out a list of the principal authorities referred to and the shorthand terms used to refer to them, together with the most relevant statutory provisions of the Taxes Management Act 1970 ("TMA"), the Income and Corporation Taxes Act 1988 ("ICTA") and FA 1998 in the form in which they were in force at relevant times.

9. We heard submissions from Mr Bremner KC on all issues for the Taxpayers. Mr Ewart KC led for HMRC, but we also had the benefit of submissions from Ms Belgrano and Ms Ruxandu on two issues. We are grateful for all Counsel's assistance, but particularly welcome the opportunity provided by HMRC for oral advocacy by junior Counsel, in line with the encouragement given by the Lady Chief Justice and Master of the Rolls in November 2023.

The issues

10. Fourteen issues were addressed at the FTT hearing (issues 1 to 14), and five further sub-issues later emerged which were dealt with via written submissions (issues A to E). As in the UT, it is simplest to adopt the same numbering and lettering. In outline, all of the issues remain in dispute except for issue 1, which has been common ground throughout (but remains relevant to other issues), issue 12 (which was decided by neither the FTT nor the UT), issue 13 (which was agreed in the FTT), issue 14 (a question of fact where there was no appeal to the UT against the FTT's decision in favour of HMRC) and Issue D (where HMRC do not appeal against decisions against them in the FTT and UT).

11. Of the outstanding issues, HMRC achieved a substantial measure of success in the UT, which reversed the FTT's decision in significant respects. HMRC appeal to this court against the UT's decision on issues 3 and C only.

12. The Taxpayers' appeal, although framed as two grounds, in effect covers all the other outstanding issues, namely issues 2, 4 to 11, A, B and E.

13. The FTT set out the relevant issues, as they existed at the hearing before it, as follows at [7] of its decision:

> "**A – Issues Concerning the Validity of Claims**

Issue 1: Non-resident dividend income returned as exempt
Appellants' wording: Can tax paid on dividend income in excess of that due upon the proper application of EU law be recovered in circumstances where the dividend income was returned as exempt?
Respondents' wording: Where non-UK dividends have been treated as exempt in a return, does that amount to a valid claim for full double tax relief ("DTR")?
(Lead cases: Schroder Institutional Growth for the accounting period ending 30 June 2004 and Henderson for the accounting period ending 31 October 2006. Issue 1 also arises in Henderson for the accounting period ending 31 October 2007 and Fidelity UK Index Fund for the accounting periods ending 28 February 2007, 2008, 2009 and 2010.)

Issue 2: Paragraph 51 of Schedule 18 to the Finance Act 1998 ("Paragraph 51")
Appellants' wording: Is a claim under Paragraph 51 a valid means to recover tax paid on dividend income in excess of that due upon the proper application of EU law? Alternatively, is a Paragraph 51 claim to be treated as a claim for double tax relief for underlying tax?
Respondents' wording:

2.1 Have valid Paragraph 51 claims been made?
2.2 Is a Paragraph 51 claim to be treated as a claim for DTR (underlying tax ("ULT"))?
2.3 Even if valid Paragraph 51 claims have been made, is relief due in respect of those claims?
2.4 Should HMRC give effect to claims made pursuant to Paragraph 51 on the basis that non-UK dividends were returned as taxable where credit at the FNR was not claimed and not given?

(Lead cases: SLMM for accounting periods ending 31 March 2004-06 and Schroder European for accounting period ending 15 January 2003. Issue 2 also arises in Henderson for the accounting periods ending 28 February 2009 and 2010.)

Issue 3: Non-resident dividend income returned as taxable
Agreed wording: Where the return claims DTR for withholding tax ("WHT") and an enquiry was opened into the return should HMRC have allowed DTR for ULT at the FNR when closing the enquiry?
(Lead cases: Schroder Institutional Growth for the accounting period ending 30 June 2004 and Henderson for the accounting period ending 31 October 2007. Issue 3 also arises in Fidelity UK Index Fund for accounting periods ending 28 February 2007-2010.)

Issue 4: Schedule 1A to the Taxes Management Act 1970 ("TMA")
Agreed wording: In the alternative, do paragraphs 54, 55, 57 and 59 of Schedule 18 to Finance Act 1998 and Schedule 1A TMA create a separate legal claim (the purported Schedule 1A TMA claims)?
(Lead cases: SLMM for the accounting periods ending 31 March 2004-06 and Henderson for the accounting periods ending 31 October 2006 and 2007. As Issue 4 represents the Appellants' default position it arises in

every test case to the extent that the taxpayer is not otherwise found to have a valid claim for an accounting period.)

Issue 5: "Out of time" amendments
Agreed wording: Concerning amendments to returns to show income as exempt which had previously been returned as taxable, is the amendment if made beyond the anniversary of the filing date but within the period in s 806(1) of the Income and Corporation Taxes Act 1988 to be treated as equivalent to an in-time claim for full DTR or as claims made pursuant to Paragraph 51?
(Lead case: Fidelity UK Index Fund for the accounting periods ending 28 February 2007, 29 February 2008, 28 February 2009 and 28 February 2010. Issue 5 also arises in SLMM, Schroder European and Henderson.)

B – Issues Concerning s 806(2) Income and Corporation Taxes Act 1988 ("ICTA")
Issue 6: s 806(2) ICTA
Agreed wording: When does s 806(2) ICTA apply?
(Lead cases: Schroder Asian and Avon, although it appears that Avon was not in receipt of any Schedule D Case V income. It also arises in all other test cases.)

Issue 7: Non-resident dividend income returned as exempt in part
Agreed wording: If the closure notice brings into account income previously returned as exempt, and as a result s 806(2) ICTA is engaged, can DTR only be claimed on the income previously returned as exempt?
(Lead case: Schroder Institutional Growth in respect of accounting period ending 30 June 2004. This issue also arises for Fidelity UK Index Fund and Henderson.)

Issue 8: Eligible Unrelieved Foreign Tax ("EUFT")
Agreed wording: Where s 806(2) ICTA is engaged, can EUFT be generated and claimed? Can EUFT be generated by ULT at the FNR?
(Lead cases: Schroder Institutional Growth and also arises in Fidelity UK Index Fund.)

C – Issues concerning amendments to returns
Issue 9: "in time" amendments following an enquiry notice
Agreed wording: In what circumstances can HMRC refuse to give effect (in whole or part) to an amendment to a return made before the anniversary of the filing date on the grounds that an enquiry into the return had already been opened?
(Lead case: Henderson in respect of accounting period ending 31 October 2007.)

D – Issues Concerning management expenses
Issue 10: s 75 ICTA 1998
Agreed wording: Do the statutory provisions when read compatibly with EU law, prohibit the application of management expenses if the effect is to prevent the full utilisation of the DTR available? Alternatively, can DTR

which cannot be fully utilised by reason of management expenses be carried forward and generally applied?
(Lead case: Fidelity UK Index Fund.)

Issue 11: Management expenses and s 806(2) ICTA
Agreed wording: Will s 806(2) ICTA be engaged where a closure notice brings dividend income returned as exempt into account but then offsets that income with management expenses? If the answer to this question is yes, in respect of which accounting period is s 806(2) ICTA engaged?
(Lead case: Fidelity UK Index Fund.)

…"

14. The additional issues that emerged were summarised at [221]:

> "(1) Disputed **Issue A** (closure notice directions) – Where the Tribunal directs the closure of an enquiry, does the Tribunal also have power to indicate the conclusions and amendments to be effected by the closure notice?
> (2) Disputed **Issue B** (applying excess DTR to other tax liabilities) – Can DTR credits in excess of the amount of UK corporation tax due be set against corporation tax on other income or only against tax on dividend income?
> (3) Disputed **Issue C** (excess management expenses and s 811 ICTA) – Where management expenses exceed profits (eg Fidelity APEs ending 2007 and 2008), should the net dividend be brought into account applying s 811 ICTA or should the Case DV income be grossed up for foreign tax?
> …
> (5) Disputed **Issue E** (EUFT at the FNR) – Can EUFT be claimed for credit at the FNR and applied in year (rather than being carried forward)?"

15. It is not immediately obvious what common theme or themes run through these apparently disparate issues. There are however two overarching points. The first is the extent to which the interpretation of the procedural regime should be approached in a manner which ensures that Taxpayers secure all the benefits to which they would have been entitled under an EU law compliant tax regime, even though they were not aware of the precise nature of their rights before the time limits for making relevant claims expired, and as a result made claims which HMRC maintain are not effective. The second is about the extent of the consequences of the conforming interpretation of the DTR regime required by EU law; essentially, how far that interpretation goes in terms of the benefits available to the Taxpayers.

16. These points are reflected in the way the Taxpayers express their grounds of appeal, which were formulated as follows:

> "1. The Upper Tribunal erred in law in failing to hold that the claims made by the Taxpayers were valid and effective. In particular, the Upper Tribunal erred in:

> (1) Failing to recognise that principles of EU and ECHR law and common law required the taxpayers' claims to be accepted as valid claims to recover overpaid tax.
> (2) Alternatively, failing to hold that the taxpayers had, as a matter of domestic law properly construed, made valid claims to recover overpaid tax in any event.
>
> 2. The Upper Tribunal erred in law in misunderstanding the nature and effect of the required conforming construction of section 790 [of ICTA] and the interaction of section 790 (as conformingly construed) with other provisions in the UK statutory regime (in particular Part XVIII [of ICTA, i.e. the DTR provisions])."

Grounds 1(1) and 2 reflect the overarching points mentioned above.

Structure of this judgment and summary of conclusions

17. After a brief summary of the legal background, I will turn first to the Taxpayers' overarching challenges to the UT's approach encapsulated by grounds 1(1) and 2 of their appeal, namely the UT's asserted failure to recognise that "principles of EU and ECHR law and common law required the taxpayers' claims to be accepted as valid claims to recover overpaid tax" and the claim that the UT misunderstood the nature and effect of the required conforming construction of s.790 ICTA.

18. I will then turn to the individual issues. I have dealt with those issues in numerical order, following the numbering in the FTT (which was also adopted in the UT). The additional sub-issues referred to at [14] above are addressed where most convenient to do so, namely issues B and E with issue 8 and issue C with issue 10, leaving only issue A to be dealt with separately.

19. In summary, I would allow HMRC's appeal and dismiss the Taxpayers' appeal, with the result that all the outstanding issues are determined in HMRC's favour.

The essential legal background

20. The UT's decision contains a helpful outline of the statutory framework, the challenges to it and the context for the present appeals, as follows:

> "8. At all material times, UK dividends received by UK resident companies were exempt from corporation tax pursuant to section 208 [of ICTA]. The purpose of this provision was to prevent economic double taxation of the underlying profits of the relevant company declaring the dividend.
>
> 9. Where UK resident companies received dividends from shareholdings in foreign companies, DTR was available either by way of treaty relief or unilateral relief.
>
> 10. Treaty relief was given by way of arrangements in a double taxation treaty pursuant to section 788 [of ICTA]. A claim for treaty relief had to be made to HMRC (see section 788(6)). Relief was available for:

(1) Any withholding tax ("WHT") deducted on payment of the dividend, subject to any limit in the arrangements on the amount of such relief.

(2) The underlying tax actually paid by the overseas company on profits from which the dividend was paid. Such relief was generally limited to non-portfolio holdings. It was given by way of credit for the foreign tax against UK tax chargeable.

11. Unilateral relief was available pursuant to section 790 where there was no relief pursuant to a double taxation treaty. Section 793A provided that unilateral relief was not available where treaty relief was available or where a treaty expressly provided that relief was not available. The relief was given as if there was a treaty in existence containing the reliefs in section 790. As such, a claim for unilateral relief also had to be made to HMRC pursuant to section 788(6). In fact, the UK has double taxation treaties with almost all jurisdictions, including all the jurisdictions relevant to the Taxpayers in these appeals.

12. Unilateral relief was available pursuant to section 790(4)-(6) ICTA 1988 for:

(1) WHT deducted in the relevant foreign jurisdiction.

(2) The underlying tax on profits from which the dividend was paid.

However, relief for underlying tax was expressly excluded in relation to portfolio holdings by section 790(5)(c)(ii) and (6).

13. Non-portfolio holdings fell within section 790(6) such that relief was available for foreign tax paid on the underlying profits from which the dividend was paid in addition to WHT. The relief for foreign tax on the underlying profits was calculated by reference to the actual foreign tax paid by the dividend paying company. Again, it was given by way of credit against the UK tax chargeable.

14. These provisions breached articles 49 and 63 of the Treaty on the Functioning of the European Union (previously articles 43 and 56 of the EC Treaty) in relation to freedom of establishment and free movement of capital by failing to accord foreign dividends equivalent treatment to domestic dividends in preventing economic double taxation. Various taxpayers challenged the UK tax treatment of foreign dividends in relation to both portfolio and non-portfolio holdings.

15. There were two potential challenges available to investors who had paid tax without appropriate DTR. First, they could bring common law claims in unjust enrichment on the basis the tax had been paid under a mistake of law and/or under the principles established in *Woolwich Equitable Building Society v IRC* [1993] AC 70. Such claims have been brought in the High Court and managed pursuant to Group Litigation Orders. Prudential is the test claimant in relation to portfolio holdings litigation under the CFC GLO. The FII GLO is concerned with non-portfolio holdings. Many of the authorities referred to on these appeals arose in the context of those common law claims.

16. The alternative challenge available to investors was to make statutory claims for DTR and/or for repayment of overpaid tax. Such claims fall within the jurisdiction of the FTT and it is the existence, validity and extent of those claims which the FTT considered in the Decision. There are various ways in which the Taxpayers have asserted their right to DTR and/or their right to reclaim overpaid tax. For example, some of the Taxpayers included foreign dividend income received in their company tax returns but treated it as exempt income. Other Taxpayers included dividend income as taxable income and accounted for tax without any claim for DTR, but then purported to make statutory claims for repayment of overpaid tax.

17. We are concerned on these appeals with statutory claims made by the Taxpayers which have been refused by HMRC or upon which the Taxpayers rely in their applications for closure notices. In the latter case, concerning four Taxpayers, HMRC have opened enquiries into those claims without prejudice to their contention that they are not valid because they are out of time. The validity of those claims is being tested in the closure notice applications. If the claims are in time, then it was open to the FTT to direct HMRC to issue a closure notice and, in those circumstances, HMRC would not object to such a direction."

21. It is unnecessary for the purposes of this decision to set out the case law developments that established that the UK legislation was in breach of EU law, the precise nature of the breaches and the solutions in detail. The most significant aspects for present purposes are as follows:

a) *Test Claimants in the FII Group Litigation v IRC* (Case C-446/04) [2007] STC 326, [2012] 2 AC 436 ("*FII CJEU1*") decided that, in principle, a Member State could operate an exemption system for domestic dividends and an imputation system for foreign dividends (that is, a system under which dividends are taxed but with a credit given for foreign tax on the profits out of which the dividend was paid). However, the UK corporation tax treatment of portfolio dividends from both EU/EEA and other foreign sources breached EU law in failing to accord a tax credit for such tax: *FII CJEU1* at [74]. At that point the CJEU referred to "tax actually paid" by the dividend paying company. In response to a further reference in the *Prudential* litigation, the CJEU followed *FII CJEU1* via a reasoned order: see *Prudential Assurance Co Ltd v Revenue and Customs Commissioners* [2013] EWHC 3249 (Ch), [2014] STC 1236 ("*Prudential HC*") at [29].

b) *Test Claimants in the FII Group Litigation v Revenue and Customs Commissioners* (Case C-35/11) [2013] STC 612 ("*FII CJEU2*") arose because of the difficulties encountered in applying the decision in *FII CJEU1*. *FII CJEU2* determined, in the context of non-portfolio holdings, that "equivalence" between the exemption of domestic dividends and the taxation of foreign dividends required the provision of an underlying tax credit at the FNR, rather than only for tax actually paid. This was because the effective rate of tax paid by dividend-paying companies was generally lower than the nominal rate, whereas the

domestic exemption resembled a credit at the nominal rate. That approach was applied to portfolio dividends in the *Prudential* litigation, culminating in *Prudential Assurance Co Ltd v Revenue and Customs Commissioners* [2018] UKSC 39, [2019] AC 929 ("*Prudential SC*").

c) The breach of EU law could be cured by a conforming interpretation under the *Marleasing* principle (after *Marleasing SA v La Comercial Internacional de Alimentación SA* [1990] (Case C-106/89) ECR I-4135, "*Marleasing*").

d) Specifically, *Prudential* decided that s.790 ICTA should be given a conforming interpretation such that, in addition to relief for withholding tax, an underlying tax credit at the FNR was available for portfolio dividends (as well as dividends from non-portfolio holdings): *Prudential SC* at [27]. While relief was strictly available at the level of the actual underlying tax if, unusually, it was higher than the FNR, in practice holders of portfolio investments were unlikely to have the relevant information available to determine the actual tax paid, so the focus is on the FNR.

e) Further, where DTR could not be used in the year in which the dividend was received due to other domestic reliefs which applied in priority (such as management expenses or group relief), then the UK rule which provided that the DTR credit available in respect of particular income could only be allowed against tax computed by reference to the same income was to be disapplied in favour of a rule that unused DTR credits (calculated on a FNR basis) could be carried forward for use against tax liabilities arising in subsequent years: *Test Claimants in the Franked Investment Income Group Litigation v Revenue and Customs Commissioners* [2021] UKSC 31, [2021] STC 1597 ("*FII SC3*") at [145], applying the approach in *Österreichische Salinen* (Case C-437/08), reported as *Haribo Lakritzen Hans Rigel BetriebsgmbH* (Joined Cases C-436/08 and C-437/08) [2011] STC 917, [2011] ECR I-305 ("*Salinen*").

22. The potential difficulties for the Taxpayers in relying on the statutory regime to vindicate their EU rights lie in a combination of a) the requirement for DTR to be claimed; and b) the fact that the analysis set out at [21] above has only become apparent over a lengthy period. In particular, even when the Taxpayers were aware that they might have claims based on a breach of EU law, there was a substantial period when it was possible that any breach might be addressed in another way. For some of the period there was also doubt about whether claims could extend beyond dividends received from EU/EEA sources to dividends received from sources elsewhere.

23. By way of illustration, issue 1 concerns dividends from non-UK sources returned as exempt, and issue 2 concerns later claims to treat such dividends as exempt. Issue 9 concerns returns where EU dividends were returned as exempt and non-EU dividends were returned as taxable. Issues 10 and 11 concern situations where it was not appreciated that DTR at the FNR was not only available but could be carried forward if not used in-year due to the offset of management expenses, including where the offset is against dividend income previously returned as exempt.

24. A further preliminary point to make is that it is common ground that DTR must be claimed; it is not provided automatically. It is worth noting, however, that the requirement for DTR to be claimed is perhaps not spelt out in the legislation as clearly as it might be. In brief, it derives from a combination of s.788(6), the effective

application of that provision to unilateral relief by s.790(3), and the time limits in s.806 of ICTA (all set out in the Appendix). Since the relevant claim would be for credit under Chapter II of Part XVIII of ICTA, the claim required under s.788(6) is to HMRC rather than specifically to the Board.

25. Leaving to one side the extended time limit in s.806(2) discussed below, the normal time limit for DTR claims during the relevant period was six years after the end of the accounting period in question, under s.806(1). Paragraph 54 of Schedule 18 FA 1998 required the claim to be quantified, albeit that the initial quantification did not need to be accurate (*Class 8* at [98]-[101]).

Ground 1(1): overarching principles of EU and ECHR law

The Taxpayers' case

26. The essence of ground 1 of the Taxpayers' appeal is their complaint that the effect of the UT's decision is a "retrospective invalidation" of the Taxpayers' claims for credit at the FNR. The Taxpayers had made "every conceivable statutory claim" and had clearly asserted their EU law rights. They had done so at a time when the existence and nature of a breach of EU law, and in particular the appropriate remedy, were unclear and in circumstances where domestic law made no provision for a credit at the FNR. Nevertheless the statutory procedures had been applied as if s.790 had always provided a credit at the FNR, even though the Taxpayers could not have anticipated that when the claims were made. The Taxpayers maintain that this is the wrong approach under both EU law (ground 1(1)) and domestic law (ground 1(2), considered below in the context of the individual issues).

27. Ground 1(1) is expressed by reference to "principles of EU and ECHR law and common law", but in his submissions Mr Bremner relied on case law of the Court of Justice of the European Union (the "CJEU") and cases decided by the European Court of Human Rights (the "ECHR"), rather than the common law. In essence, his argument under that ground was that the Taxpayers' claims were wrongly being denied by reliance on a failure to meet conditions that were not notified to them in advance.

28. The relevance of ECHR case law is not obvious, since the Taxpayers do not seek to rely on the Human Rights Act. Mr Bremner submitted that the principles recognised in that case law form part of EU law by virtue of the Charter of Fundamental Rights of the European Union (the "Charter"). The effect of s.5(4) of the European Union (Withdrawal) Act 2018 is that the Charter is no longer part of domestic law. However, during the course of the hearing it was confirmed that the Taxpayers in the eight test cases filed their appeals in the FTT before 31 December 2020, so benefitting from the transitional protection from the application of s.5(4) contained in paragraph 39(3) of Schedule 8 to the 2018 Act. As the Supreme Court noted in *Lipton and another v BA Cityflyer Ltd* [2024] UKSC 24, [2024] 3 WLR 474 at [100], under EU law the Charter "may affect the interpretation of EU instruments which give rise to enforceable rights… and may itself create such rights".

29. The provisions of the Charter on which I understood Mr Bremner to rely were Article 47 (right to an effective remedy and a fair trial), Article 52(3) (correspondence with the extent of protection provided by the European Convention on Human Rights ("the

Convention")) and Article 53 (level of protection provided by, inter alia, the Convention not to be restricted).

30. Mr Bremner placed particular reliance on three cases, being the decision of the CJEU in *Raffaello Visciano v Istituto nazionale della previdenza sociale* (Case C-69/08) [2009] ECR I-6741 ("*Visciano*") and the decisions of the ECHR in *Bellet v France* 23805/94 ECHR, 4 December 1995 ("*Bellet*"), and *Gil Sanjuan v Spain* 48297/15 ECHR, 26 May 2020 ("*Gil Sanjuan*").

31. *Visciano* related to an Italian employee who had sought to rely on his rights under a Directive (80/987) which required Member States to take steps to ensure that outstanding liabilities to employees were guaranteed in the event of insolvency. Uncertainties over the application of the Directive led to inconsistent Italian court decisions and to a reference to the CJEU. One issue was whether the Directive precluded the application of a one year limitation period. The CJEU confirmed that Member States were able to establish their own limitation periods provided they satisfied the principles of equivalence and effectiveness, commenting on the latter:

> "43. As regards the principle of effectiveness, the Court has stated that it is compatible with Community law to lay down reasonable time-limits for bringing proceedings in the interests of legal certainty which protects both the taxpayer and the authorities concerned... Such time-limits do not make it impossible in practice or excessively difficult to exercise the rights conferred by Community law."

While in the particular context a one-year time limit appeared reasonable:

> "46. However, it is also apparent from Case C-62/00 *Marks & Spencer* [2002] ECR I-6325, paragraph 39, that in order to serve their purpose of ensuring legal certainty, limitation periods must be fixed in advance. A situation marked by significant legal uncertainty may involve a breach of the principle of effectiveness, because reparation of the loss or damage caused to individuals by breaches of Community law for which a Member State can be held responsible could be rendered excessively difficult in practice if the individuals were unable to determine the applicable limitation period with a reasonable degree of certainty…"

32. In contrast, the relevant legislative decree had fixed a limitation period but had not determined when it started to run, and the Italian court had also initially concluded that rules on the suspension of limitation periods applied before later concluding that they did not. These points were liable to give rise to legal uncertainty which might breach the principle of effectiveness, a matter which would be for the national court to decide ([47]-[49]).

33. *Bellet* concerned a French national who had sought damages for an HIV infection said to have been caused by infected blood products. He had obtained some compensation from a fund established to compensate individuals in his position, but on the reasonably held understanding that it would not preclude a civil claim for additional damages. That proved incorrect when his claim was dismissed by the Paris Court of Appeal as inadmissible because he had been "fully compensated". Mr Bellet argued that his Article 6 right of access to the courts had been infringed. The ECHR referred to the

requirement that, for the right of access to be effective, there must be a "clear, practical opportunity" to challenge an interference with it ([36]). On the facts the system was not "sufficiently clear or sufficiently attended by safeguards to prevent a misunderstanding as to the procedures for making use of the available remedies and the restrictions stemming from the simultaneous use of them" and, in all the circumstances, the applicant did not have a "practical, effective right of access to the courts" ([37]-[38]).

34. In *Gil Sanjuan* the applicant complained that her Article 6 rights had been infringed by the retroactive application of a new interpretation of procedural rules which led the Spanish Supreme Court to rule her previously filed appeal inadmissible. The ECHR upheld her complaint. In its discussion it relied on the principle of legal certainty. It noted at [31] that "excessive formalism" could run counter to the requirement under Article 6(1) of securing a practical and effective right of access to a court. It attached particular weight to whether the procedure could be regarded as foreseeable and, if not, whether an opportunity had been provided to remedy any deficiency in the applicant's notice of appeal. It observed that the appeal had been filed at a time when there was "no indication of any perceptible line of case-law development" departing from the criteria previously laid down by the Supreme Court ([39]). This made it "important" to establish whether the applicant had been allowed any opportunity to remedy any problem ([40]), which the ECHR was not persuaded had been the case ([42]). The effect was to have "restricted her access to a court to such an extent that the very essence of that right was impaired" ([44]).

35. Mr Bremner further relied on qualifications of national procedural autonomy being imposed as a matter of EU law by requirements of effective judicial protection and legal certainty, in addition to the principles of equivalence and effectiveness. In relation to effective judicial protection he relied on *Unibet (London) Ltd v Justitiekanslern* (Case C-432/05) [2007] ECR I-2271, to the effect that "the principle of effective judicial protection is a general principle of Community law" which national legislation "must not undermine", it being "for the Member States to establish a system of legal remedies and procedures which ensure respect for that right" ([37] and[42]). However, I note that the CJEU went on at [43] and [44] to explain this mainly in terms of the principles of equivalence and effectiveness, simply adding that it was for national courts to interpret procedural rules to enable them "wherever possible" to be implemented in such a way as to contribute to the "objective" of ensuring effective judicial protection of Community rights (see also *T-Mobile (UK) Ltd v Office of Communications* [2008] EWCA Civ 1373, [2009] Bus LR 794 at [22]).

36. As far as legal certainty is concerned, Mr Bremner referred us to *Banco de Portugal v VR* (C-504/19), but the basic point is most conveniently summarised in *Test Claimants in the FII Group Litigation v Revenue and Customs Commissioners* (Case C-362/12) [2014] AC 1161 ("*FII CJEU3*") at [44]:

> "44. It should be recalled that, according to settled case law, the principle of legal certainty, the corollary of which is the principle of the protection of legitimate expectations, requires that rules involving negative consequences for individuals should be clear and precise and that their application should be predictable for those subject to them…"

In this context, however, it is hard to see what this adds to the principle of effectiveness. As can be seen from the CJEU's reasoning in *Visciano*, the issue there

related to a potential breach of that principle caused by a lack of legal certainty. That is, as I understand it, the core of the Taxpayers' complaint in this case as well.

HMRC's response

37. HMRC's response to these arguments can be summed up by Mr Ewart's reliance on the following paragraph in the CJEU's decision in *Metallgesellschaft Ltd v Inland Revenue Commissioners* (Joined Cases C-397 and 410/98) [2001] Ch 620 ("*Metallgesellschaft*"):

> "85. In the absence of Community rules on the restitution of national charges that have been improperly levied, it is for the domestic legal system of each member state to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from Community law, provided, first, that such rules are not less favourable than those governing similar domestic actions (principle of equivalence) and, secondly, that they do not render practically impossible or excessively difficult the exercise of rights conferred by Community law (principle of effectiveness)…"

These points are very well established, for example being repeated almost verbatim in *FII CJEU3* at [31] and [32].

38. Mr Ewart submitted that there was no breach of these principles, nor any other breach of the principle of legal certainty. The UK procedural rules were at all times clear, drew no distinction between EU and domestic law rights, and did not breach the principle of effectiveness. Further, the CJEU had explicitly recognised that it was not problematic that an imputation system imposed additional burdens on taxpayers as compared to an exemption system: *FII CJEU1* at [53]. As recognised in *Class 8*, that point had been correctly applied in the *Prudential* litigation with reference to *Salinen* (referred to there by the name of the joined case, *Haribo*).

Discussion

39. I would dismiss the Taxpayers' appeal on ground 1(1). In summary, it is based on the incorrect premise that the domestic procedural rules would otherwise be treated as retrospectively rewritten to deprive the Taxpayers of an effective remedy. The true position is that the domestic procedural rules met the requirements referred to in *Metallgesellschaft* at [85], have not been "rewritten", and there is therefore neither a need nor a justification to adapt them now to treat claims that would otherwise be ineffective as effective.

40. The starting point is that the decisions of the CJEU in the *FII* litigation were in their nature retrospective in effect, in the sense that they declared what the law had been at all relevant times. That accords with the normal declaratory theory of judicial decision-making. Indeed, in *FII CJEU1* the CJEU expressly rejected the imposition of any temporal limitation (a limitation which of course would not have been in the interests of the taxpayer claimants). It is true that there was a period of considerable uncertainty, at least until the availability of an FNR credit was established in *FII CJEU2*, but that was a function of the developing CJEU jurisprudence rather than any aspect of national procedural law.

41. The UK courts were obliged to give effect to the CJEU's decisions, which therefore also involved them being applied in accordance with the normal declaratory approach. They did so by a conforming interpretation (as to which see further [57]-[61] below). As Sir Andrew Morritt C pointed out in *Vodafone 2 v Revenue and Customs Comrs (No 2)* [2009] EWCA Civ 446, [2010] Ch 77 ("*Vodafone 2*") at [56] when rejecting a submission that a conforming interpretation of the controlled foreign companies legislation would breach legal certainty, conforming interpretation is inevitably retrospective in its operation. In the earlier case of *Revenue and Customs Commissioners v IDT Card Services* [2006] EWCA Civ 29, [2006] STC 1252 ("*IDT*"), this court similarly concluded that the principle of legal certainty was not infringed by the application of the *Marleasing* principle: see Arden LJ's judgment at [110].

42. The retrospective nature of the process, however unlikely it was that the interpretation would have occurred to anyone earlier, was also emphasised by Lord Sumption in *Test Claimants in the FII Group Litigation v Revenue and Customs Commissioners* [2012] UKSC 19, [2012] 2 AC 337 ("*FII SC1*"). Having made the point at [151] that there is no rule of EU law which requires the running of limitation periods to be deferred until a right has been judicially established, he said this in relation to conforming interpretation at [176]:

> "It is no doubt correct that, however strained a conforming construction may be, and however unlikely it is to have occurred to a reasonable person reading the statute at the time, a later judicial decision to adopt a conforming construction will be deemed to declare the law retrospectively in the same way as any other judicial decision."

43. The same point is equally relevant to the principle of effectiveness, which as I have indicated I consider to be the principle at the core of the Taxpayers' case. In *Class 8* at [83], Sir Geoffrey Vos C relied on Lord Sumption's statement, above, to reject an argument that s.790 ICTA did not provide an effective remedy because it only applied to portfolio dividends as a result of a conforming interpretation. He went on also to reject arguments that it was prevented from being an effective remedy either because the claimants did not know they had such a remedy before it became statute-barred (disagreeing with the approach taken by Marcus Smith J in *Jazztel plc v Revenue and Customs Commissioners* [2017] EWHC 677 (Ch), [2017] STC 1422) or because they would not have known how to quantify their claim (the response to which was that paragraph 54 of Schedule 18 FA 1998 did require quantification but did not require it to be correct) ([85]-[101]). In this court's decision in *Jazztel* ([2022] EWCA Civ 232, [2022] STC 541) the Chancellor's conclusion in *Class 8* that it is not a requirement of EU law that the taxpayer should have actual or constructive knowledge of its right to make a claim before the limitation period expired was approved at [89].

44. I also agree. There is nothing in the EU law principles relied on by the Taxpayers (whether equivalence, effectiveness, legal certainty or effective judicial protection) that mandates a different approach. In particular, there is no principled basis for a distinction of the kind that the Taxpayers seek to draw between having no knowledge that EU law rights have been infringed (in which case Mr Bremner accepted that national limitation periods may validly expire without a claimant appreciating that they have a claim) and having some, imperfect, knowledge that leads to a claim being made that turns out to be the wrong one. Provided that a time limit under national law is reasonable and is fixed in advance it will be valid, whatever the state of knowledge of

the claimant and however reasonably (or otherwise) they acted. There is similarly no obligation to interpret domestic rules so that a claim made for one thing is to be treated as a claim for something else.

45. The procedural rules applicable to claims for DTR have remained materially unchanged throughout the relevant period. It was clear throughout how long Taxpayers would have to make a claim and how it could be made. There is nothing comparable, for example, to the limitation rules considered in *Visciano*, where key aspects of the rules had either not been fixed in advance or had been subject to a change in approach by the national court (see [32] above). To the extent that *Bellet* or *Gil Sanjuan* are relevant at all (both are decisions of the ECHR rather than the CJEU, and furthermore both are in the context of Article 6 of the Convention), the right to claim a DTR credit was clear on the face of the legislation, could straightforwardly be exercised and has not been affected by any retrospective change in approach.

46. There is nothing here that renders the exercise of EU law rights "practically impossible or excessively difficult", or otherwise legally uncertain in the sense referred to by the CJEU. In reality, the situation is no different to any case where a lack of clarity about the substantive law may lead a claimant to make what turns out to be the wrong kind of claim. This applies equally to claims based on EU law and purely domestic claims. For a recent example of the former in a common law context, see the conclusion reached on the pleading issue in *AXA Sun Life* at [164]. An example of the latter, which also illustrates that the principle of equivalence is not engaged, would be a domestic law claim which a later court decision determines was flawed, where that decision is reached outside the time limit for an alternative claim to be made. The Taxpayers' complaint is in truth about uncertainty in the development of the substantive law and not about domestic procedural rules.

47. *Leeds City Council v Revenue and Customs Commissioners* [2015] EWCA Civ 1293, [2016] STC 2256 provides an illustration of these points in an EU law context, in that case article 4(5) of EC Council Directive 77/388, concerning VAT. In rejecting the taxpayer's argument that there should be a relaxation of a limitation period, Lewison LJ both made the point at [41] that a failure to transpose a Directive did not preclude reliance by a tax authority on a limitation period (referring to *Fantask A/S v Industriministeriet (Erhvervsministeriet)* (Case C-188/95) [1998] All ER (EC) 1, [1997] ECR I-6783 at [52]) and said this at [42] in relation to the argument that article 4(5) was difficult to understand and apply:

> "…art 4(5) may indeed be difficult to understand or to apply. I express no view one way or the other. But the fact that a piece of European legislation is difficult to understand or apply cannot justify an extension of the limitation period. If the meaning of a piece of European legislation is unclear it can be referred to the CJEU which sometimes manages to clarify its meaning. If and in so far as there was a perceived problem it arose because of uncertainties about the law, and had nothing to do with any shortcomings in domestic procedure for claims for repayment of VAT."

As Lewison LJ also pithily commented at [46], "the principle of effectiveness means not that it must be easy to obtain a remedy, but that it must not be 'excessively difficult' to do so".

48. Mr Bremner sought to argue that the difficulties arose not from EU law but from the way in which a conforming interpretation was adopted, which was a matter of domestic law (see further below). However, the conforming interpretation of s.790 did no more than reflect the substantive EU law, to the effect that an underlying tax credit was both available for portfolio dividends and should be granted at the FNR. This was not a question of domestic law imposing some form of impermissible procedural barrier, as Mr Bremner suggested. Further, the attempt to suggest that the problems in *Visciano* were also derived from uncertainty over a Directive is unpersuasive. The issues related to the Italian limitation rules, and in any event in that case the CJEU left it to the national court to decide whether there had in fact been a breach of the principle of effectiveness.

49. Mr Bremner relied on the CJEU's rejection in *Metallgesellschaft* at [106] of an argument based on the claimants' failure to apply for a group income election to avoid the unlawfully levied advance corporation tax ("ACT") that was the subject of the reference in that case. However, that point arose in the context of an asserted defence to a claim for compensation on the basis that the claimants had not acted diligently in limiting their loss ([99] and [101]). It was also clear that any such application would have been refused, and that in that event the ACT would still have been payable, and indeed would not have been recoverable ([103]-[104]). Those features led the CJEU to conclude that a rejection of a claim on that basis would breach the principle of effectiveness. That is very different to this situation. While HMRC may have not accepted a claim for DTR if one had been made, it would have been open to a claimant to assert the validity and effectiveness of the claim through an appeals process.

50. In effect, the Taxpayers' position is that the conforming interpretation required to remedy the breach of EU law goes beyond a conforming interpretation of s.790 and extends to applying (or perhaps more accurately, disapplying) the procedural requirements in such a way that the Taxpayers are not disadvantaged by the uncertainties that resulted in them failing to file in-time claims for DTR credits at the FNR. I can see no basis for that in the case law.

51. When asked during argument whether there was any example of the CJEU addressing the impact on legal certainty of the retrospective effect of its own determinations, Mr Bremner referred us to *Impact v Minister for Agriculture and Food* (Case C-268/06) [2008] ECR I-2483, where the fourth question referred was whether the national court was obliged to give domestic legislation retrospective effect to the date when the relevant Directive should have been transposed ([93]). The CJEU said this at [99]-[101] (citations omitted):

> "99. The requirement that national law be interpreted in conformity with Community law is inherent in the system of the EC Treaty, since it permits national courts, for the matters within their jurisdiction, to ensure the full effectiveness of Community law when they determine the disputes before them…
>
> 100. However, the obligation on a national court to refer to the content of a directive when interpreting and applying the relevant rules of domestic law is limited by general principles of law, particularly those of legal certainty and non-retroactivity, and that obligation cannot serve as the basis for an interpretation of national law *contra legem*…

> 101. The principle that national law must be interpreted in conformity with Community law none the less requires national courts to do whatever lies within their jurisdiction, taking the whole body of domestic law into consideration and applying the interpretative methods recognised by domestic law, with a view to ensuring that the directive in question is fully effective and achieving an outcome consistent with the objective pursued by it…"

One of the cases referred to at [101] was the *Pfeiffer* case referred to at [58] below, which applied the *Marleasing* principle.

52. The CJEU answered the question at [104] by saying that, insofar as national law precluded the retrospective application of legislation without a clear indication to the contrary, that legislation should only be construed as having retrospective effect if such an indication was included.

53. I can see nothing here that assists the Taxpayers' case. The CJEU referred at [100] to general principles of legal certainty and non-retroactivity, but their existence is not in dispute. More pertinently, the CJEU emphasised the requirement to give full effect to EU law so far as that can be achieved. That is what the courts of this jurisdiction have done in giving a conforming interpretation to s.790 ICTA, with the normal consequences that has for the past as well as for the future.

54. Although I do not consider it strictly relevant, I would add that Mr Ewart fairly took issue with the Taxpayers' argument that they had actually made "every conceivable statutory claim". In particular, HMRC had at no point during the course of the litigation accepted that foreign dividends could be treated as exempt, as many Taxpayers claimed (see further below). Rather, it was clear following *FII CJEU1* that underlying tax relief should be available in respect of portfolio dividends ([21a)] above). Further, the Taxpayers' complaint that domestic law would not have permitted a claim to DTR is nothing to the point. Without regard to EU law, domestic law would equally not have permitted the claims they actually sought to make, such as the claims for exemption considered under issue 2.

55. A further point which is worth adding is that what we are concerned with in this appeal are statutory claims. We are not concerned with common law claims in restitution, where different considerations may arise. We are also not concerned with any form of public law challenge to HMRC's decision not to accept claims as valid. Statutory claims must comply with the legislative provisions applicable to them, subject only to any modification required to ensure that those provisions comply with the EU law principles already discussed. As it happens (albeit that it makes no difference to what we need to decide), until the law changed with effect from 1 April 2010 it would have been open to the Taxpayers to bring common law claims which would not have been subject to the same procedural rules, but they chose not to do so (see [4] above). The Taxpayers' complaint that for some time during the dispute HMRC maintained that common law claims were precluded even before the law changed in 2010 is also nothing to the point.

Ground 2: consequences of the conforming interpretation of s.790

56. The Taxpayers maintain that the UT misunderstood the interaction between s.790 ICTA, conformingly construed, and other statutory provisions. While correctly accepting at [193] that once s.790 was given a conforming construction "other DTR provisions will apply in accordance with their ordinary meaning", the UT did not follow that through as it should have done. In particular, it should have treated tax at the FNR as "tax payable" as referred to in s.790(1), and then applied that elsewhere in the DTR code, including in s.806(2) (relevant to issue 6) and the EUFT provisions (issues 8 and E).

57. As already touched on, the concept of conforming interpretation is derived from *Marleasing*. It is uncontroversial that, as the name suggests, it is an exercise undertaken in order to ensure that legislation complies (conforms) with EU law. As applied in this jurisdiction, and as explained in more detail by Sir Andrew Morritt C in *Vodafone 2* at [37]-[38], it is an obligation to "construe domestic legislation consistently with Community law obligations" which is "broad and far-reaching", the only constraints being that the meaning given must "go with the grain" and be "compatible with the underlying thrust" of the legislation being construed. As Lord Sumption put it in *FII SC1* at [106]:

> "*Marleasing*, at any rate as it has been applied in England, is authority for a highly muscular approach to the construction of national legislation so as to bring it into conformity with the directly effective Treaty obligations of the United Kingdom."

58. By way of further background, in the earlier case of *IDT*, Arden LJ cited at [80] a passage from *Pfeiffer v Deutsches Rotes Kreuz, Kreisverband Waldshut eV* (Cases C-397/01 to C-403/01) [2005] ICR 1307, [2005] IRLR 137 in which the CJEU had considered the *Marleasing* principle and had said this at [114] of its judgment:

> "114. The requirement for national law to be interpreted in conformity with Community law is inherent in the system of the Treaty, since it permits the national court, for the matters within its jurisdiction, to ensure the full effectiveness of Community law when it determines the dispute before it…"

(In domestic law, this was of course reflected in s.2 of the European Communities Act 1972, before its repeal: *IDT* at [73]-[74].) Arden LJ went on to explain that it is for domestic law to determine how far domestic courts can change provisions of domestic law, and adopted the approach applied in relation to s.3 of the Human Rights Act in *Ghaidan v Godin-Mendoza* [2004] 2 AC 557, which involved considering whether words sought to be implied "go with the grain" of the legislation ([81]-[92]).

59. The point that the process of conforming interpretation is a matter for UK law was reiterated in *Test Claimants in the FII Group Litigation v Revenue and Customs Commissioners* [2016] EWCA Civ 1180, [2017] STC 696 ("*FII CA2*") at [103], which confirmed that "all that EU law requires is that the result complies with EU law". Underhill LJ (giving the judgment of the court) went on to add:

> "104. The basic principle is that, so far as possible, domestic legislation will be interpreted so as to conform with EU law. But, as the authorities concerning EU law and the analogous area of human rights establish, the court must examine the whole of the relevant legislation and is not confined to construing the existing words of the legislation."

60. It is clear from this that the aim of the process of conforming interpretation is to ensure compliance with EU law. That was also the extent of the mandate provided by s.2 of the 1972 Act.

61. I also do not understand it to be controversial that, where compliance would not be secured by interpreting the statute in accordance with ordinary domestic principles of interpretation, a conforming interpretation will be adopted if that is possible: in addition to the passage just cited from *FII CA2*, see for example *Test Claimants in the FII Group Litigation v Revenue and Customs Commissioners* [2010] EWCA Civ 103 ("*FII CA1*") at [97], discussed in *Prudential Assurance Co Ltd v Revenue and Customs Commissioners* [2016] EWCA Civ 376, [2016] STC 1798 ("*Prudential CA*") at [104]. The alternative, which is a disapplication of the offending provision, will only be resorted to if a conforming interpretation is not possible (see for example *Prudential CA* at [107]-[108]).

62. Henderson J applied this approach in *Prudential HC* at [103], observing that:

> "… I consider that it falls well within the scope of conforming interpretation to construe s 790 of ICTA 1988 as providing for the grant of a tax credit for foreign dividends to the extent necessary to secure compliance with EU law."

The reference to "the extent necessary to secure compliance with EU law" will be noted. That is obviously correct, and consistent with the other authorities to which I have referred.

63. Mr Bremner relied on a passage in *Prudential CA* at [109]-[111]. This is set out below but the context is important. The context was a conforming interpretation adopted in *FII CA1* of the rules concerning ACT, and specifically s.231(1) of ICTA. The effect of the conforming interpretation was to confer a tax credit in respect of foreign dividends which the recipient could set against its liability to ACT on dividends paid by it (so-called franked payments). That approach was applied in *Prudential CA* to receipts of portfolio dividends. Prudential submitted that s.231(1) should be construed to grant a credit of the amount needed to secure compliance with EU law ([92]). HMRC's competing argument was that the quantum of the credit had been left undecided and that what Lewison LJ described as a "completely different" methodology should be applied ([93]-[94]).

64. Prudential's argument was accepted in the following terms:

> "100. The question then arises how that credit should be given. As outlined above, Prudential contends that this should be done by a simple modification of the UK's existing system for allowing for tax credits to be brought into account in calculating the ACT payable by a UK receiving company when it distributes onwards dividends which it has received. It

says that when foreign portfolio dividends are received by a UK water's edge company, it is possible to work out the relevant underlying foreign tax (at either the effective rate or the foreign nominal rate) for which credit should be given; that this credit should be treated as a tax credit for the purposes of s 231(1) by giving that provision a modified construction to conform with the requirements of EU law; and that it then follows from the ordinary interpretation of s 238(1) that this tax credit becomes part of the calculation of the UK receiving company's franked investment income and hence by application of s 241 falls to be set off (ie to be taken into account as a credit) against any franked payments made by the receiving company, thereby reducing its liability to pay ACT in the relevant accounting period.

101. In our judgment, the decision of this court in [*FII CA1*] has given the answer to this question. The answer which has been given bears out Prudential's submission on this point."

65. HMRC's submission was addressed as follows, in the passage on which Mr Bremner relied:

"109. On this appeal Mr Ewart seeks to contend that the question of the correct methodology to use to determine the amount of credit in respect of foreign tax Prudential should have been allowed against its liability to pay ACT and hence the extent of its *San Giorgio* restitutionary claims was left at large by this court in [*FII CA1*] and also by the judge's declaration. We do not agree. Once the conforming interpretation of s 231(1) given by this court in [*FII CA1*] and by the judge's declaration is applied, <u>the other ACT provisions simply apply in accordance with their ordinary meaning</u>, precisely as Prudential submits on the present appeal.

110. Mr Ewart sought to suggest that this court's ruling at [107] in [*FII CA1*] was not tied to interpretation of s 231(1) but produced a sort of power of amendment which roamed at large across all the ACT provisions, leaving it open to HMRC to propose a different methodology within the interstices of those provisions taken as a whole for giving effect to the requirements of EU law. In substance, he wished to introduce a distinct crediting methodology into s 241.

111. In our view this is an unsustainable submission. It rests on a misconception regarding the operation of the *Marleasing* interpretive principle and of the ruling given in [*FII CA1*]. Application of that principle does not make it irrelevant which particular statutory provision in a group of provisions is being interpreted. On the contrary, <u>it is a principle of interpretation which is applied to give a specifiable and specific meaning to a particular provision</u> (or series of provisions, taken one by one), even if it allows considerable latitude as to the wording which may be read into the provision (or provisions). In considering whether a particular conforming interpretation can be given to a particular provision, the court has to check to see that that proposed interpretation does not go against 'the grain' of the legislation in question or conflict with its cardinal features. This was the exercise performed by this court in [*FII CA1*] to arrive at the particular

> conforming interpretation it identified for a specific section, namely s 231(1) of ICTA. That interpretation was sufficient to give effect in domestic law to taxpayers' rights under art 63 precisely because ss 238(1) and 241 continue to operate alongside s 231(1) (as so interpreted) in the usual way. Nothing was left at large so far as concerns the meaning of the ACT provisions in a way which could now accommodate HMRC's proposed alternative methodology." (Emphasis supplied.)

66. As indicated by the underlining, Mr Bremner placed emphasis on other provisions being applied "in accordance with their ordinary meaning" ([109]) and "in the usual way", rather than being left at large ([111]), and on the reference to conforming interpretation being "applied to give a specifiable and specific meaning to a particular provision".

67. Mr Bremner also relied on the way in which the level of the FNR has been determined in cases involving non-portfolio holdings and corporate chains of companies bearing different nominal rates. In *FII CA2* this court approved the approach of Henderson J ([2014] EWHC 4302 (Ch), [2015] STC 1471) in determining the FNR by applying a weighted average of the FNRs in the jurisdictions where the income had suffered tax, following the approach in s.801 ICTA. In contrast, in *Prudential HC* Henderson J had applied the FNR of the foreign "water's edge" company – that is the top company in the overseas corporate chain – for portfolio holdings, bearing in mind the likely practical impossibility of calculating an alternative: *FII CA2* at [91].

68. Section 801 ICTA was the provision that conferred tax credits, by way of unilateral relief, for tax borne at levels in the corporate chain below the foreign water's edge company. In outline, where dividends had been paid up the chain to the water's edge company, tax borne lower down in the chain on the profits out of which the dividends were paid was imputed to the water's edge company for DTR purposes, as if that company had paid the tax itself. In the *FII* litigation, the claimants sought to adopt the same approach, whereas HMRC put forward a different methodology. In preferring the claimants' approach, Henderson J observed that the question of unlawfulness did not arise in a "legislative vacuum" but instead needed to be considered in the context of a domestic tax system which had to be applied, subject only to what was required to make it compliant with EU law. He went on:

> "The introduction of a credit for tax at the FNR should therefore be implemented in a way which, as far as reasonably possible, reflects and goes with the grain of the existing UK legislative scheme. It seems to me that the claimants' approach respects this principle more closely than the Revenue's, because it adapts and builds on the existing machinery for giving credit for underlying tax. It is not an objection to this approach, in my judgment, that the grant of relief from juridical double taxation of cross-border dividends, of which the s 801 machinery forms part, is not itself required by EU law. The point is, rather, that the machinery formed an integral part of the UK's existing system for taxation of cross-border dividends which has to be made compliant with EU law."

(Henderson J's judgment at [54], reproduced in *FII CA2* at [98] and [113].)

69. In endorsing Henderson J's approach at [54] of his judgment, this court observed at [111] that HMRC's "very broad" alternative approach of disaggregating dividends from different sources into parts carrying different FNRs, went "far wider" than anything previously accepted as a conforming interpretation and was contrary to authority. It introduced a scheme "that is simply not in the legislation". The similarity with the approach put forward by HMRC in *Prudential CA* was noted ([112]).

70. I would make the following points about Mr Bremner's reliance on these parts of *Prudential CA* and *FII CA2*:

    a) In both cases the court was addressing HMRC's proposed adoption of a methodology that had no foundation in the legislation, whereas the taxpayers' approach was based on, or at least much closer to the scheme of, the legislation. References to other provisions applying "in the usual way" (and similar references) should be read with that in mind.

    b) The approach approved by this court in each case was one that reflected, and went with the grain of, the legislation.

    c) Importantly, in both cases the court was faced with an issue that had to be addressed in order to secure compliance with EU law. In *Prudential CA* it was common ground that a credit needed to be granted. The issue was how it should be calculated. In *FII CA2* it was similarly common ground that an FNR credit should be conferred; the issue was, again, how it should be calculated where dividends reflected profits subject to different FNRs.

    d) In contrast, in this case (and as will be seen from the discussion below) the Taxpayers rely on a conforming construction of s.790 ICTA as having an effect, under domestic law, which goes beyond what is required to secure compliance with EU law.

71. Mr Bremner also relied on *Routier v Revenue and Customs Commissioners (No 2)* [2019] UKSC 41, [2021] AC 327 ("*Routier*") at [50]-[54]. In that case the Supreme Court secured the conformity of an inheritance tax provision with EU law by not applying a judicial gloss that had previously been adopted by the House of Lords. Mr Bremner relied on the court's disapproval of this court's alternative approach which involved a "hypothetical restriction" related to the existence of mutual assistance agreements, which did not exist in domestic law.

72. *Routier* takes the argument no further. It is entirely consistent with the points made at [70] above.

Issue 1

73. Although issue 1 is not in dispute, it is helpful to explain it because it provides relevant context for some of the other issues.

74. This issue concerns non-UK source portfolio dividend income included in a return as exempt rather than taxable, either at the time that the return was originally filed or following an amendment to the return that was made within the time allowed (12 months from the filing date, paragraph 15 of Schedule 18 FA 1998). Of course, it is

now apparent that the correct tax treatment would have been to treat the income as taxable but with relief at the FNR: see above.

75. HMRC have correctly accepted that if a closure notice is issued which amends the return to treat the relevant dividends as taxable, the relevant Taxpayer is entitled to claim an FNR credit under s.806(2) ICTA (a provision discussed further below, under issue 6). This is on the basis that:

    a) An FNR credit is in principle available under the unilateral relief regime in s.790 ICTA (under a conforming interpretation).

    b) Under s.790(3), Chapter II is applied as if "arrangements" were in place with the territory in question that provide for relief at the FNR.

    c) Section 806(2) provides for an extended six year time limit where "the amount of any credit given under the arrangements is rendered … insufficient by reason of any adjustment of the amount of any tax payable … in the United Kingdom".

    d) The closure notice adjusts the UK tax payable on the dividend, and this results in the credit given under the arrangements (so far, none) to be insufficient. The causation requirement in s.806(2) (see the reference to "by reason of") is therefore met. The Taxpayer accordingly has a further six years in which to claim the credit.

Issue 2

76. Of all the issues identified by the FTT, issue 2 received most focus in the parties' oral submissions. It is multi-faceted. The basic question is whether a claim for repayment of tax which identified that dividends were mistakenly treated as taxable rather than exempt must be given effect under paragraph 51 of Schedule 18 FA 1998 to generate a repayment of the tax paid on those dividends. Alternatively, the Taxpayers maintain that the claim should be treated as a claim for a DTR credit at the FNR, or failing which that s.114 TMA applies to remedy any defect in the form of the claim. (They also maintain in relation to both this and other issues that overarching principles of EU law in any event require the issue to be determined in their favour, but I have already addressed that point.) The FTT held that the claim was validly made under paragraph 51. The UT disagreed and also determined the other arguments under this issue against the Taxpayers.

77. The principal lead appellant on this issue is SLMM European Equity Fund ("SLMM"). The relevant claims were made in a letter to HMRC dated 15 December 2009 in respect of accounting periods ended between 2004 and 2006, in the following terms:

> "**Claim under para 51 Schedule 18 FA 1998 for relief for a mistake in a return**
> Please treat this letter as a claim to the Commissioners of HM Revenue and Customs under paragraph 51 Schedule 18 FA 1998 for a repayment of tax. The repayment claimed represents excessive tax paid as a result of a mistake in the company tax return for the above period…

> The mistake relates to the erroneous inclusion, within the taxable profits computation, of overseas source dividend receipts shown in the final return as Schedule D Case V income. We consider that the correct application of section 208 ICTA 1988, read in compliance with EU law, (specifically Articles 43 EC and 56 EC dealing with the freedom of establishment and free movement of capital and payments), provides that all overseas source dividends should not be chargeable to UK corporation tax.
>
> The attached appendix identifies the dividend receipts relevant to this claim and the resulting excessive tax paid. We believe that the ECJ ruling in the FII test case (Case C-446/04) supports this position…
>
> With reference to paragraph 51(3) Schedule 18 FA 1998 and the requirement to consider prevailing practice, we believe that this provision must again be read taking into consideration the supremacy of European law. Whilst it may be the case that, at the time the return was prepared, overseas source dividends were typically included in the computation of taxable profits, it also appears that the UK rules requiring the taxation of overseas source dividends (whilst exempting UK source dividends) were in fact illegal under European law. We consider that prevailing practice is relevant only in the context of UK rules which are indeed lawful and do not breach European law. Therefore, on the basis that the UK rules are illegal taking into account European law, we consider that the prevailing practice provision should not apply so as to deny the claim."

78. HMRC acknowledged receipt and stated that they would enquire into the claims (as paragraph 51(2) provided). On 21 April 2020 HMRC rejected the claims on the basis that the dividends had correctly been treated as taxable.

79. This is of course correct, in that the dividends were taxable and not exempt. But we also now know that a tax credit at the FNR was available in respect of them. It is uncontroversial that the grant of a credit at the FNR would have had a similar effect to exemption in terms of the quantum of tax overpaid.

Were there valid claims under paragraph 51 of Schedule 18 FA 1998?

80. Paragraph 51, as in force up to 31 March 2010, is set out in the Appendix. The most critical parts are as follows:

> "(1) A company which believes it has paid tax under an assessment which was excessive by reason of some mistake in a return may make a claim for relief…
>
> (2) On receiving the claim the Board shall enquire into the matter and give by way of repayment such relief in respect of the mistake as is reasonable and just.
>
> (3) No relief shall be given under this paragraph —
>
> …
>
> (b) in respect of a mistake in a claim or election which is included in the return."

81. Mr Bremner submitted that tax paid was excessive because of a mistake in the returns. The mistake was to treat the tax as lawfully due when it was not. There was also no "mistake in a claim… included in the return" within paragraph 51(3)(b) because no claim had been made at all in the return. He contrasted the language of the provisions that replaced paragraph 51 with effect from 1 April 2010, which include a specific exclusion for a mistake of failing to make a claim, as well as a mistake in a claim (paragraph 51A(2)(a) and (b) of the current version of Schedule 18 FA 1998).

82. I have come to the conclusion that HMRC are correct that, on a proper construction of paragraph 51 in its statutory context, there was no "mistake in a return". Since no mistake was made within paragraph 51(1), HMRC are not obliged to give relief "in respect of the mistake" as provided in paragraph 51(2).

83. The reason that there was no mistake in the return is that the dividends were correctly treated as taxable. In the absence of a valid claim for an FNR credit, the tax paid was therefore not excessive. What was missing from the return was a claim for that credit, but without such a claim no credit was allowable and the return was accurate.

84. This makes sense of the fact that paragraph 51(3)(b) is limited to excluding mistakes made in claims included in a return. There was simply no need for it to have gone further and cover claims that were not included in the return at all. Mr Bremner referred to paragraph 57(2) of Schedule 18, which requires claims to be included in a return if they can be so included. But that does not assist. It simply has the effect that, if a taxpayer wants to make such a claim, they need to include it in the return.

85. The conclusion I have reached is strongly supported by the broader statutory context. Provisions that permit claims to be made may well contain their own time limits. It so happens that at the relevant time the normal time limit for DTR claims was consistent with the time limit for claims under paragraph 51 (six years after the end of the accounting period) but that is far from universal. For example, the basic time limit for group relief claims is 12 months after the filing date for the claimant's return: paragraph 74 of Schedule 18 FA 1998.

86. If the Taxpayers' argument were correct then, where a mistake took the form of failing to make a claim at all, shorter time limits for claims could be circumvented by a mistake-based claim under paragraph 51 at any time up to six years after the end of the accounting period. In contrast, where a claim had been made but in a mistaken amount then the effect of paragraph 56 of Schedule 18 FA 1998 would be that a supplementary claim could only be made within the original time allowed for the claim. (Paragraph 56, set out in the Appendix, permits "a supplementary claim… within the time allowed for making the original claim" where a claim has been made which contains a mistake.)

87. Thus, if the Taxpayers' argument were correct then a claim that was mistakenly made in the amount of (say) £1 rather than £1m could not be corrected outside the original time limit for a claim because paragraph 56 would preclude it, whereas a failure to make any claim to any part of the £1m could be corrected if the time limit under paragraph 51 had not expired. That would make little sense. Rather, paragraph 56 provides a clear indication that Parliament did not intend claim time limits to be circumvented.

88. Although the point was rightly made that later statutory provisions cannot be used as an aid to interpreting earlier ones, it is worth observing that the language relied on by Mr Bremner in what is now paragraph 51A must be read in the context of the rewriting of paragraph 51 with effect from April 2010. Rather than referring to a "mistake in a return", the revised paragraph 51 applies where "a person has paid an amount by way of tax but believes that the tax was not due". That is obviously a broader concept than a mistake in a return. As Mr Ewart submitted, paragraph 51 is now a more general overpayment provision, not one based on mistake. It makes sense that paragraph 51A would therefore make specific provision for a failure to make a claim.

89. This last point is reflected in HMRC's "Business Brief" dated 3 June 2010. That explained that "error or mistake relief" was replaced by "overpayment relief" with effect from 1 April 2010. It also explained that HMRC would not seek to apply the "practice generally prevailing" exception (in paragraph 51(3)(a) of the pre-2010 version) to refuse claims relating to tax paid in breach of EU law, but that other conditions "such as time limits" would still need to be met.

90. The Taxpayers gain no assistance from the Business Brief. Mr Bremner suggested that it amounted to an indication that paragraph 51 was the appropriate remedy for claims relying on breaches of EU law. But even if that was correct (which I do not consider it is) it can have no effect on the proper construction of the legislation.

91. Mr Bremner submitted that the UT's conclusion that paragraph 51 was not engaged did not give proper weight to the fact that the UK provisions breached EU law. Excessive tax was unlawfully levied precisely because no FNR credit existed to be claimed, and a conforming interpretation did not affect that. Mr Bremner relied on *FII SC1* at [176] where (after the passage cited at [42] above) Lord Sumption said this:

> "But it does not follow that there was not, at the time, an unlawful requirement to pay the tax. It simply means that the unlawfulness consists in the exaction of the tax by the Inland Revenue, in accordance with a non-conforming interpretation of what must (on this hypothesis) be deemed to be a conforming statute. This is so, notwithstanding that the tax may have been paid without anything in the nature of a formal demand by the revenue. The rule as the House of Lords formulated it in *Woolwich Equitable* is in large measure a response to realities of the relationship between the state and the citizen in the area of tax. The fact that as a matter of strict legal doctrine a statute turns out always to have meant something different from what it appeared to say is irrelevant to the realities of power if it was plain at the relevant time that the tax authorities would enforce the law as it then appeared to be. Strictly speaking, in *Woolwich Equitable* itself there were no unlawful regulations, because, being ultra vires the enabling Act, they were and always had been a nullity. But that did not stop the Woolwich from recovering."

92. I do not consider that this assists the Taxpayers. What Lord Sumption was addressing was the point that the retrospective effect of a conforming interpretation did not prevent a *Woolwich* claim on the basis of unlawful exaction of tax. The same applies to the comments of Lord Walker to a similar effect, at [82]-[83]. They do not assist in deciding whether a valid claim was made under paragraph 51.

93. Mr Bremner further submitted that the analysis should not differ depending on whether a claim in mistake was made in common law or under a statutory regime. On either basis the tax had been mistakenly treated as lawfully due when it was not. Mr Bremner relied on *Deutsche Morgan Grenfell Group plc v Inland Revenue Commissioners* [2006] UKHL 49, [2007] 1 AC 558 ("*DMG*") which (like *Metallgesellschaft*) considered the group income election mechanism, but in the context of the nature of the mistake made when ACT was paid without an attempt to make such an election. I considered that issue in some detail in *British Telecommunications plc v Revenue and Customs Commissioners* [2023] EWCA Civ 1412, [2024] STC 23 at [107]-[115], concluding that the majority of the House of Lords in *DMG* had decided that the substance of the mistake related to whether DMG was liable for ACT, rather than the application or otherwise of the group income election provisions.

94. I therefore agree with Mr Bremner's submission that the House of Lords decided that tax was unlawfully levied and paid by mistake, even though under UK law such ACT was properly due in the absence of a group income election. However, I do not agree that this assists in demonstrating that paragraph 51 applies here. That question is a different one which depends on the correct statutory construction of paragraph 51 and its application to the facts.

95. As I have said, SLMM's return accurately included the dividends as taxable income. There was no mistake there. I can accept that SLMM made a mistake in failing to appreciate that a claim was available for a DTR credit at the FNR, and that as a result it filed its return and paid the tax that was due on the mistaken understanding that no such claim was possible. That mistake may have enabled SLMM to bring a common law claim in restitution on the basis of unlawfully levied tax (because it paid the tax on the basis that the statutory regime requiring it to do so was lawful). However, it does not follow that there was a "mistake <u>in a return</u>" for the purposes of paragraph 51. It is also true that when SLMM wrote in December 2009 it made a further mistake by relying on an exemption as the basis for recovering the tax paid. But that mistake is on any basis irrelevant to the analysis under paragraph 51, since the statutory question is whether there was a mistake in the return.

Can the claims be treated as claims for a DTR credit?

96. Mr Bremner submitted in the alternative that the December 2009 letter should be treated as a claim to a DTR credit at the FNR. Such a claim was equivalent to the exemption that had been claimed. Mr Bremner pointed to the fact that in *FII CJEU2* at [61] the CJEU analysed the UK domestic exemption as one that "resembles" the grant of a credit at the nominal rate. The FNR credit was invented by the CJEU (at the suggestion of the Commission) to "mimic" the domestic exemption, and its underlying purpose was the same. The UK courts could have achieved compliance with EU law by a conforming interpretation of s.208 ICTA (the domestic exemption provision). The denial of a remedy would be a triumph of form over substance, and the only sensible approach was that Taxpayers should be taken as having asserted their rights to be taxed in accordance with EU law, that is net of the appropriate credit. The claims should have been construed in accordance with their substance, namely that the Taxpayers were (as HMRC were well aware) vindicating their EU law rights.

97. I do not accept these submissions. First, exemption and taxation with a credit at the FNR are, while sufficiently "equivalent" to comply with EU law, not the same. Not

only will there be additional tax to pay if the FNR is lower than the domestic tax rate, but as the CJEU explicitly recognised in *FII CJEU2* at [64], differences in the tax base could also lead to a less favourable result than where dividends are exempt. In *Prudential SC* the Supreme Court recognised that it was also possible that credit at the FNR could give a better result than exemption: [29]-[31].

98. Secondly, the CJEU has not decided that EU law required foreign dividends to be treated as exempt to any extent. Rather, it decided that a system under which foreign dividends were taxable, but with the benefit of a tax credit, was lawful, subject to the provisos explained in *FII CJEU1* and *FII CJEU2* (as to which see further [158] to [160] below). Mr Bremner's suggestion that the UK courts could have adopted a conforming interpretation of s.208 rather than s.790 is unrealistic.

99. Thirdly, it is common ground that DTR must be claimed. The procedural mechanisms for doing so are a matter of UK law, provided they do not breach the principles of equivalence or effectiveness: *Metallgesellschaft* at [85], set out at [37] above. As already discussed, there is no such breach.

100. Fourthly (and as discussed in relation to issue 3 at [127] below), while there are no particular formalities for a claim to a DTR credit, it must as a minimum convey to HMRC the nature of what is being claimed (compare, in a different context, Lord Oliver's comments about the then limited requirements for a valid group relief claim in *Gallic Leasing Ltd v Coburn (Inspector of Taxes)* [1991] 1 WLR 1399, [1991] STC 699, especially at p.1406E-G). As the UT indicated at [103], it is necessary to consider how a reasonable officer of HMRC would understand the letter. The answer to that is obvious. It would be read as a claim to repayment of tax on the basis of an exemption, not a claim to a DTR credit which would (if validly made) entitle the claimant to a repayment of tax. The fact that the practical effect of an exemption in terms of the tax repayable could well be the same as a credit at the FNR makes no difference to the nature of the claim.

101. The Taxpayers gain no assistance on this point from the factual context at the time. By December 2009, when the letter was sent, *FII CJEU1* had determined that the failure to grant underlying tax relief on dividends from portfolio holdings was in breach of EU law. It was far from apparent that the solution was an exemption rather than the provision of a credit in compliance with EU law, as *FII CJEU1* indicated. There is therefore no reason based on the broader context why HMRC should have understood the letter as a claim for a credit rather than an exemption, or even as a claim for a credit in the alternative (a claim that I note could have been made).

102. Mr Bremner's written submissions suggested that the Taxpayers' arguments on this point were supported by *Trustees of the BT Pension Scheme v Revenue and Customs Commissioners* [2014] EWCA Civ 23, [2014] STC 1156 at [28]-[30]; and by *Meilicke v Finanzamt Bonn-Innenstadt* (Case C-262/09) [2013] STC 1494 at [46]-[47]. In the *BT* case Lewison LJ explicitly rejected both an argument that a claim to the tax exemption available to pension funds could be regarded as a claim to tax credits on foreign dividends, and, at [30], an argument that filing annual returns which had not in fact included any claim to tax credits should be treated as amounting to such a claim. I agree with the UT that this does not assist the Taxpayers. While Lewison LJ referred at [29] to the fact that the exemption in question did not turn on the particular form of income,

whereas a claim for tax credits would, he had no need to consider whether a claim for exemption could be treated as a claim for a credit in other circumstances.

103. *Meilicke* concerned tax credits in respect of cross-border dividends paid to a German resident. One issue concerned the form and detail of the evidence needed to support a claim. The CJEU said nothing that supports the Taxpayers' case that the type of claim in question need not be articulated.

Does s.114 TMA cure the defect in the claim?

104. Section 114(1) TMA provides:

> "An assessment or determination, warrant or other proceeding which purports to be made in pursuance of any provision of the Taxes Acts shall not be quashed, or deemed to be void or voidable, for want of form, or be affected by reason of a mistake, defect or omission therein, if the same is in substance and effect in conformity with or according to the intent and meaning of the Taxes Acts, and if the person or property charged or intended to be charged or affected thereby is designated therein according to common intent and understanding."

105. It is generally accepted that the words "other proceeding" are shorthand for the list in s.113(3) TMA (set out in the Appendix), which includes "every… document required to be used in assessing, charging, collecting and levying tax": *Archer and Donaldson v Revenue and Customs Commissioners* [2016] EWCA Civ 761, [2018] STC 38 ("*Archer*") at [34].

106. The Taxpayers maintain that s.114(1) can apply to cure any "mistake, defect or omission" in the December 2009 letter, such that it can be treated as a claim to DTR relief. Mr Bremner submitted that the UT was wrong to have decided that s.114(1) was inapplicable, because (contrary to what the UT decided at [121]) the mistake was neither "gross" nor "fundamental" and it could not be said that the claim would have misled a reasonable officer. There was no question of an officer being misled. Rather, SLMM was clearly asserting its EU law rights.

107. Ms Belgrano made submissions on this issue for HMRC. She submitted that the Taxpayers' argument raises four questions. The first is whether s.114(1) can have any application at all to "taxpayer documents", meaning documents produced by a taxpayer, as opposed to documents produced by HMRC. HMRC maintain that it does not. The second is whether there was any "mistake" (or "defect or omission"). The third is whether any mistake, defect or omission was "too fundamental or gross" to fall within s.114(1), and the fourth is whether a reasonable officer of HMRC would have been misled.

108. Rather surprisingly given the longevity not only of s.114 but its statutory predecessors, the first of these questions has never been resolved: see *GLL BVK Internationaler Immobilien Spezialfonds v Revenue and Customs Commissioners* [2019] UKUT 17 (TCC), [2019] STC 951 ("*GLL*") at [39]. It is not necessary for us to decide it and, as the Upper Tribunal did in *GLL*, I consider it best left to a case where it matters. I would also observe that even if some taxpayer documents may fall within s.114(1), there would be a further question as to whether the document in question did so as being one

"required to be used in assessing, charging, collecting and levying tax": cf. *GLL* at [40], as opposed to being an after-the-event claim for a repayment.

109. The scope of s.114(1) was considered in *Revenue and Customs Commissioners v Donaldson* [2016] EWCA Civ 761, [2016] STC 2511 ("*Donaldson*"). As Lewison LJ explained in *Archer* at [35], in *Donaldson* Lord Dyson MR endorsed an earlier observation of Henderson J that some mistakes may be "too fundamental or gross" to fall within s.114(1), but:

> "Lord Dyson did not approach the question from some a priori categorisation of what kind of mistakes were fundamental or gross. Instead he concentrated on the nature and effect of the omission in the particular circumstances of the case."

110. In *Donaldson* this court held that the omission in question, which was a failure to state the period in a notice of assessment, was "one of form and not substance", and that "Mr Donaldson was not misled or confused" ([29]). Section 114(1) was held to apply.

111. In *Archer*, Lewison LJ observed at [36] that, contrary to the suggestion that it was relevant whether Mr Donaldson himself was misled, the test must be an objective one, albeit that the notional reader must be taken to be equipped with the knowledge that the taxpayer and his advisers had. That must be right. The error considered in *Archer*, which related to defects in closure notices in failing to state the tax owed, was (like the one in *Donaldson*) a matter of form, because on the facts Mr Archer "can have been in no doubt what he owed HMRC" ([39]).

112. Rather than breaking down the issue in the way Ms Belgrano submitted through her second to fourth questions, I would adopt a more holistic approach. This is because I do not consider that the points she makes can really be separated out as she suggested, and also her questions 3 and 4 are not posed in a way that fully reflects the case law.

113. In my view SLMM's claim for repayment of tax on the basis that dividends should have been treated as exempt cannot be regarded as a claim affected by a mistake, defect or omission in the sense required by s.114(1). SLMM intended to claim exactly what it did claim. There was no error in the claim it actually made, which conveyed exactly what SLMM intended. Rather, as events have turned out it would have preferred it if it had made a different claim. The fact that it now has a better understanding of the law does not mean that the original claim was affected by a mistake, defect or omission within s.114(1).

114. This is so even though it could be said that SLMM had a mistaken understanding of the law at the time the letter was sent. That mistake affected its decision as to <u>what</u> to claim. It was not a mistake (or defect or omission) which affected the claim that it actually made, and intended to make. Section 114(1) cures certain defects affecting documents that do particular things, such as assess tax. If a taxpayer's claim can fall within s.114(1) at all it could, at most, correct an error in the claim actually intended to be made. I agree with Ms Belgrano that there is an analogy with *Bath and West Property v Thomas* [1977] 1 WLR 1423, where an assessment to tax on the basis that the profits in question were non-trading profits could not be treated under a predecessor of s.114 as an assessment on profits of a trade under Schedule D Case I, because there

had been no (relevant) mistake. The inspector had made the assessment that he intended to make: see Walton J's judgment at p.1429B.

115. This point overlaps heavily with Lord Dyson's endorsement of the suggestion that some mistakes may be "too fundamental or gross" to fall within s.114(1). That is not a statutory test and it should not be treated as such. As Lewison LJ observed, what is necessary is a consideration of all the circumstances. Errors of form may be cured by s.114(1). Errors of substance would not be because the document would not then be "in substance and effect in conformity with or according to the intent and meaning of the Taxes Acts". In this case the failure to claim a DTR credit is on any basis an error of substance rather than of form: SLMM simply made no such claim. There is perhaps an analogy with the error of issuing an assessment for the wrong tax year considered by this court in *Baylis v Gregory* [1987] STC 297, where s.114(1) was held not to assist the Inland Revenue in allowing the assessment to be read as if it had been issued for the correct tax year, even though in that case no one would have been misled.

116. Similarly, the references in *Donaldson* and *Archer* to not being misled are not part of the statutory test. Rather, the question whether a recipient, with knowledge of the circumstances, would be misled is a relevant factor to consider in determining whether an error is in fact one of form rather than substance, such that it can be cured by s.114(1). To the extent that it is relevant here, a reasonable officer of HMRC would have understood the claim for what it was, that is for a repayment of tax on the basis that the dividends were exempt.

117. Accordingly, s.114(1) TMA cannot assist the Taxpayers.

Issue 3

118. Issue 3 concerns dividends originally returned as taxable but with a claim for a DTR credit in respect of withholding tax, in respect of a period for which an enquiry was opened. The question is whether HMRC should also have allowed a credit at the FNR when closing the enquiry.

119. The lead appellant for this issue is Schroder Institutional Growth Fund ("SIG"), in respect of its accounting period ended 30 June 2004 ("AP 2004"). It originally filed its return on the basis that all its foreign dividends from portfolio holdings were taxable, and claimed DTR credits for withholding tax suffered on those dividends. The enquiry was opened because it made an in-time amendment to its return to treat the EU source dividends as exempt: FTT decision at [90(42)-(46)]. The resolution of issue 1 has the effect that credit at the FNR is available in respect of the EU-source dividends. This issue therefore concerns the non-EU source dividends. SIG's case is that the claim it made to DTR in its return is sufficient to extend to the FNR credit to which it now understands that it is entitled in respect of those dividends. The UT agreed with the FTT that it did.

120. I respectfully disagree with the both the UT and the FTT on this issue.

121. It is helpful to start with the facts. SIG's tax return for AP 2004 included a completed box 61 for "Double taxation relief" of £2,022.94. The margin notes instructed taxpayers to "Put an 'X' in box 61A if box 61 includes an underlying rate relief claim". SIG left box 61A (which was adjacent to box 61) blank. The appended calculations showed how

the £2,022.94 was calculated, based on the withholding tax suffered on individual dividends, and eliminating withholding tax charged in excess of the rate permitted under the relevant double tax treaty.

122. Two points immediately arise. First, and most fundamentally, it was therefore clear from the face of the return that SIG was not seeking to claim underlying tax relief. In fact, it was expressly eschewed. Secondly, withholding tax may or may not be charged on a dividend, and indeed a number of dividends shown in the appended calculations did not attract withholding tax. The fact that the Taxpayers' approach on issue 3 appears to depend on the unrelated happenstance of whether withholding tax was charged for which a credit could be claimed raises its own question mark as to its correctness.

123. It is true that the legislation says relatively little about the mechanics and content of claims to DTR. As already indicated, the requirement for a claim derives from s.788(6), the effective application of that provision to unilateral relief by s.790(3), and the time limits in s.806 ICTA. Their effect is to require a claim for relief by way of credit to be made to HMRC within the period specified. The effect of paragraph 54 of Schedule 18 FA 1998 is that the claim must be quantified, but the quantification need not be accurate: *Class 8* at [98]-[101].

124. However, what is required is a claim for the relief in question. A claim for a credit at the FNR, or indeed for actual underlying tax, is a fundamentally different kind of claim to a claim for a withholding tax credit. This is not a point about a difference between relief available under a treaty and unilateral relief, or (for example) about whether an incorrect statutory reference is included in a claim. Those are just the legislative routes by which credit is available. Rather, the point is about <u>what</u> relief is being claimed. There is a material difference between relief from juridical double taxation in the form of foreign tax actually charged on the same income, and a relief conferred to prevent economic double taxation of the profits out of which the dividend was paid. In the case of an FNR credit it is also a relief that is available irrespective of whether tax was actually borne. A claim for credit in respect of withholding tax is a claim in respect of that tax, and in my view cannot be construed as a claim to something else, being in this case not only of a different amount but of an entirely different nature.

125. The Taxpayers' position is that what the legislation contemplates is a single claim to DTR relief, which would encompass any kind of credit that is in fact available. They point out that the legislation does not distinguish between different types of claim to DTR credits. The fact that the quantification of the initial claim was wrong is not problematic (so the argument goes), because HMRC must resolve that when closing the enquiry with an accurate quantification, based on a correct view of the law.

126. However, it does not follow from the fact that the legislation says very little about the format of claims that this argument is correct. The legislation grants credit relief for specific types of tax, whether by treaty (s.788(4)) or unilaterally. In the context of unilateral relief, credit is granted either for tax charged directly on a dividend (s.790(5)(c)(i)) or if certain conditions are met for tax paid on the profits of the dividend-paying company (s.790(5)(c)(ii) and (6)). Outside the context of an EU law breach, I do not consider that it would be seriously arguable that a claim expressed to be for the former could later be interpreted as extending to a claim for the latter, even though both are

claims for a DTR credit. They are claims to credits for different things. The taxpayer would have claimed one but not the other.

127. It seems to me that, while it need not be quantified correctly, a claim to HMRC must indicate what is being claimed, not least so that HMRC are able to determine whether or not to accept it without enquiry. If a taxpayer chooses to claim credit for withholding tax, and as in SIG's case makes it clear that that (alone) is what it is claiming, that cannot sensibly be treated as a claim that extends to anything else. It is nothing to the point that a claim for either a withholding tax credit or relief at the FNR would be a claim for a DTR credit. There is also nothing in the process of conforming interpretation that requires a different approach. Under s.806(1) ICTA, SIG had six years after the end of the accounting period to claim an FNR credit.

128. SIG's position is not assisted by reliance on the conclusion in *Metallgesellschaft* that HMRC could not deny a claim simply because the taxpayers had not applied for a tax advantage which the domestic law denied them, in the form in that case of a group income election that would have permitted dividends to be paid without ACT: see [49] above. There was nothing to prevent SIG claiming an FNR credit within the period permitted by law.

129. I would also observe that the Taxpayers' position on this point appears not to be limited to an argument that if credit for withholding tax is claimed in respect of a particular dividend, then an FNR credit should be treated as claimed in relation to that dividend. Rather, the argument seems to extend to saying that the claim made by SIG amounts to a general claim for a DTR credit that extends to all foreign income (or at least foreign dividend income), with s.806 engaged simply on an accounting period by accounting period basis. HMRC would then be obliged, on closing an enquiry, to allow credit for all DTR that could legitimately have been claimed on any income, even though the actual claim was not in fact contemplated by either party, and could not reasonably be understood, as extending beyond a claim to withholding tax credits on specified dividends.

130. An echo of this can be seen with issue 7, discussed below, which the FTT and UT correctly determined in favour of HMRC. In my view the argument is wrong in its more limited form in respect of a particular dividend, but the more obvious incorrectness of the broader argument helps to illustrate the point that the relief claimed must be articulated. To answer a specific point in respect of that broader argument, the reference in s.806(1) to a claim for a credit in respect of "any income" is not a reference to all income, or even all foreign income. It is clearly a reference to the item of income in respect of which credit is claimed. The provision needs to be read in context, in particular ss.788, 790 (which focuses on the dividend in question, see s.790(5)(c) and (6)) and s.797 (which caps relief at the corporation tax attributable to the income in question).

131. In dismissing HMRC's arguments on this issue the UT referred at [153] and [154] to the possibility of Taxpayers making supplementary claims for additional DTR. I agree that there is no difficulty in supplementary claims being made for additional DTR if they are made within the time allowed by s.806: see paragraph 56 of Schedule 18 FA 1998. However, what SIG is seeking to do is to expand its claim for withholding tax credit into a claim for a credit at the FNR. Even if this could be characterised as a supplementary claim, it is well outside the time limit.

Issue 4

132. This issue can be dealt with very briefly. It is whether, if reliance on other domestic provisions is not possible, any of the Taxpayers' claims can be validated by reliance on Schedule 1A to the TMA.

133. The FTT and UT correctly decided this issue in favour of HMRC. Schedule 1A is an entirely procedural provision. It is applied for corporation tax purposes by paragraphs 57 and 58 of Schedule 18 FA 1998 to certain claims which are made outside a return (for example, because the time for amending the return has expired) and by paragraph 59 of Schedule 18 to other claims. Importantly, it confers no right to make a claim, nor does it have the effect that a claim for one thing can be deemed to be a claim for something else. It simply provides procedural mechanisms for making, enquiring into and giving effect to claims permitted by the legislation. Mr Bremner's submission that it should be construed as conferring a more substantive right in order to comply with EU law fails for the reasons already discussed.

Issue 5

134. Issue 5 relates to purported amendments to tax returns which sought to amend the tax treatment of dividends returned as taxable to exempt. The attempted amendments were made outside the time limit for doing so in paragraph 15 of Schedule 18 FA 1998 (12 months from the filing date) but within the six year time limit in s.806(1) ICTA.

135. The lead appellant is Fidelity UK Index Fund ("Fidelity"). We were shown a letter dated 25 February 2013 in which its advisers stated that they "would like to amend the tax filing positions for the 2009 and 2010 accounting periods… under paragraph 31, Schedule 18 FA 1998". (Paragraph 31 deals with amendments during an enquiry, see [187] below.) The letter went on:

> "The original tax computations and returns were submitted to HMRC on the basis that third country dividends (i.e. non-EU dividends) were brought into charge to tax. The amendment is to exempt third country dividends for the relevant periods above.
>
> We have enclosed details of the additional amounts of UK corporation tax repayable…as a result of the amendment…"

136. Fidelity says that this letter should be treated as a claim for a DTR credit at the FNR, or alternatively as a claim under paragraph 51 Schedule 18 FA 1998.

137. The resolution of this issue essentially follows issue 2. As an initial point, the letter could not take effect as an amendment to the return because it was sent after the time limit in paragraph 15. At the most it could be treated as a claim for repayment of tax on the grounds that the dividends had wrongly been treated as taxable when they should have been exempt. For the reasons given in relation to issue 2 at [97]-[103], the letter cannot be regarded as a claim for a DTR credit. Indeed, as to the contextual point at [101] about the stage the litigation had reached, by the time this letter was sent in February 2013 *FII CJEU2* had decided that a credit at the FNR was available for non-portfolio holdings, and *Prudential HC*, in which the claimants would submit that the

same credit should be available for portfolio dividends, was due to be heard just a few months later, in July 2013.

138. Similarly, Fidelity is not assisted by paragraph 51. In short, there was no "mistake in a return". The dividends were correctly treated as taxable and, in the absence of a valid claim for an FNR credit, the tax paid was not excessive: see [82]-[95] above. Section 114(1) TMA can also not assist for the reasons given under issue 2.

Issue 6

139. Issue 6 is described as "when does s 806(2) ICTA apply". Section 806(2) substantially extends the normal time limit for claiming DTR credits in s.806(1) in specified circumstances, as follows:

> "(2) Where the amount of any credit given under the arrangements is rendered excessive or insufficient by reason of any adjustment of the amount of any tax payable either in the United Kingdom or under the laws of any other territory, nothing in the Tax Acts limiting the time for the making of assessments or claims for relief shall apply to any assessment or claim to which the adjustment gives rise, being an assessment or claim made not later than six years from the time when all such assessments, adjustments and other determinations have been made, whether in the United Kingdom or elsewhere, as are material in determining whether any and if so what credit falls to be given."

140. As can be seen from this, key requirements are: (a) an adjustment to tax payable either in this jurisdiction or elsewhere; (b) credit given under arrangements "is rendered excessive or insufficient"; and (c) that excessiveness or insufficiency is caused by (is "by reason of") the adjustment. Where that situation arises, time is extended by a further six years following the relevant determination.

141. The point in dispute is illustrated by the facts of the principal lead appeal on this issue, brought by Avon Insurance plc. Avon Insurance included foreign dividends from portfolio holdings in its returns for periods between 1997 and 2003, claiming credit only for withholding tax. In November 2018, following the decision in *Prudential SC* which finally confirmed that such claims could be made in respect of portfolio holdings, it claimed additional DTR by way of FNR credit. HMRC maintain that the claims are out of time.

142. In short, Avon Insurance's position is that the effect of *Prudential SC* (or, by way of fallback, *FII CJEU2*) was to create an adjustment to "tax payable … under the laws of any other territory" (in the form of tax at the FNR) which resulted in the amount of credit allowed in the United Kingdom being insufficient. In a little more detail, Mr Bremner relied on the reference to "tax payable" in s.790(1) and submitted that the effect of the conforming interpretation required by EU law was to treat the FNR credit as "tax payable" for the purposes of all other provisions in the DTR code, including s.806(2).

143. I cannot accept this. The conforming interpretation of s.790 is one designed to secure compliance with EU law, no more and no less. By definition, an FNR credit does not reflect actual tax payable. In order to secure compliance with EU law, s.790 must be

read as granting a credit at the FNR. It does not follow that tax at the FNR must then be treated as "tax payable" for all purposes of the DTR rules, whether or not that is required to make them compliant. Rather, each provision must be examined.

144. Starting with s.790 itself, it will be observed that s.790(1) is an introductory provision. The operative provisions that confer relief are s.790(4)-(6). These provisions are the obvious candidate for a conforming interpretation that confers credit at the FNR, including where the dividend is paid on a portfolio holding (contrary to the restriction to 10% plus holdings in s.790(6)).

145. I accept that, to give proper effect to the conforming interpretation of s.790, it must follow that at least some other provisions must be read with the modified version of s.790 in mind. For example, when applying the grossing up provision in s.795(2) (as to which see further below under issues 10 and C) or the limit on credit to the UK tax on the dividend in s.797, credit at the FNR would need to be treated as "foreign tax" as defined in s.792(1).

146. However, in my view there is no such requirement in relation to s.806(2), and indeed the effect of the Taxpayers' argument would be to provide a wholly unwarranted extension of time, contrary to the purpose of that provision. Rather than allowing an extension of time to claim a credit to take account of an adjustment to UK or foreign tax, the Taxpayers seek to rely on the materialisation of the <u>credit itself</u> (via the decision in *Prudential SC*) as creating the relevant adjustment to tax, so allowing it to make a claim only after it became clear that such a claim could validly be made.

147. As Mr Ewart submitted, s.806(2) applies where there has been some adjustment to tax in the UK or foreign jurisdiction. For example, UK tax on a dividend might increase because domestic reliefs that were previously assumed to be available turn out not to be, or the foreign tax payable on the profits out of which the dividend was paid could increase as a result of a challenge by a foreign tax authority. In either case this may have the effect of altering the amount of DTR credit available (in these examples, potentially increasing it). Section 806(2) allows additional time to claim DTR credits in those situations. (Conversely, where available DTR is reduced, HMRC also has longer to assess additional UK tax.)

148. In contrast, in this case the "adjustment" in tax on which the Taxpayers rely is no more than a realisation, following *Prudential SC*, that additional DTR credits were available – and indeed had always been available under the law as conformingly construed – in the form of relief at the FNR. That is not the sort of "adjustment" at which s.806(2) is aimed. While I accept Mr Bremner's submission that an adjustment to tax following a dispute with a tax authority may well have the retrospective effect of confirming what the "correct" amount of tax always was, it is no abuse of language to say that in such a case there is an adjustment to tax which results in the credit being insufficient or excessive. That is not so here.

149. Even if tax at the FNR could be treated as "tax payable", and even if the additional objection that it would not be tax payable "under the laws of any other territory" could be overcome, it strains the language and sense of s.806(2) to say that the credit is insufficient "by reason of" an adjustment to that tax. Rather, it would if anything be the other way round. The effect of granting credit at the FNR would be to adjust the <u>credit</u>, which on the Taxpayers' approach leads to an adjustment to "tax payable", whereas

what the provision requires is an adjustment to tax which results in the credit becoming insufficient. In any event, and more realistically, no distinction can sensibly be drawn between the credit and what Mr Bremner says is "tax payable", because that (notional) tax has no existence independent of the availability of the credit: it would be simply a function or consequence of it. The argument is circular.

150. Mr Bremner had an alternative argument that relied on computational provisions in paragraph 8 of Schedule 18 FA 1998, which require "double taxation relief under section 788 or 790" to be deducted when calculating tax payable. That adds nothing, because it assumes that relief has been validly claimed.

Issue 7

151. This issue arises where a closure notice brought foreign dividend income previously treated as exempt into charge to tax. As agreed under issue 1, the extended time limit in s.806(2) then applies to allow an FNR credit to be claimed. The question raised by issue 7 is whether an extended time limit is available only in respect of the income previously returned as exempt (or the subject of an in-time amendment to that effect) as determined by issue 1, or whether s.806(2) also applies in respect of other dividends which were (and remained) returned as taxable.

152. As with issue 3, the lead appellant is SIG in respect of its accounting period ending 30 June 2004. As already explained (see [119] above) SIG originally filed its return for that period on the basis that all its foreign dividends from portfolio holdings were taxable, but it made an in-time amendment to treat EU source dividends as exempt. SIG filed a claim for a tax credit at the FNR on non-EU source dividends on 24 March 2015. HMRC has refused that claim as out of time.

153. I agree with the UT that dividends need to be considered individually. A claim for DTR is a claim to a particular tax credit. Such credits are available on a dividend by dividend basis. It is necessary to consider the dividend in question to determine what relief may be available, whether by way of withholding tax credit or underlying tax relief, and either for actual tax paid or at the FNR. As discussed in relation to issue 3, withholding tax and underlying tax relief in respect of a dividend are also different in nature.

154. Where s.806(2) has applied to income previously treated as exempt, that is because the closure notice has adjusted the UK tax payable on the dividend, resulting in the credit given in respect of it being insufficient ([75] above). So far as other (non-EU source) dividends are concerned, the available credit is unaffected by the adjustment. The closure notice made no alteration to the tax due on those dividends. Even if the credit in respect of non-EU source dividends could be regarded as insufficient, that is not because of ("by reason of") any adjustment to tax payable. It is because of a failure to claim a DTR credit at the FNR within the time available. As the UT said at [206], the required causal connection is absent.

Issues 8, B and E

155. Issue 8 relates to the eligible unrelieved foreign tax ("EUFT") regime. It raises the question whether credit at the FNR can generate EUFT for which relief is available. Issue E also concerns EUFT.

156. Issue B concerns DTR credits at the FNR which exceed the amount of UK corporation tax due on the dividend, and asks whether excess credits can be set against corporation tax on other income. It is convenient to consider issue B first, because it most clearly illustrates a fundamental point that is also raised by issues 8 and E.

157. In short, the answer to issue B is no, because it would go beyond what is required to remedy the breach of EU law, contrary to the principles discussed at [56] to [72] above. The UT therefore correctly reversed the FTT's decision on this issue.

158. The CJEU expressed the principle as follows in *FII CJEU1*:

> "48. … Community law does not, in principle, prohibit a member state from avoiding the imposition of a series of charges to tax on dividends received by a resident company by applying rules which exempt those dividends from tax when they are paid by a resident company, while preventing, through an imputation system, those dividends from being liable to a series of charges to tax when they are paid by a non-resident company.
>
> 49. In order for the application of an imputation system to be compatible with Community law in such a situation, it is necessary, first of all, that the foreign-sourced dividends are not subject in that member state to a higher rate of tax than the rate which applies to nationally-sourced dividends.
>
> 50. Next, that member state must prevent foreign-sourced dividends from being liable to a series of charges to tax, by offsetting the amount of tax paid by the non-resident company making the distribution against the amount of tax for which the recipient company is liable, <u>up to the limit of the latter amount</u>." (Emphasis supplied.)

159. In *FII CJEU2*, the CJEU said this:

> "37. It should be recalled that, in the context of tax rules, such as those at issue in the main proceedings, which seek to prevent the economic double taxation of distributed profits, the situation of a corporate shareholder receiving foreign-sourced dividends is comparable to that of a corporate shareholder receiving nationally-sourced dividends in so far as, in each case, the profits made are, in principle, liable to be subject to a series of charges to tax…
>
> 38. That being so, arts 49 TFEU and 63 TFEU require a member state which has a system for preventing economic double taxation as regards dividends paid to residents by resident companies to accord equivalent treatment to dividends paid to residents by non-resident companies…
>
> 39. It is to be recalled, next, that the court has held that a member state is, in principle, free to prevent the imposition of a series of charges to tax on dividends received by a resident company by opting for the exemption method when the dividends are paid by a resident company and for the imputation method when they are paid by a non-resident company. Those two methods are in fact equivalent provided, however, that the tax rate applied to foreign-sourced dividends is not higher than the rate applied to

> nationally-sourced dividends and that the tax credit is at least equal to the amount paid in the state of the company making the distribution, up to the limit of the tax charged in the member state of the company receiving the dividends…" (Citations omitted and emphasis supplied.)

160. The CJEU's solution in relation to the first question referred was reasoned as follows:

> "61. The tax exemption to which a resident company receiving nationally-sourced dividends is entitled is granted irrespective of the effective level of taxation to which the profits out of which the dividends have been paid were subject. That exemption, in so far as it is intended to avoid economic double taxation of distributed profits, is thus based on the assumption that those profits were taxed at the nominal rate of tax in the hands of the company paying dividends. It thus resembles grant of a tax credit calculated by reference to that nominal rate of tax.
>
> 62. For the purpose of ensuring the cohesion of the tax system in question, national rules which took account in particular, also under the imputation method, of the nominal rate of tax to which the profits underlying the dividends paid have been subject would be appropriate for preventing the economic double taxation of the distributed profits and for ensuring the internal cohesion of the tax system while being less prejudicial to freedom of establishment and the free movement of capital."

161. This was applied by Henderson J in *Prudential HC*, where he accepted the claimants' "dual" credit approach (that is, credit for actual tax paid and credit at the FNR), but on the basis that they were alternatives, with:

> "…credit to be granted for whichever amount is the higher (up to the limit of the Case V charge reduced by withholding tax)." ([95], emphasis supplied.)

162. Henderson J also said this at [98], in relation to both the special tax regime for taxing life insurers and the general corporation tax regime:

> "98. … In my judgment it follows from the ECJ's reasoning in [*FII CJEU2*] that the exemption of UK-source dividends is equivalent to taxing the dividends and giving credit at the relevant UK nominal tax rate. This principle applies to dividends received by an insurance company which are taxed on the I minus E basis and allocated to the policy holders' share of profits in the same way as it applies to dividends taxed at the full UK corporation tax rate, the only difference being that the assumed credit is correspondingly smaller because it is capped at the lower nominal rate. Equal treatment of foreign dividends can therefore be achieved by granting a credit based on the foreign nominal rate but capped at the UK policy holder rate. So, for example, where the foreign nominal rate is 30% and the UK policy holder rate is 20%, the credit is limited to 20%. In principle, this is no different from the case where an ordinary UK company receives a dividend from a country whose nominal rate is higher than the normal UK corporation tax rate. In such cases the foreign nominal rate credit is again

capped at the rate at which the dividends are taxed in the UK." (Emphasis supplied.)

Henderson J made the same point at [123], where he referred to credit being "capped at the UK nominal rate applicable to the dividend less withholding tax".

163. Similarly, in *FII SC3* at [216] Lord Reed and Lord Hodge noted a similar approach taken by Henderson J in the *FII* litigation.

164. As Mr Ewart submitted, what the CJEU were describing at [39] of *FII CJEU2* were two alternative means of preventing double taxation, one being an exemption system and the other being an imputation system. But as is clear from [37], [61] and [62] of the CJEU's judgment in that case, the point of each system is to avoid economic double taxation of the same income, not to confer additional relief that goes beyond that. Accordingly, relief is capped at the corporation tax charged on the relevant dividend, a charge which will itself be computed after allowing credit for any withholding tax (as to which see further below).

165. In accordance with *Salinen* and *FII SC3*, there is what may be regarded as an exception to this where the tax charge is eliminated by reliefs such as management expenses. However, on analysis that is not a true exception. The carry forward of credits permitted by *Salinen* and *FII SC3* is a response to a particular problem that arises where domestic tax reliefs are used against foreign dividend income in priority to the credit that would otherwise have eliminated the double taxation, in circumstances where those reliefs would not have needed to be used against exempt domestic dividends: see *FII SC3* at [142]. Again, the solution goes no further than avoiding double taxation, in the form of "unlawful economic double taxation, equivalent in effect to the postponement of an unlawful tax charge on the dividend income until a later year": *FII SC3* at [138]. What is carried forward is the tax credit that would have been available but for the reliefs. That carried forward credit is therefore capped at the level of what would otherwise be the unlawful tax charge, just as it would be if the tax charge had not been offset by reliefs.

166. What *Salinen* and *FII SC3* do illustrate, however, is that issue B may in some respects be better expressed in terms of the UK tax rate rather than the corporation tax actually due on the dividend. However, even that is not without difficulty, because it ignores the additional complication of withholding tax, discussed further below.

167. I now turn to issues 8 and E, which concern the EUFT regime.

168. The EUFT regime was introduced with effect from March 2001, as part of a set of changes which prevented multinational groups from engaging in "offshore mixing". Offshore mixing was a response to the fact that, under the domestic system, DTR credits were capped at the UK tax payable on the dividend income in question. Excess credits could not be used against other income, including dividends from other sources. Offshore mixing involved groups structuring their affairs so that foreign dividends derived from profits taxed at low rates, and so carrying insufficient credit to offset UK tax if received directly, could be combined with dividends sourced from high tax jurisdictions in an offshore "mixer company", typically a Netherlands based sub-holding company. The idea was to average out the rates in such a way that the dividends paid on to the United Kingdom by the mixer company attracted underlying

tax relief at a rate similar to the UK corporation tax rate, with the effect that there was little or no additional tax to pay. In contrast, if the dividends received by the mixer company had been paid direct to the United Kingdom the "excess" credit on the highly taxed profits would be wasted and (subject to other reliefs) other dividends would be subject to additional tax.

169. Offshore mixing was prevented by the introduction of a mixer cap, which limited the creditable tax charged on profits (at any point in the corporate chain) to the UK corporation tax rate. The EUFT regime was introduced at the same time to allow a limited form of onshore pooling instead. Under the EUFT regime certain ("eligible") amounts of unrelieved foreign tax could be pooled to offset against certain types of dividend income, up to an upper rate limit of 45% (the "upper percentage"). There was also provision not only for carry forward but for carry back for up to three years and surrender to other group companies. (For some more detail on the background to and introduction of the regime see *Test Claimants in the FII Group Litigation v Revenue and Customs Commissioners* [2008] EWHC 2893 (Ch), [2009] STC 254 ("*FII HC1*") at [102]-[106].)

170. Mr Bremner referred in submissions to the two types of EUFT, Case A and Case B. He referred to Case A as covering a case where DTR could not be used because of a reduction in taxable profits and Case B as applying where DTR exceeded the UK tax rate, up to 45%. However, the actual position is more nuanced.

171. Case A would indeed be engaged in a situation where UK taxable profits were reduced by virtue of reliefs, because it applies in any case where the available credit is restricted by the rule (in s.797) that it cannot exceed the corporation tax attributable to that income, s.806A(4). But it is not limited to that situation: the foreign tax rate might simply exceed the UK tax rate. Further, the calculation of Case A EUFT in s.806B(2) is not limited to the difference between the credit actually allowed and the credit that would have been allowed absent the reliefs (the sort of situation addressed in *Salinen* and *FII SC3*). It is the difference between the amount of credit actually allowed and the amount that would have been allowed if the rate of corporation tax payable was 45% (rather than the actual rate during most of the relevant period of 30%). Case B is a case where DTR relief is restricted by the mixer cap, and is calculated as the difference between the amount of credit to be allowed because the mixer cap has been applied and the greater amount that would have been allowed if the mixer cap calculation had used a rate of 45% rather than the actual UK corporation tax rate, s.806B(3).

172. The reason for going into this detail is to illustrate that, if the EUFT regime were applied as the Taxpayers say it should, its effect would be to go beyond allowing relief at the FNR up to the corporation tax payable on the income in question (or payable but for the use of other reliefs), and therefore would provide more relief than is required under EU law. In particular, the regime potentially permitted relief at a rate of 45% rather than the prevailing UK tax rate of 30%.

173. The EUFT rules were considered by the Supreme Court in *FII SC3*. Their relevance in that case was twofold. One was whether their introduction meant that the "standstill" provision in Article 64(1) TFEU ceased to apply. The Supreme Court held that it did ([221]). We are not concerned with that. The other was in the consideration of *Salinen* (see [21.e)] above), where the claimants argued that the EUFT regime did not satisfy the requirements of EU law as established by that case: see *FII SC3* at [132] and [134].

174. Lord Reed and Lord Hodge accepted this argument, saying at [140]:

> "In the light of [*Salinen*], it is clear that in so far as United Kingdom law prevented the carrying forward of unused DTR credits, prior to the introduction of the EUFT rules (and to the extent, if any, that those rules may themselves have prevented the carrying forward of unused credits in full), it was in breach of article 63 of the TFEU. It is not suggested that the position would be any different under article 43, which is also relevant in the present proceedings, and the same reasoning would appear to apply, mutatis mutandis."

175. This statement was part of the reasoning that led to the conclusion at [145] that the UK rule which provided that a DTR credit given in respect of particular income could only be allowed against tax computed by reference to the same income was to be disapplied in favour of a rule that unused DTR credits (calculated on a FNR basis) could be carried forward for use against tax liabilities arising in subsequent years.

176. In this case, the FTT accepted the Taxpayers' argument that the effect of the conforming interpretation of s.790 ITCA that allowed relief at the FNR was that other provisions of the DTR code, including the EUFT provisions, should be applied to it. The FTT also concluded at [177] that the extended time limit in s.806(2) applied to EUFT.

177. The UT disagreed on the basis that a credit at the FNR was not "tax payable" within s.790(1) and as such did not fall within the EUFT provisions, that in any event the FNR credit could not exceed the tax payable on a dividend and *FII SC3* did not assist. Further, s.806(2) could not apply to extend time.

178. I have no hesitation in rejecting the Taxpayers' argument that their position on this issue is supported by *FII SC3*. They rely on [132], [134] and [140] of that decision. Paragraph [140] is set out above, and merely confirms that the introduction of the EUFT rules did not answer the EU law challenge. Paragraphs [132] and [134] do no more than outline the EUFT rules and the argument that they did fully address the problem, as follows:

> "132. Following the introduction of the Eligible Unrelieved Foreign Tax rules ('the EUFT rules'…), applicable to dividends arising after 30 March 2001, surplus EUFT could be carried forward or surrendered to another group company. The credit continued to be based on the foreign tax paid rather than the FNR, and it could only be set against particular categories of dividend income.
>
> …
>
> 134. In relation to [the argument that the DTR rules breached EU law by not permitting carry forward], the claimants rely particularly on the judgment of the CJEU in [*Salinen*]… The claimants also argue that this problem was not fully addressed by the EUFT rules. Although the relevant provisions allowed surplus EUFT to be carried forward or surrendered, it could not be offset against other profits, but only against restricted categories of dividend income, with the consequence that it still might not be fully utilised."

179. The more substantive question is whether the Taxpayers are right to maintain that the consequence of a conforming interpretation of s.790 to allow FNR credit relief is that all other provisions of the DTR code must be applied in a way that reflects that modification, including provisions (such as the EUFT regime) the effect of which would be to confer additional relief beyond what EU law requires. The answer to that is no. The question of extending time under s.806(2) therefore does not arise.

180. As discussed at [56] to [72] above and in relation to issue 6, the process of conforming interpretation is one that secures compliance with EU law. It does not go beyond that. In the context of the FNR credit this means that s.790 (and some associated provisions – see [145] above) must be interpreted to give effect to that credit, and the prohibition on carrying forward surplus DTR credits must be disapplied (as to which see further below).

181. It was rightly not suggested that EU law itself requires additional relief to be conferred under the EUFT regime. The EUFT regime is specific to foreign dividends rather than one that confers any benefit corresponding to an advantage available in respect of domestic dividends; the advantage conferred by the exemption for domestic dividends has been addressed by the grant of a credit at the FNR and the removal of the prohibition on carrying forward DTR credits. Rather, the EUFT rules simply attempted to provide a partial amelioration of the abolition of offshore mixing, an abolition which has also not been found to conflict with EU law.

182. The Taxpayers' alternative case on issue 8 was that the UT was wrong to decide at [228] that credit for withholding tax had to be given in priority to credit at the FNR. This was on the basis that the UT's approach went beyond a permissible conforming interpretation, effectively cancelling out part of the credit required by EU law and repeating this court's error in *Routier* (see [71] above). The idea is that, if the priority was reversed so that credit at the FNR was given first, then the withholding tax could itself create EUFT. The order of set off was left open by Henderson J in *Prudential HC*.

183. The UT said this at [228]:

> "The difficulty arises because there is no provision describing the order in which the two credits should be applied. That is because the legislation did not make any provision for credit at the FNR. Further, EU law does not require any credit for WHT. Whether and to what extent such credit was given was a matter for individual member states. In those circumstances it seems to us that the conforming construction to section 790 should be that which has the least impact on the effect of the domestic legislation, whilst being consistent with the EU law obligations recognised in *FII CJEU 2*. It seems to us that this leads to credit for WHT being given in priority to credit for the FNR. Further, the WHT credit is given as part of the computation of the tax charged in the UK. It is logical therefore that the FNR credit must be capped by the amount of UK tax after taking into account the WHT credit."

184. I agree with this approach. What is required is a conforming interpretation that addresses the breach of EU law. But neither the imposition of withholding tax nor the domestic tax rules which give credit for such tax have been found to be in breach of EU law. Those rules should therefore be applied in the normal way, there being no

justification for a different approach which affects their operation. There is an analogy here with the Supreme Court's approach in *FII SC3*, where Lord Reed and Lord Hodge rejected HMRC's proposal that DTR credits should be treated as used in priority to management expenses, on the grounds that the rules governing the latter were entirely lawful: [141] and [142].

185. As Mr Ewart correctly submitted, a credit for withholding tax is a (lawful) part of the computation of the UK tax charge on a dividend. What was unlawful was the tax charge that remained after allowing for that credit, insofar as that remaining tax charge did not reflect underlying tax relief at the FNR. The conforming interpretation must go no further than eliminating that unlawfulness. This is also why Henderson J emphasised in *Prudential HC* at [123] that credit was "capped at the UK nominal rate applicable to the dividend less withholding tax".

186. Issue E is whether, assuming that EUFT can be claimed for credit at the FNR, that EUFT can be applied against other income in the same year (as the EUFT rules permit in respect of certain categories of dividend income), rather than being carried forward. Following issue 8, the answer is no since FNR credits do not generate EUFT.

Issue 9

187. Issue 9 concerns amendments made to a return within the 12 month period permitted by paragraph 15 of Schedule 18 FA 1998, but after an enquiry was opened into the return. In such a case paragraph 31 of Schedule 18 is engaged. Paragraph 31 is set out in the Appendix. In summary, it provides that the amendment "does not take effect while the enquiry is in progress" but instead "takes effect as part of the amendments made by the closure notice".

188. The lead appellant on this issue is Henderson Emerging Markets Fund ("Henderson"). It filed its return for the accounting period ended 31 October 2007 on the basis that EU source dividends were exempt and non-EU source dividends were taxable. HMRC opened an enquiry into the return. On 28 September 2009, during the course of the enquiry and before the expiry of the time allowed for amendments, Henderson sought to amend the return to treat the non-EU source dividends as exempt. A closure notice was finally issued in 2020 in which the EU source dividends were brought into charge to tax and no adjustment was made in respect of non-EU source dividends. HMRC also invited Henderson to make a claim for a DTR credit on the EU source dividends on the basis that s.806(2) was engaged (see issue 1, [75] above).

189. Issue 9 relates to the non-EU source dividends. In short, Henderson maintains that the extended time limit under s.806(2) should be available in respect of non-EU source dividends in the same way as it would have been if the amendment to treat them as exempt had been made before any enquiry was opened (or indeed if the dividends had been originally returned as exempt), as accepted in relation to issue 1. Paragraph 31 is no more than a timing provision which defers the operation of the amendment until the point that the enquiry is closed, and cannot have a further substantive effect of denying Taxpayers the ability to claim a credit under the extended time limit in s.806(2).

190. Both the FTT and UT disagreed, essentially on the basis that the amendment made no adjustment to tax payable for the purposes of s.806(2). I agree.

191. While I have some sympathy for the argument that the ultimate result should not differ depending on the happenstance of whether an enquiry was opened before or after an amendment, we must apply the legislation. Further, the resolution of issue 1 also followed straightforwardly from the wording of the legislation, rather than any broader considerations of policy, so as Mr Ewart pointed out it is not necessarily a good guide to whether issue 9 should also be resolved in the Taxpayers' favour. It is also fair to say that neither issue has arisen in what might be regarded as typical circumstances.

192. It is clear from paragraph 31(3) that an amendment during an enquiry does not have effect while the enquiry is in progress. Paragraph 31(4) (in the form in force when the closure notice was issued) provides as follows:

> "(4) An amendment whose effect is deferred under sub-paragraph (3) takes effect as follows —
> (a) if the conclusions in [the closure notice] state either —
> (i) that the amendment was not taken into account in the enquiry, or
> (ii) that no amendment of the return is required arising from the enquiry,
> the amendment takes effect when [the closure notice] is issued;
> (b) in any other case, the amendment takes effect as part of the amendments made by the closure notice."

193. It is not suggested that sub-paragraph (4)(a) is in point, so Henderson must rely on sub-paragraph (4)(b). Thus, the amendment "takes effect as part of the amendments made by the closure notice". This needs to be read with paragraph 34(2), which provides that:

> "(2) The [closure notice] must state the officer's conclusions and—
> (a) state that, in the officer's opinion, no amendment is required of the return that was the subject of the enquiry, or
> (b) make the amendments of that return that are required —
> (i) to give effect to the conclusions stated in the notice…"

194. Where, as here, the effect of the closure notice is to reject the Taxpayer's amendment in its entirety that can only mean that the amendment has no operative effect, and does not adjust the tax payable for the purposes of s.806(2). Rather, paragraph 31(4)(b) and paragraph 34(2) have the effect that the issue of the closure notice both 1) incorporates the deferred amendment into the return, and 2) <u>at the same time</u> negates it by the effect of the closure notice. Thus, it cannot be said that the amendment somehow takes effect to adjust tax payable downwards, followed (even immediately) by an upwards adjustment by virtue of the closure notice.

195. There is therefore no point in time at which the amendment made by Henderson took effect to adjust the tax payable on the non-EU source dividends. The only adjustment to tax effected by the closure notice was to treat the EU source dividends as taxable. The closure notice did not adjust the tax payable on the non-EU source dividends. The UT's reasoning on this issue at [241] and [242] was therefore correct.

Issues 10 and C

196. Issues 10, 11 and C all concern DTR credits that arise in one year ("Year 1") which cannot be used in that year due to other reliefs – for present purposes, management

expenses – and which relevant Taxpayers seek to offset against tax chargeable in a later year ("Year 2"). It is convenient to consider issues 10 and C together, followed by issue 11.

197. As originally expressed, issue 10 was answered by *FII SC3*, namely that EU law requires that DTR credits that could not be used due to the offset of management expenses to be available to be carried forward against future tax liabilities. However, the question remained as to whether a conforming interpretation of the statutory regime requires a valid claim in respect of the year in which the DTR arose, or only in respect of a subsequent year in which it is sought to be used. The UT held, in disagreement with the FTT, that it did. The point arises where the relevant Taxpayer is out of time to make a claim in respect of Year 1 but may not be out of time in respect of Year 2.

198. Mr Bremner submitted that the UT's conclusion is irreconcilable with *FII SC3*. I disagree. That decision was concerned with issues of principle in common law claims in restitution. The Supreme Court was not concerned with claims made under the statutory regime. (Indeed, the Supreme Court was not concerned with the individual claims at all. That was a matter that was considered in *AXA Sun Life*.)

199. The key relevant issue decided in *FII SC3* was that what was unlawful was the fact that UK law prevented the carrying forward of DTR credits. This was the effect of *Salinen*: *FII SC3* at [140]. Rejecting an argument of HMRC, Lord Reed and Lord Hodge explained that it was the DTR rules, not the management expenses (or group relief) rules, that were non-compliant with EU law. Rather:

> "142. The problem which was identified in *Salinen*, and which is relevant also in the present case, is that legislation which prevents the carrying forward of unused DTR credits is precluded by EU law, since it results in a difference in treatment between domestic-sourced dividends, which are fully protected against economic double taxation, and foreign-sourced dividends, which are indirectly subject to economic double taxation if the applicable credit cannot be fully used. It is therefore the DTR legislation which is contrary to EU law; and if the problem can be resolved by addressing the DTR legislation, that is the appropriate place to find the solution.
> …
> 144. … the problem results from the rule that the DTR credit given in respect of particular income can only be allowed against tax computed by reference to the same income. That rule is contrary to EU law, to the extent that it prevents unused DTR credits from being carried forward and applied against other income in subsequent years. The requirement arising under EU law, that it must be possible to carry forward unused DTR credits for use against tax liabilities arising in subsequent years, was at all material times directly applicable as law in the United Kingdom, and had to be given effect in priority to inconsistent domestic law, whether legislative or judicial in origin.
>
> 145. In principle, therefore, the problem can be resolved by disapplying the domestic rule that the DTR credit given in respect of particular income can only be allowed against tax computed by reference to the same income, to the extent that it prevents unused DTR credits from being carried forward

> and applied against tax liabilities arising in subsequent years, and giving effect instead to the EU rule that unused DTR credits (calculated on a FNR basis) can be carried forward for use against tax liabilities arising in subsequent years. The disapplication of the domestic rule is in accordance with the approach which has been taken to legislation which is incompatible with directly applicable EU law since *R v Secretary of State for Transport, Ex p Factortame Ltd (No 2)* [1991] 1 AC 603 . As Lord Bridge of Harwich stated in that case at p 659:
>
> > 'Under the terms of the [European Communities] Act of 1972 it has always been clear that it was the duty of a United Kingdom court, when delivering final judgment, to override any rule of national law found to be in conflict with any directly enforceable rule of Community law.'
>
> Looking to the future, therefore, any unused DTR credits (calculated on a FNR basis) must in principle be regarded as remaining available to be applied against other income in subsequent years, notwithstanding any statutory provisions or other domestic rules of law to the contrary effect. That result is consistent with the treatment of unutilised (lawful) ACT in [*Prudential SC*], para 103."

Lord Reed and Lord Hodge then discussed the situation where tax had already been paid as a result of the domestic law prohibition on carrying forward unused DTR, concluding that the tax was repayable under the *San Giorgio* principle ([146]-[158]).

200. What is clear from this is that the unlawfulness in the regime lies in the domestic prohibition on carrying forward unused DTR credits. That unlawfulness is cured by a partial disapplication of the rule (in s.797) that the DTR credit given in respect of particular income can only be allowed against tax computed by reference to the same income, so that unused DTR credits can be carried forward.

201. There is no basis for a disapplication or modification of other domestic rules. It is common ground that DTR credits must be claimed. In that respect they are different to reliefs which are available (and indeed are carried forward) automatically, such as management expenses or indeed the ACT credits referred to in *Prudential SC* at [103]. Without a claim, DTR is not available as a credit. As a matter of principle, therefore, a credit cannot be said to arise and be unused, or be available for carry forward, unless it has been claimed in respect of Year 1. If it is claimed in respect of Year 1 but it cannot be used, then *FII SC3* tells us that it must be carried forward and set off against future tax liabilities. There being no further domestic machinery, it will offset those tax liabilities as and when they arise.

202. Mr Bremner submitted that this approach is inconsistent with *FII SC3*, because that decision demonstrated that the unlawfulness is in respect of Year 2, not Year 1. However, that does not answer the question of what is required by way of statutory claim, in circumstances where it is accepted that DTR credits must be claimed.

203. The UT considered that it was implicit in ss.788 and 790 that a claim must be made in relation to the accounting period in which the dividend is taxable ([256]). Clearly, some caution is required because the domestic rules do not permit the carry forward of unused credits, but nevertheless I consider that the UT was right. Credit must be claimed in respect of particular income (see issues 3 and 7 above). Section 788 obviously requires consideration of the terms of the particular treaty and its application

to the income in question. Section 790(4) grants unilateral relief for foreign tax "computed by reference to income arising… in that territory" against corporation tax "computed by reference to <u>that</u> income or gain" (emphasis supplied). If a claim is required, as the Taxpayers accept, it would be extraordinary if it were to be completely untethered from the income in respect of which the credit arose, and be validly made only later (and potentially many years later) when it is sought to be offset against wholly unrelated income.

204. The conclusion I have reached is supported by a slightly broader consideration of how the rules work. If no credit is claimed in respect of foreign tax on income, the default is that the foreign tax must be treated as reducing the income in question. This is the automatic effect of s.811 ICTA. Thus, for example, if a foreign source dividend of 100 is subject to withholding tax of 10, the effect of s.811 is that the income brought into charge in the United Kingdom is 90 unless (or until) a claim is made for a credit. If a claim is made, then s.795(2) (to which s.811 is expressly subject) requires that the income brought into account is 100 (s.795(2)(a)). Credit of 10 is then available to offset UK tax on the dividend.

205. Section 811 applies to withholding taxes and other foreign taxes charged directly on the income in question (juridical double taxation): see the reference to "tax on that income" in s.806(1). It has no need to apply to economic double taxation attributable to tax suffered on the profits of the dividend-paying company. Another simple example illustrates this. Assume a foreign company has 100 of pre-tax profits on which it pays 30 of tax. The maximum dividend it is in a position to pay is 70. Absent a claim for a DTR credit (and assuming in this example no withholding tax) the recipient will simply bring into account the actual dividend received, 70 in the example. There is no need for the legislation to provide for a deduction.

206. The position is different if the recipient wishes to claim a credit for the 30 (as underlying tax). In that case s.795(2)(b) will require the dividend income of 70 to be treated as increased by the underlying tax of 30. Thus the total income brought into account in the example will be 100, with a credit of 30. This process of grossing up reflects the "imputation" to the dividend recipient of the profits of the dividend-paying company out of which the dividend was paid. It is an inherent part of the system for addressing economic double taxation of profits using credits rather than exemption, that is, an imputation system.

207. This point underlines the correctness of the conclusion that DTR credits should be claimed in respect of the year in which they arise (Year 1). Not only is a claim required under the legislation but the effect of a claim goes beyond creating a tax credit which we now know can be carried forward if it is unused. The claim also has the effect of making a material alteration to the amount of income required to be brought into account in Year 1.

208. This last point also indicates the answer to issue C, which is closely linked and therefore convenient to consider at this point. That issue is also best illustrated by an example.

209. Assume that in Year 1 a foreign-source dividend is paid of 100, which is subject to withholding tax of 10 such that the net receipt is 90. Due to excess management expenses the recipient cannot use the credit of 10, so the correct tax treatment is to

bring 90 into account as the taxable income in accordance with s.811 (see above). This is unaffected by EU law, which has had no effect on the DTR regime in respect of withholding tax (see above at [182]-[185]).

210. The question raised by issue C is how the calculation works if there is a subsequent claim for DTR credit at the FNR in respect of the dividend, which the Taxpayer (Fidelity in the test case) wishes to offset against tax in Year 2. The FTT rejected HMRC's argument that this required the dividend to be grossed up in Year 1, but nevertheless agreed that grossing up should apply in calculating the amount of the FNR credit carried forward. The UT did not disturb this conclusion (possibly because of some confusion as to HMRC's position, which was put in alternative ways), and HMRC now appeal against it.

211. I have no doubt that it is wrong to perform calculations on different bases in Year 1 and Year 2. As Ms Ruxandu (who made submissions on issue C) pointed out, the effect would be to create a windfall. Using the same example, on the FTT's approach only 90 would be brought into account in Year 1, tax on which would be offset by 90 of management expenses. However, in Year 2 the FNR credit available would be determined by grossing the dividend up. At an assumed 30% rate the grossed up amount would be approximately 129, leading to a credit of around 39. That corresponds to a tax rate of about 43% on income of 90 (39/90 x 100), whereas the actual FNR is 30%. In contrast, a credit based on income of 90 would be 27 (30% x 90).

212. Rather, the correct approach must be to gross up the dividend in Year 1, reflecting the claim for an FNR credit in respect of that dividend. The requirement to gross up is a fundamental part of the system for granting underlying tax credits (see [206] above) and must be applied as part of the conforming interpretation of s.790 (see also [145] above). The argument that it should somehow be applied in Year 2 but not Year 1 lacks coherence.

213. The Taxpayers complain that grossing up in Year 1 would use up management expenses more quickly, such that more tax is paid on other income in later years. They say that this would amount to indirect unlawful taxation of the dividend income, contrary to *Salinen* and *FII SC3*. I agree that HMRC's approach would use up management expenses more quickly than the Taxpayers', but the answer to that lies in the corresponding level of FNR credit available in Year 2.

214. Using the same example, and bearing in mind that there is no requirement to disturb the treatment of withholding tax, the correct treatment is as follows. In Year 1, dividend income originally returned of 90 (net of a deduction under s.811 for the 10 of withholding tax) is grossed up at 30% to 129 when a claim is made for an FNR credit at a rate of 30%. This results in the offset of 129 of management expenses in Year 1. An FNR credit of approximately 39 is then carried forward and will offset a corresponding amount of tax in Year 2, just as it would have done in Year 1 in the absence of management expenses.

215. Put another way, the effect of the carry forward required by *Salinen* and *FII SC3* cannot be to put the taxpayer in a better position than it would be if management expenses did not offset the income in Year 1 and had (for example) arisen in Year 2 instead. If, for the sake of simplicity, the UK corporation tax rate was also 30%, the effect of HMRC's approach would be that the carried forward FNR credit would fully offset the tax on

129 of income in Year 2. That is precisely equivalent to the value (at a 30% rate) of the management expenses which were in fact used in Year 1. In contrast, on the Taxpayers' approach they would have both 39 of FNR credit in Year 2 and would only have used 90 rather than 129 of management expenses in Year 1, leaving (all other things being equal) an additional 39 of management expenses for carry forward against other income. That would amount to an unwarranted windfall.

216. The Taxpayers maintain that this approach is not one that HMRC may maintain, because Issue 13 was conceded in the FTT. Issue 13 was:

> "Subject to Issue 11 above, in closing enquiries to bring income returned as exempt into account without double tax relief, must withholding tax incurred be deducted pursuant to s811 ICTA?"

217. However, there is no inconsistency, and the FTT was wrong to consider that there was. Issue 13 concerned withholding tax only, which HMRC now accept must be deducted under s.811 as already described.

Issue 11

218. Like issues 10 and C, issue 11 concerns DTR credits that arise in one year (Year 1) which cannot be used in that year due to the offset of management expenses, and which are sought to be offset against tax chargeable in a later year (Year 2). Issue 11 concerns the potential application of the extended time limit in s.806(2), discussed under issue 6 above, but specifically in the context of a reallocation of management expenses from Year 2 to Year 1 caused by bringing foreign dividends into charge to tax in Year 1.

219. While Mr Ewart submitted that deciding issue 10 in HMRC's favour would mean that issue 11 fell away, Mr Bremner disagreed. I will therefore deal with it, although I think Mr Ewart is right that it does fall away.

220. Issue 11 is illustrated by an example adopted by the FTT and UT. I will use the same example but have restated it to make some elements a little clearer:

(1) In Year 1 a fund received foreign dividend income of £100 and also incurred deductible management expenses of £100.

(2) In Year 2 the fund received foreign dividend income of £100 and interest income of £200 (and incurred no deductible management expenses).

(3) In its tax returns for each of Year 1 and Year 2 the fund showed the dividend income as exempt.

(4) The result of doing that was that the management expenses of £100 from Year 1 were carried forward and set against part of the interest income in Year 2, leaving a net taxable profit in Year 2 of £100.

(5) The fund accordingly returned a nil tax liability in Year 1 and in Year 2 paid tax (at an assumed rate of 20%) on the net taxable profit of £100 (i.e. tax of £20).

(6) If credit had been claimed at the FNR instead of exemption (and ignoring for the moment the impact of the management expenses in Year 1) there would have been

no tax to pay on the dividend income on that basis either, because the FNR credit would have been sufficient to offset UK tax on the dividend income (at the assumed 20% rate) in full in each year.

(7) Enquiries were opened into both years and completed by the issue of closure notices. Under the closure notice for Year 1, dividend income of £100 was treated as taxable but it was offset with the management expenses of £100. The closure notice for Year 2 showed taxable income of £300 (£100 of dividend income and £200 of interest income) but no management expenses as these were used in Year 1. No DTR relief was allowed, on the basis that no claim for a DTR credit had been made in respect of either year. Consequently, tax was shown as due for Year 2 on profits of £300, or £60 tax at a 20% rate.

(8) On receiving the closure notices the fund then claimed DTR credits at the FNR in respect of Years 1 and 2. The claims were made outside the period permitted by s.806(1) ICTA.

221. If DTR credits had been validly claimed the effect would have been as follows. The Year 1 dividend income would still be offset by the management expenses but the associated DTR credit of £20 would be carried forward to Year 2 (*FII SC3* at [145]). In Year 2, tax on the dividend income would be fully offset by a DTR credit on that dividend, leaving the credit brought forward from Year 1 to offset part of the tax on the interest income. The result would be a UK tax charge of 20 (20% of £200 of interest income, less a DTR credit of £20), the same result in terms of tax payable as originally returned.

222. Section 806(2) cannot apply in respect of Year 1, for the simple reason that there is no "adjustment… to tax payable". The UK tax payable in respect of Year 1 was nil both before and after the adjustment made by the closure notice. The realisation of the potential availability of an FNR credit in respect of the Year 1 dividend also cannot generate "tax payable" for the purposes of s.806(2): see Issue 6 above.

223. The Taxpayers argue that there is nevertheless an adjustment to tax payable in Year 2 which has rendered the DTR credit insufficient, such that s.806(2) is engaged. Mr Bremner submitted that the reallocation of management expenses from Year 2 to Year 1 amounted to an adjustment to tax payable in the United Kingdom, such that s.806(2) is engaged in respect of Year 2. The UT rejected that argument at [267] on the basis that there was no causal link between the reallocation of management expenses and the DTR credit in Year 2.

224. I have not found this straightforward. There seem to me to be a number of points.

225. The first is that there is on any basis an adjustment to tax payable in Year 2. Tax of £20 has become tax of £60 as a result of the closure notice, a £40 adjustment. Half of that adjustment reflects the inclusion of the Year 2 dividend income, previously treated as exempt, without a DTR credit of £20. The remaining half is attributable to the reallocation of management expenses to Year 1.

226. Secondly, the result of deciding issue 10 in favour of HMRC is that DTR is not available for carry forward in respect of the Year 1 dividend. As discussed there, DTR credits need to be claimed in respect of the year in which they arise (Year 1), and not in

respect of the year to which they would otherwise be carried forward (Year 2). Therefore, tax on the £200 of interest income in Year 2 could not be reduced by £20 of DTR carried forward.

227. Thirdly, if a DTR credit is available in respect of the Year 2 dividend income that credit could fully offset the tax chargeable on that income. Although neither party raised this point, the outcome of issue 1 would indicate that s.806(2) applies in respect of the Year 2 dividend income. There has been an adjustment to tax payable because dividend income that was previously treated as exempt in Year 2 is now treated as taxable, and as a result the credit in respect of that income is insufficient. Based on the numbers in the example, that would allow a credit to be claimed of £20. That would result in the tax payable for Year 2 being £40, being tax at 20% on the interest income of £200.

228. I think this explains why HMRC consider that issue 11 falls away if issue 10 is resolved in their favour. They view issue 11 as relating to the reallocation of management expenses to Year 1 and the associated unused DTR credit arising in respect of that year. The resolution of issue 10 in HMRC's favour means that there is simply no DTR credit to carry forward to Year 2, so the tax charge can only be reduced to £40, not to £20 as it would have been if valid claims had been made for each year. In contrast, I assume – although again this was not articulated – that the Taxpayers seek to reduce the tax charge to £20.

229. However, in case it matters I will address the reallocation of management expenses and associated unused DTR credit from Year 1.

230. It is true that part of the adjustment to tax payable in Year 2 is caused by the reallocation of management expenses from Year 2 to Year 1. However, it cannot be said that there is an insufficient credit in Year 2 "by reason of" that adjustment. If, contrary to the outcome of issue 10, a DTR credit from Year 1 were available to be carried forward to Year 2, it would not be rendered insufficient by reason of the adjustment to tax. This is because, on the numbers in the example, there would have been enough tax to absorb the credit even without the adjustment, namely the £20 of tax originally returned.

231. I would conclude that, consistently with the resolution of issue 1, a claim could be made under s.806(2) in respect of the adjustment to tax in Year 2 attributable to the dividend income in that year being treated as taxable rather than exempt, so reducing the tax charge from £60 to £40. However, on the numbers in the example there is no insufficiency of credit caused by a reallocation of management expenses.

Issue A

232. Issue A is a discrete issue as to whether, when directing the closure of an enquiry, the FTT has power to indicate the conclusions and amendments to be effected by the closure notice. The FTT concluded that it had, but the UT disagreed. As I understand it, this issue should not arise because of the determination of other issues in favour of HMRC, but I propose to address it in case there is any doubt.

233. Under paragraph 33 of Schedule 18 FA 1998 (relevant parts of which are set out in the Appendix), a company can apply to the FTT for a direction that HMRC give a closure

notice within a specified period. The FTT is required to give such a direction unless it is satisfied that an officer of HMRC has reasonable grounds for not doing so.

234. Paragraph 33 is clear on its face. The power given to the FTT is a power to direct the provision of a closure notice. The FTT is not given power to do anything that goes beyond that. Specifically, it is not given a power to direct how HMRC should close the enquiry, as opposed to whether it should be closed. If a taxpayer disagrees with the content of a closure notice its remedy is to appeal against it.

235. The Taxpayers' argument on this issue is based on a misreading of *Revenue and Customs Commissioners v Vodafone 2* [2006] EWCA Civ 1132, [2006] STC 1530 ("*Vodafone*") (an earlier decision than the *Vodafone 2* case already referred to). That case simply makes it clear that the FTT has power to determine incidental questions of law in deciding whether a closure notice should be required.

236. As explained by Rose LJ in *Revenue and Customs Commissioners v Eastern Power Networks* [2021] EWCA Civ 283, [2021] STC 568 at [21] and [54], in *Vodafone* the issue of the compatibility of the controlled foreign companies regime with EU law had to be determined <u>in order to decide</u> whether HMRC should be required to issue a closure notice. The issue "was so fundamental as to be capable of bringing the enquiry to a halt if decided in a particular way". This court decided in *Vodafone* that the Special Commissioners accordingly had jurisdiction to determine that issue, as an incidental question of law. The tribunal's decision on that issue would, subject to any appeal, then bind the parties in the usual way. The concept of "incidental points of law" was expressly defined by Arden LJ in *Vodafone* at [21] as "points of law that need to be resolved in order to decide whether there are reasonable grounds for not giving a closure notice". It was those issues that the tribunal had power to decide ([24]).

237. *Eastern Power Networks* was a different kind of case, where the issue in question would not resolve the entire dispute and the tribunal was being asked to apply statutory provisions without clear findings of fact, risking running into "the choppy waters of legal precedents and issue estoppel" ([55] and [56]). But there was nevertheless no suggestion that the FTT's role could extend beyond issues relevant to deciding whether to direct the issue of a closure notice.

238. The Taxpayers' argument on this issue is said to be based on considerations of case management, effectively the risk that HMRC would ignore determinations made in deciding a closure notice application when issuing a closure notice. However, to the extent that this is anything more than a theoretical concern given the point made in *Eastern Power Networks* at [54] about the sparing approach that should be taken to deciding incidental questions on a closure notice application, there are other mechanisms that would help address the point. For example, even though the nature of annual taxation means that questions of issue estoppel have much less of a role to play in tax cases than in conventional litigation (see most recently *R (oao Refinitiv Ltd) v Revenue and Customs Commissioners* [2024] EWCA Civ 1412 at [64], referring to the detailed discussion by Henderson J in *Littlewoods Retail and Others v Revenue and Customs Commissioners* [2014] EWHC 868 (Ch), [2014] STC 1761 at [169] to [181]), that ought not to prohibit the application of that principle to the tax year and issue in question. Further, more general considerations of abuse of process may apply, and HMRC are of course subject to public law duties.

Conclusion

239. In conclusion, I would allow HMRC's appeal and dismiss the Taxpayers' appeal. I would also, like the UT, formally remit the Taxpayers' appeals to the FTT in order for it to make the detailed decisions required in relation to the individual appeals and closure notice applications, in accordance with the conclusions reached by this court. I would however encourage the parties to seek to agree how those matters should be resolved, without the need for a further hearing.

Sir Launcelot Henderson:

240. I agree.

Lord Justice Arnold:

241. I also agree.

APPENDIX

(1) Principal authorities: abbreviations

Abbreviation	**Citation**
EU Authorities	
Metallgesellschaft	*Metallgesellschaft Ltd v Inland Revenue Commissioners* (Joined Cases C-397 and 410/98) [2001] Ch 620
FII CJEU1	*Test Claimants in the FII Group Litigation v Inland Revenue Commissioners* (Case C-446/04) [2007] STC 326, [2012] 2 AC 436
FII CJEU2	*Test Claimants in the FII Group Litigation v Revenue and Customs Commissioners* (Case C-35/11) [2013] STC 612
FII CJEU3	*Test Claimants in the FII Group Litigation v Revenue and Customs Commissioners* (Case C-362/12) [2014] AC 1161
Salinen	*Österreichische Salinen*, reported as *Haribo Lakritzen Hans Rigel BetriebsgmbH* (Joined Cases C-436/08 and C-437/08) [2011] STC 917, [2011] ECR I-305
Domestic authorities	
DMG	*Deutsche Morgan Grenfell Group plc v Inland Revenue Commissioners* [2006] UKHL 49, [2007] 1 AC 558
IDT	*Revenue and Customs Commissioners v IDT Card Services* [2006] EWCA Civ 29, [2006] STC 1252
Vodafone 2	*Vodafone 2 v Revenue and Customs Comrs (No 2)* [2009] EWCA Civ 446, [2010] Ch 77
FII HC1	*Test Claimants in the FII Group Litigation v Revenue and Customs Commissioners* [2008] EWHC 2893 (Ch), [2009] STC 254
FII CA1	*Test Claimants in the FII Group Litigation v Revenue and Customs Commissioners* [2010] EWCA Civ 103
FII CA2	*Test Claimants in the FII Group Litigation v Revenue and Customs Commissioners* [2016] EWCA Civ 1180, [2017] STC 696
FII SC1	*Test Claimants in the FII Group Litigation v Revenue and Customs Commissioners* [2012] UKSC 19, [2012] 2 AC 337
FII SC2	*Test Claimants in the Franked Investment Income GLO v Revenue and Customs Commissioners* [2020] UKSC 47, [2022] AC 1
FII SC3	*Test Claimants in the Franked Investment Income Group Litigation v Revenue and*

	Customs Commissioners [2021] UKSC 31, [2021] STC 1597
Prudential HC	*Prudential Assurance Co Ltd v Revenue and Customs Commissioners* [2013] EWHC 3249 (Ch), [2014] STC 1236
Prudential CA	*Prudential Assurance Co Ltd v Revenue and Customs Commissioners* [2016] EWCA Civ 376, [2016] STC 1798
Prudential SC	*Prudential Assurance Co Ltd v Revenue and Customs Commissioners* [2018] UKSC 39, [2019] AC 929
Class 8	*Claimants in Class 8 of the CFC and Dividend Group Litigation v Revenue and Customs Commissioners* [2019] EWHC 338 (Ch), [2019] 1 WLR 5097
Jazztel	*Jazztel plc v Revenue and Customs Commissioners*[2022] EWCA Civ 232, [2022] STC 541
AXA Sun Life	*AXA Sun Life plc v HMRC* [2024] EWCA Civ 1430

(2) Relevant statutory provisions

Taxes Management Act 1970

113 Form of returns and other documents.
(1) Any returns under the Taxes Acts shall be in such form as the Board prescribe, and in prescribing income tax forms under this subsection the Board shall have regard to the desirability of securing, so far as may be possible, that no person shall be required to make more than one return annually of the sources of his income and the amounts derived therefrom.

(3) Every assessment, determination of a penalty, duplicate, warrant, notice of assessment, of determination or of demand, or other document required to be used in assessing, charging, collecting and levying tax or determining a penalty shall be in accordance with the forms prescribed from time to time in that behalf by the Board, and a document in the form prescribed and supplied or approved by them shall be valid and effectual.

114 Want of form or errors not to invalidate assessments, etc
(1) An assessment or determination, warrant or other proceeding which purports to be made in pursuance of any provision of the Taxes Acts shall not be quashed, or deemed to be void or voidable, for want of form, or be affected by reason of a mistake, defect or omission therein, if the same is in substance and effect in conformity with or according to the intent and meaning of the Taxes Acts, and if the person or property charged or intended to be charged or affected thereby is designated therein according to common intent and understanding.

Income and Corporation Taxes Act 1988

208 UK company distributions not generally chargeable to corporation tax
Except as otherwise provided by the Corporation Tax Acts, corporation tax shall not be chargeable on dividends and other distributions of a company resident in the United Kingdom, nor shall any such dividends or distributions be taken into account in computing income for corporation tax.

Part XVIII Double Taxation Relief
Chapter 1 The Principal Reliefs

788 Relief by agreement with other territories
(1) If Her Majesty by Order in Council declares that arrangements specified in the Order have been made in relation to any territory outside the United Kingdom with a view to affording relief from double taxation in relation to—

(a) income tax,

(b) corporation tax in respect of income or chargeable gains, and

(c) any taxes of a similar character to those taxes imposed by the laws of that territory,

and that it is expedient that those arrangements should have effect, then those arrangements shall have effect in accordance with subsection (3) below.

(3) Subject to the provisions of this Part, the arrangements shall, notwithstanding anything in any enactment, have effect in relation to income tax and corporation tax in so far as they provide —

(a) for relief from income tax, or from corporation tax in respect of income or chargeable gains; or …

(4) The provisions of Chapter II of this Part shall apply where arrangements which have effect by virtue of this section provide that tax payable under the laws of the territory concerned shall be allowed as a credit against tax payable in the United Kingdom.

(6) Except in the case of a claim for an allowance by way of credit in accordance with Chapter II of this Part, a claim for relief under subsection (3)(a) above shall be made to the Board.

(7) Where —

(a) under any arrangements which have effect by virtue of this section, relief may be given, either in the United Kingdom or in the territory in relation to which the arrangements are made, in respect of any income or chargeable gains, and

(b) it appears that the assessment to income tax or corporation tax made in respect of the income or chargeable gains is not made in respect of the full amount thereof, or is

incorrect having regard to the credit, if any, which falls to be given under the arrangements,

any such assessments may be made as are necessary to ensure that the total amount of the income or chargeable gains is assessed, and the proper credit, if any, is given in respect thereof…

790 Unilateral relief

(1) To the extent appearing from the following provisions of this section, relief from income tax and corporation tax in respect of income and chargeable gains shall be given in respect of tax payable under the law of any territory outside the United Kingdom by allowing that tax as a credit against income tax or corporation tax, notwithstanding that there are not for the time being in force any arrangements under section 788 providing for such relief.

(2) Relief under subsection (1) above is referred to in this Part as "unilateral relief".

(3) Unilateral relief shall be such relief as would fall to be given under Chapter II of this Part if arrangements in relation to the territory in question containing the provisions specified in subsections (4) to (10C) below were in force by virtue of section 788, but subject to any particular provision made with respect to unilateral relief in that Chapter; and any expression in that Chapter which imports a reference to relief under arrangements for the time being having effect by virtue of that section shall be deemed to import also a reference to unilateral relief.

(4) Credit for tax paid under the law of the territory outside the United Kingdom and computed by reference to income arising or any chargeable gain accruing in that territory shall be allowed against any United Kingdom income tax or corporation tax computed by reference to that income or gain (profits from, or remuneration for, personal or professional services performed in that territory being deemed for this purpose to be income arising in that territory).

(5) Subsection (4) above shall have effect subject to the following modifications, that is to say —

(a) …

(b) where arrangements in relation to the territory are for the time being in force by virtue of section 788, credit for tax paid under the law of the territory shall not be allowed by virtue of subsection (4) above in the case of any income or gains if any credit for that tax is allowable under those arrangements in respect of that income or those gains; and

(c) credit shall not be allowed by virtue of subsection (4) above for overseas tax on a dividend paid by a company resident in the territory unless —

(i) the overseas tax is directly charged on the dividend, whether by charge to tax, deduction of tax at source or otherwise, and the whole of it represents tax which neither the company nor the recipient would have borne if the dividend had not been paid; or

(ii) the dividend is paid to a company within subsection (6) below;...

(6) Where a dividend paid by a company resident in the territory is paid to a company falling within subsection (6A) below which either directly or indirectly controls, or is a subsidiary of a company which directly or indirectly controls —

(a) not less than 10 per cent of the voting power in the company paying the dividend…

and the company receiving the dividend shows that the conditions specified in subsection (7) below are satisfied;

any tax in respect of its profits paid under the law of the territory by the company paying the dividend shall be taken into account in considering whether any, and if so what, credit is to be allowed in respect of the dividend…

(6A) A company falls within this subsection if—

(a) it is resident in the United Kingdom…

(11) Where —

(a) unilateral relief may be given in respect of any income or chargeable gain, and

(b) it appears that the assessment to income tax or corporation tax made in respect of the income or chargeable gain is not made in respect of the full amount thereof, or is incorrect having regard to the credit, if any, which falls to be given by way of unilateral relief,

any such assessments may be made as are necessary to ensure that the total amount of the income or chargeable gain is assessed, and the proper credit, if any, is given in respect thereof, and, where the income is, or the chargeable gain is, entrusted to any person in the United Kingdom for payment, any such assessment may be made on the recipient of the income or gain.

Chapter II Rules Governing Relief By Way Of Credit
General

792 Interpretation of credit code
(1) In this Chapter, except where the context otherwise requires —

"arrangements" means any arrangements having effect by virtue of section 788 ;

"foreign tax" means, in relation to any territory, arrangements in relation to which have effect by virtue of section 788 , any tax chargeable under the laws of that territory for which credit may be allowed under the arrangements…;

"the United Kingdom taxes" means income tax and corporation tax;

"underlying tax" means, in relation to any dividend, tax which is not chargeable in respect of that dividend directly or by deduction; and

"unilateral relief" means relief under section 790 .

793 Reduction of United Kingdom taxes by amount of credit due
(1) Subject to the provisions of this Chapter, where under any arrangements credit is to be allowed against any of the United Kingdom taxes chargeable in respect of any income or chargeable gain, the amount of the United Kingdom taxes so chargeable shall be reduced by the amount of the credit.

(2) Nothing in subsection (1) above authorises the allowance of credit against any United Kingdom tax against which credit is not allowable under the arrangements.

793A No double relief etc
(2) Where, under arrangements having effect by virtue of section 788, credit may be allowed in respect of an amount of tax, credit by way of unilateral relief may not be allowed in respect of that tax.

(3) Where arrangements made in relation to a territory outside the United Kingdom contain express provision to the effect that relief by way of credit shall not be given under the arrangements in cases or circumstances specified or described in the arrangements, then neither shall credit by way of unilateral relief be allowed in those cases or circumstances.

795 Computation of income subject to foreign tax
(2) Where credit for foreign tax falls under any arrangements to be allowed in respect of any income or gain…, then, in computing the amount of the income or gain for the purposes of income tax or corporation tax —

> (a) no deduction shall be made for foreign tax…,whether in respect of the same or any other income or gain; and
>
> (b) the amount of the income shall, in the case of a dividend, be treated as increased by —
>
> > (i) any underlying tax which, under the arrangements, is to be taken into account in considering whether any and if so what credit is to be allowed in respect of the dividend…

797 Limits on credit: corporation tax
(1) The amount of the credit for foreign tax which under any arrangements is to be allowed against corporation tax in respect of any income or chargeable gain ("the relevant income or gain") shall not exceed the corporation tax attributable to the relevant income or gain, determined in accordance with the following provisions of this section.

(2) Subject to subsections (2A) and (3) below, the amount of corporation tax attributable to the relevant income or gain shall be treated as equal to such proportion of the amount of that income or gain as corresponds to the rate of corporation tax payable by the company (before any credit under this Part) on its income or chargeable gains for the accounting period in which the income arises or the gain accrues ("the relevant accounting period").
…

(3) Where in the relevant accounting period there is any deduction to be made for charges on income, expenses of management or other amounts which can be deducted from or set against or treated as reducing profits of more than one description —

> (a) the company may for the purposes of this section allocate the deduction in such amounts and to such of its profits for that period as it thinks fit; and
>
> (b) the amount of the relevant income or gain shall be treated for the purposes of subsection (2) above as reduced or, as the case may be, extinguished by so much (if any) of the deduction as is allocated to it.

799 Computation of underlying tax
(1) Where in the case of any dividend arrangements provide for underlying tax to be taken into account in considering whether any and if so what credit is to be allowed against the United Kingdom taxes in respect of the dividend, the tax to be taken into account by virtue of that provision shall be so much of the foreign tax borne on the relevant profits by the body corporate paying the dividend as

> (a) is properly attributable to the proportion of the relevant profits represented by the dividend, and
>
> (b) does not exceed the amount calculated by applying the formula set out in subsection (1A) below.

(1A) The formula is —
(D + U) x M%
where —

> D is the amount of the dividend;
> U is the amount of underlying tax that would fall to be taken into account as mentioned in subsection (1) above, apart from paragraph (b) of that subsection; and
> M% is the maximum relievable rate;

and for the purposes of this subsection the maximum relievable rate is the rate of corporation tax in force when the dividend was paid.

Miscellaneous rules

806 Time limit for claims etc
(1) Subject to subsection (2) below and section 804(7), any claim for an allowance under any arrangements by way of credit for foreign tax in respect of any income or chargeable gain —

> (b) shall, in the case of any income or chargeable gain which falls to be charged to corporation tax for an accounting period, be made not more than —
>
> > (i) six years after the end of that accounting period…

(2) Where the amount of any credit given under the arrangements is rendered excessive or insufficient by reason of any adjustment of the amount of any tax payable either in the United Kingdom or under the laws of any other territory, nothing in the Tax Acts limiting the time for the making of assessments or claims for relief shall apply to any assessment or claim to

which the adjustment gives rise, being an assessment or claim made not later than six years from the time when all such assessments, adjustments and other determinations have been made, whether in the United Kingdom or elsewhere, as are material in determining whether any and if so what credit falls to be given.

Foreign dividends: onshore pooling and utilisation of eligible unrelieved foreign tax

[**Note:** In what follows, the "mixer cap" is set out in s.799(1) and (1A), above and the "upper percentage" is 45%: s.806J(7).]

806A Eligible unrelieved foreign tax on dividends: introductory
(1) This section applies where, in any accounting period of a company resident in the United Kingdom, an amount of eligible unrelieved foreign tax arises in respect of a dividend falling within subsection (2) below paid to the company.

(2) The dividends that fall within this subsection are any dividends chargeable under Case V of Schedule D, other than…

(3) For the purposes of this section —

> (a) the cases where an amount of eligible unrelieved foreign tax arises in respect of a dividend falling within subsection (2) above are the cases set out in subsections (4) and (5) below; and
>
> (b) the amounts of eligible unrelieved foreign tax which arise in any such case are those determined in accordance with section 806B.

(4) Case A is where —

> (a) the amount of the credit for foreign tax which under any arrangements would, apart from section 797, be allowable against corporation tax in respect of the dividend, exceeds
>
> (b) the amount of the credit for foreign tax which under the arrangements is allowed against corporation tax in respect of the dividend.

(5) Case B is where the amount of tax which, by virtue of any provision of any arrangements, falls to be taken into account as mentioned in section 799(1) in the case of the dividend (whether or not by virtue of section 801(2) or (3)) is less than it would be apart from the mixer cap. But if that is so in any case by reason only of the mixer cap restricting the amount of underlying tax that is treated as mentioned in subsection (2) or (3) of section 801 in the case of a dividend paid by a company resident in the United Kingdom, the case does not fall within Case B.

806B The amounts that are eligible unrelieved foreign tax
(1) This section has effect for determining the amounts of eligible unrelieved foreign tax which arise in the cases set out in section 806A(4) and (5).

(2) In Case A, the difference between —

(a) the amount of the credit allowed as mentioned in section 806A(4)(b), and

(b) the greater amount of the credit that would have been so allowed if, for the purposes of subsection (2) of section 797, the rate of corporation tax payable as mentioned in that subsection were the upper percentage,

shall be an amount of eligible unrelieved foreign tax.

(3) In Case B, where the mixer cap restricts the amount of tax to be taken into account as mentioned in section 799(1) in the case of the Case V dividend, the difference, in the case of that dividend, between—

(a) the amount of tax to be taken into account as there mentioned, and

(b) the greater amount of tax that would have been taken into account as there mentioned, had M in the formula in section 799(1A) in its application in the case of that dividend (but not any lower level dividend) been the upper percentage,

shall be an amount of eligible unrelieved foreign tax.

Chapter III Miscellaneous Provisions

811 Deduction for foreign tax where no credit allowable
(1) For the purposes of the Tax Acts, the amount of any income arising in any place outside the United Kingdom shall, subject to subsection (2) below, be treated as reduced by any sum which has been paid in respect of tax on that income in the place where the income has arisen (that is to say, tax payable under the law of a territory outside the United Kingdom).

(2) Subsection (1) above —

(a) shall not apply to…

and this section has effect subject to section 795(2)…

Finance Act 1998, Schedule 18

Company tax return
3. (1) An officer of Revenue and Customs may by notice require a company to deliver a return (a "company tax return") of such information, accounts, statements and reports—

(a) relevant to the tax liability of the company, or

(b) otherwise relevant to the application of the Corporation Tax Acts to the company, as may reasonably be required by the notice.

Amendment of return by company
15. (1) A company may amend its company tax return by notice to an officer of Revenue and Customs.

(4) Except as otherwise provided, an amendment may not be made more than twelve months after —

(a) the filing date…

Notice of enquiry
24. (1) An officer of Revenue and Customs may enquire into a company tax return if they give notice to the company of their intention to do so ("notice of enquiry") within the time allowed.

Amendment of return by company during enquiry
31. (1) This paragraph applies if a company amends its company tax return at a time when an enquiry into the return is in progress in relation to any matter to which the amendment relates or which is affected by the amendment.

(2) The amendment does not restrict the scope of the enquiry but may be taken into account (together with any matters arising) in the enquiry.

(3) So far as the amendment affects —
(a) the amount stated in the company's self-assessment as the amount of tax payable, or
(b) any amount that affects or may affect—
(i) the tax payable by the company for another accounting period, or
(ii) the tax liability of another company for any accounting period,
it does not take effect while the enquiry is in progress in relation to any matter to which the amendment relates or which is affected by the amendment…

(4) An amendment whose effect is deferred under sub-paragraph (3) takes effect as follows —
(a) if the conclusions in [the closure notice] state either —
(i) that the amendment was not taken into account in the enquiry, or
(ii) that no amendment of the return is required arising from the enquiry,
the amendment takes effect when [the closure notice] is issued;
(b) in any other case, the amendment takes effect as part of the amendments made by the closure notice.

Completion of enquiry
32. (1A) An enquiry is completed when an officer of Revenue and Customs informs the company by notice (a ["closure notice"])… that they have completed their enquiries…

(1B) The [closure notice] takes effect when it is issued.

Direction to complete enquiry
33. (1) The company may apply to the tribunal for a direction that an officer of Revenue and Customs gives a [closure notice] within a specified period.

(3) The tribunal shall give a direction unless satisfied that an officer of Revenue and Customs has reasonable grounds for not giving a [closure notice] within a specified period.

Amendment of return after enquiry
34. (1) This paragraph applies where a [closure notice] is given to a company by an officer.

(2) The [closure notice] must state the officer's conclusions and—
(a) state that, in the officer's opinion, no amendment is required of the return that was the subject of the enquiry, or
(b) make the amendments of that return that are required —
(i) to give effect to the conclusions stated in the notice…

(2A) The officer may by further notice to the company make any amendments of other company tax returns delivered by the company that are required to give effect to the conclusions stated in the closure notice.

Claim for relief for overpaid tax etc *[effective until 31 March 2010]*
51. (1) A company which believes it has paid tax under an assessment which was excessive by reason of some mistake in a return may make a claim for relief —
(a) by notice in writing,
(b) given to the Board,
(c) not more than six years after the end of the accounting period to which the return relates.

(2) On receiving the claim the Board shall enquire into the matter and give by way of repayment such relief in respect of the mistake as is reasonable and just.

(3) No relief shall be given under this paragraph —
(a) in respect of a mistake as to the basis on which the liability of the claimant ought to have been computed when the return was in fact made on the basis or in accordance with the practice generally prevailing at the time when it was made, or
(b) in respect of a mistake in a claim or election which is included in the return.

(5) On an appeal against the Board's decision on the claim, the tribunal shall determine the claim in accordance with the same principles as apply to the determination by the Board of claims under this paragraph.

Claims must be quantified
54. A claim under any provision of the Corporation Tax Acts for a relief, an allowance or a repayment of tax must be for an amount which is quantified at the time when the claim is made.

General time limit for making claims
55. Subject to any provision prescribing a longer or shorter period, a claim for relief under any provision of the Corporation Tax Acts must be made within six years from the end of the accounting period to which it relates.

Supplementary claim or election
56. A company which has made a claim or election under any provision of the Corporation Tax Acts (by including it in a return or otherwise) and subsequently discovers that a mistake has been made in it may make a supplementary claim or election within the time allowed for making the original claim or election.

Claims or elections affecting a single accounting period

57. (1) This paragraph applies to a claim or election for tax purposes which affects only one accounting period ("the relevant accounting period").

(2) If notice has been given under paragraph 3 requiring a company to deliver a company tax return for the relevant accounting period, a claim or election by the company which can be made by being included in the return (as originally made or by amendment) must be so made.

(3) If a company has delivered a company tax return for the relevant accounting period, a claim or election made by the company which could be made by amending the return is treated as an amendment of the return.
The provisions of paragraph 15 (amendment of return by company) apply.

(4) Schedule 1A to the Taxes Management Act 1970 (claims and elections not included in returns) applies to a claim or election made by a company which cannot be included in a company tax return for the relevant accounting period.
This applies in particular to a claim or election made —

(b) at a time when its return for the relevant accounting period cannot be amended.

Claims or elections involving more than one accounting period

58. (1) This paragraph applies to a claim or election for tax purposes if —

(a) the event or occasion giving rise to it occurs in one accounting period (the period to which it "relates"), and
(b) it affects one or more other accounting periods (whether or not it also affects the period to which it relates).

(2) If a company makes a claim or election which —

(a) relates to an accounting period for which the company has delivered a company tax return and could be made by amendment of the return, or
(b) affects an accounting period for which the company has delivered a company tax return and could be given effect by amendment of the return,

the claim or election is treated as an amendment of the return.
The provisions of paragraph 15 (amendment of return by company) apply.

(3) Schedule 1A to the Taxes Management Act 1970 (claims and elections not included in returns) applies to a claim or election made by a company if or to the extent that it is not —

(a) made by being included (by amendment or otherwise) in the company tax return for the accounting period to which it relates, and
(b) given effect by being included (by amendment or otherwise) in company tax returns for the accounting periods affected by it.

Other claims and elections

59. (1) Schedule 1A to the Taxes Management Act 1970 applies to a claim or election for tax purposes which is not within paragraph 57 or 58, whether or not it is included (by amendment or otherwise) in a company tax return.

(2) The provisions of this Schedule do not apply where or to the extent that the provisions of Schedule 1A apply.

Provisions supplementary to paragraphs 57 to 59
60. (1) Paragraphs 57 to 59 have effect subject to any express provision to the contrary.

(2) Nothing in those paragraphs affects the time limit or any other conditions for making a claim or election.

(3) Where Schedule 1A to the Taxes Management Act 1970 applies by virtue of any of those paragraphs and the claim or election results in an increase in the amount of tax payable, all such adjustments by way of assessment or otherwise shall be made as are necessary to give effect to it.