TC01533

Appeal number: MAN/2006/0120

FIRST-TIER TRIBUNAL

TAX

GRATTAN PLC **Appellant**

- and -

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

DIRECTIONS

TRIBUNAL: JUDGE ROGER BERNER
JULIAN STAFFORD (Member)

UPON this appeal having been heard by the Tribunal on 6 – 10 December 2010 and on 8 April 2011 and having considered the further representations in writing of the parties

IT IS DIRECTED that:

1. The question set out in the Schedule to these Directions (below) concerning the interpretation of European Union law be referred to the Court of Justice of the European Union for a preliminary ruling in accordance with Article 267 of the Treaty on the Functioning of the European Union.

2. That the Registrar of the First-tier Tribunal (Tax Chamber) do forthwith transmit to the Registrar of the Court of Justice of the European Union:

(1) this Direction and the accompanying Schedule; and

(2) the decision of the Tribunal released on 12 January 2011.

3. All further proceedings in this appeal be stayed until the Court of Justice of the European Union has given its ruling on the said question or until further direction.

SCHEDULE

REQUEST FOR PRELIMINARY RULING OF THE COURT OF JUSTICE OF THE EUROPEAN UNION BY THE FIRST-TIER TRIBUNAL (TAX CHAMBER) OF THE UNITED KINGDOM

I. INTRODUCTION

1. The First-Tier Tribunal (Tax Chamber), of the United Kingdom, ("the Tax Tribunal") seeks a preliminary ruling from the Court of Justice of the European Union ('the Court of Justice') pursuant to Article 267 of the Treaty on the Functioning of the European Union on a question concerning value added tax ("VAT").

2. The question relates to situations where a taxable person has overpaid VAT which was collected by the Member State contrary to the requirements of EU VAT legislation. It is whether the EU law principles of effectiveness and/or equivalence require any further remedy required by EU law to be provided in the Tax Tribunal, or whether it is sufficient that the remedy is available under national law in the ordinary courts of the Member State.

3. This question needs only to be addressed if the Court of Justice decides, in Case C-591/10 *Littlewoods Retail Limited v The Commissioners for Her Majesty's Revenue and Customs* ("*Case C-591/10 Littlewoods*"), that where the remedy provided by a Member State in such an overpayment situation provides only for (a) reimbursement of the principal sums overpaid, and (b) simple interest on those sums in accordance with national legislation, such as section 78 of the Value Added Tax Act 1994 ("VATA"), that remedy does not accord with EU law.

4. In connection with these same proceedings the Tax Tribunal has already referred a separate question to the Court of Justice under reference C-877/11. That question relates to the basis of assessment of a supply of goods and does not impact on the question detailed below. The reference of the question which is the subject of this order was stayed pending an appeal against the making of the reference; that appeal was refused by the Upper Tribunal (Tax and Chancery) on 15 September 2011 (decision released on 28 September 2011, see [2011] UKUT 399 (TCC).

II. THE QUESTION REFERRED

5. The Tax Tribunal seeks a preliminary ruling of the Court of Justice on the following question:

If the Court of Justice concludes that the answer to the Question 1 referred in the case of *Littlewoods Retail Limited v The Commissioners for Her Majesty's Revenue and Customs (Case C-591/10)* is in the negative:

> **(1) Do the EU law principles of effectiveness and/or of equivalence require the remedy for an overpayment of VAT in breach of EU law to be a single remedy for**

both the reimbursement of the principal sums overpaid and for the use value of the overpayment and/or interest?;

(2) In circumstances where there are alternative remedies under domestic law, is it a breach of the principles of effectiveness and/or of equivalence for the remedy or remedies not to be in the statutory provisions governing the making of the principal reimbursement claims and the appeals from administrative decisions on those claims?; and

(3) Is it a breach of the principles of effectiveness and/or of equivalence to require a claimant to pursue the principal reimbursement claim and the claim for simple interest in one set of proceedings before the Tax Tribunal and the balance of the remedy required by EU law in respect of the use value of the overpayment and/or interest in separate proceedings before the High Court?

III. THE PARTIES

6. The Appellant, Grattan plc ("Grattan"), is (1) registered for VAT as the representative member of a VAT group, and is (2) the assignee of the rights of other VAT registered persons who were representative member of two other VAT groups. Grattan either paid VAT to the Commissioners, or has the benefit of the rights of those who did so. The members of those VAT groups ("the Companies") carried on the business of retailing goods by mail order.

7. The Commissioners (and their predecessors, the Commissioners of Customs and Excise) were at all material times, and remain, responsible for the collection and management of VAT in the United Kingdom.

III. RELEVANT FACTS

8. The Companies sold goods shown in their catalogues by mail order. They used the services of persons described as "agents". An agent earned commissions (or credits) both in relation to her own purchases of goods from the mail order catalogue and in relation to purchases from the catalogue made by third parties through the agent. The dispute in the proceedings before the Tax Tribunal only concerns commissions in relation to purchases made by third parties ("Third Party Purchases"). That commission, which was credited to the agent's account with the relevant Company, was calculated as a percentage of the payments remitted to the relevant Company by the agent in respect of the relevant purchases, and could be taken in different ways as set out at paragraph 10 below.

9. Typically, the agent would hold one account for purchases of goods and have a limited number of third party "sub-customers" to whom she would pass a Company's catalogues. The agent would place the sub-customers' orders by telephoning the Company's call-centre or by sending off an order form. Unless an alternative delivery address was specified, the goods ordered would be delivered to the agent for onward distribution to the sub-customers. Payment for the goods (usually in instalments) would be collected by the agent from the sub-customers and periodically remitted to the mail order company.

10. The agents earned commission of 10% based on the amounts remitted to the Company by the agent. The commission would be credited to an account in the Company's books and the agent could then claim in the following ways:

(1) The agent could claim it as a cheque payment;

(2) The agent could apply the credit against the balance of her account so as to reduce her outstanding debt to the Company for goods that she had bought from the Company;

(3) The agent could apply the credit as full or part payment against the purchase of further goods ("secondary goods").

11. When taken as a cheque payment or as credit against the agent's outstanding balance the commission was referred to as being taken "in cash". When taken against the purchase of secondary goods, the commission was referred to as taken "in goods". The dispute in the proceedings before the Tax Tribunal concerns only situations in which the commission was taken "in cash".

12. The dispute before the Tax Tribunal arises out of claims made by Grattan to the Commissioners for repayment of sums paid by way of VAT which Grattan claimed were wrongly levied as VAT, by reason of the commissions paid in relation to Third Party Purchases having been treated as consideration for a supply of services by the agent, and not as a discount or discounts reducing the consideration for, or the taxable amount of, supplies of goods by the Companies to the Agents. The claims in respect of which Grattan maintains an appeal covered periods from April 1973 (when VAT was first introduced in the United Kingdom) to December 1996.

13. The Commissioners have already repaid most of the principal sums that have been reclaimed by Grattan. Repayment of the principal sums is in dispute before the Tax Tribunal only where the agent received commission in cash in respect of Third Party Purchases transactions in the period from 1973 up to 1 January 1978. It is in relation to that dispute that the Tax Tribunal has referred the separate question to the Court under reference C-877/10.

14. Where repayments have been made by the Commissioners, they have also paid simple interest calculated in accordance with section 78 VATA. However, the issue is about the appropriate measure of interest to be applied to the whole of the amounts that have either been repaid or, as a result of the proceedings before the Tax Tribunal, are found to be repayable.

IV. RELEVANT PROVISIONS OF NATIONAL LAW

Claims for repayment of overpaid VAT, interest and appeals

15. If a taxable person overpays VAT, section 80 VATA enables the taxable person to make a claim to the Commissioners to recover the amount overpaid. So far as material, section 80 provides as follows.

> "**80 Credit for, or repayment of, overstated or overpaid VAT**
>
> (1) Where a person-
>
> (a) has accounted to the Commissioners for VAT for a prescribed accounting period (whenever ended), and
>
> (b) in doing so, has brought into account as output tax an amount that was not output tax due, the Commissioners shall be liable to credit the person with that amount.
>
> …
>
> (2) The Commissioners shall only be liable to credit or repay an amount under this section on a claim being made for the purpose.
>
> (2A) Where—

(a) as a result of a claim under this section by virtue of subsection (1) … above an amount falls to be credited to a person, and

(b) after setting any sums against it under or by virtue of this Act, some or all of that amount remains to his credit,

the Commissioners shall be liable to pay (or repay) to him so much of that amount as so remains.

…

(7) Except as provided by this section, the Commissioners shall not be liable to credit or repay any amount accounted for or paid to them by way of VAT that was not VAT due to them".

16. Where a claim under section 80 VATA is successful, the taxable person may also be entitled to interest on the sum overpaid calculated in accordance with the provisions of section 78 VATA. Section 78 provides as follows:

"**78 Interest in certain cases of official error**

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

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

…

(c) (otherwise than in a case falling within paragraph (a) … above) paid them by way of VAT an amount that was not VAT due and which they are in consequence liable to repay to him, ….

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

…

(3) Interest under this section shall be payable at the rate applicable under section 197 of the Finance Act 1996.

…

(10) The Commissioners shall only be liable to pay interest under this section on a claim made in writing for that purpose."

17. VATA therefore provides that a person who has overpaid VAT and wishes to recover the amount of the overpayment and interest thereon must submit a claim to the Commissioners under section 80 and section 78. As a matter of national law, the provisions of section 78 and 80 VATA (for the repayment of wrongly levied VAT and the payment of simple interest thereon) are the only means available to a taxpayer to recover overpaid VAT and interest on VAT that has been overpaid. This has been confirmed in judgments of the High Court of Justice of England and Wales in *FJ Chalke Ltd v Revenue & Customs* [2009] EWHC 952 (Ch)[1] and *Littlewoods Retail Ltd v Revenue & Customs* [2010] EWHC 1071(Ch).[2] However, in those two cases the High Court has also stated that that exclusion would be disapplied to the extent necessary to give effect to any EU law right. Thus if EU law required any further

[1] http://www.bailii.org/ew/cases/EWHC/Ch/2009/952.html

[2] http://www.bailii.org/ew/cases/EWHC/Ch/2010/1071.html

remedy to be provided in addition to that already provided for under sections 78 and 80 VATA, that remedy would be available by a claim for restitution before the ordinary courts.

18. The ordinary courts of the United Kingdom comprise the High Court of Justice of England and Wales (a court with inherent jurisdiction), the County Courts in England and Wales; the Court of Session and the Sheriffs Courts in Scotland; and the High Court of Justice in Northern Ireland and the County Courts in Northern Ireland. Those courts have jurisdiction over claims for restitution, and claims for damages (including claims against the State and public bodies).

19. The Tax Tribunal is a tribunal established by statute[3]. So far as is here relevant, its jurisdiction in relation to the matters in issue is defined by section 83 VATA as follows:

> "... an appeal shall lie to the tribunal with respect to any of the following matters –
>
> ...
>
> (s) any liability of the Commissioners to pay interest under section 78 or the amount of interest so payable;
>
> (t) a claim for the ... repayment of an amount under section 80 ...".

20. A decision made by the Tax Tribunal as to whether or not the Commissioners are liable to repay an amount paid by way of VAT to a particular taxpayer or liable to pay anything by way of interest is therefore made on appeal from a decision of the Commissioners and is binding as between the Commissioners and that particular taxpayer (unless overturned on an appeal). An appeal may be made to the Upper Tribunal (with permission) on a point of law.

VI. THE NATIONAL PROCEEDINGS

21. The issues before the Tax Tribunal include whether the provisions of sections 78 and 80 VATA are in accordance with the requirements of EU law regarding any substantive right under EU law to recover interest on overpaid amounts of VAT. The Tax Tribunal does not refer questions to the Court of Justice on that issue. This is because questions concerning (a) whether there is any right under EU law to receive interest on VAT overpaid in breach of EU law; and (b) if so, the extent of that EU law right, have already been referred to the Court of Justice by the High Court in *Case C-591/10 Littlewoods*. In that respect, the Tax Tribunal has decided to stay the proceedings before it pending the judgment of the Court of Justice on that reference. (See the decision of the Tax Tribunal at paragraphs 66 – 70.)

22. However, if sections 78 and 80 VATA are not in accordance with EU law in that respect, the Tax Tribunal has taken the provisional view that the provisions of sections 78 and 80 VATA could not be construed so as to accommodate the EU substantive right in proceedings before the Tax Tribunal. The Tax Tribunal's preliminary conclusion was that that did not breach the principles of equivalence or effectiveness but it considered that it could not conclude on this point with complete confidence and without seeking the guidance of the Court of Justice on the question whether the principles of effectiveness and/or equivalence would, or would not, be breached by the failure to make provision in VATA, or through the Tax Tribunal, for interest beyond that provided by section 78 VATA.

23. For that reason the Tax Tribunal decided to refer the question of whether the EU law principles of effectiveness and equivalence require the further remedy to be available in

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[3] Tribunals, Courts and Enforcement Act 2007, section 3

proceedings before the Tax Tribunal, or whether the requirements of the principles of effectiveness and/or equivalence are met by the availability of a claim before the High Court or County Court. (See decision of the Tax Tribunal at paragraphs 71 – 81.)

VII. SUMMARY OF THE RELEVANT CONTENTIONS OF THE PARTIES

Grattan

24. Grattan submits that the United Kingdom has devised a statutory regime for dealing with claims for the repayment of overpaid VAT and claims for the payment of interest thereon. The statutory regime does not protect adequately the rights that taxable persons derive from EU law: the rates of interest provided for under that regime (which are below Grattan's commercial borrowing rates) do not fully reflect and make good the detriment to a claimant from being deprived of its money and the benefits to the Commissioners from being in possession of the claimant's money.

25. In those circumstances, the statutory regime must be applied to claims based on EU law consistently with the requirements of EU law. The United Kingdom cannot, consistently with its obligations under EU law, require claimants who invoke an EU law right to commence two sets of proceedings, one under the statutory scheme and another outside the statutory scheme, each before different courts and having different limitation periods, one starting with an administrative claim and the other not.

The Commissioners

26. The Commissioners contend that the principle of effectiveness does not require that the remedy required by EU law must be provided for or classified in any particular way in national law.

27. It follows that there is no requirement under EU law that the remedy that is required must be within the jurisdiction of any particular court or tribunal (whether a specialist tribunal, or a general court), so long as the remedy is available in national law.

28. It is well-established that in the absence of Community rules on the refund of national charges levied though not due it is for the domestic legal system of each Member State both (a) to designate the courts and tribunals having jurisdiction and (b) to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from EU law. This is subject only to the requirement that national law is consistent with the principles of equivalence and effectiveness (see e.g. *Test Claimants in the FII Group Litigation (Case C-446/04)* [2006] ECR Page I-11753 at §203).

29. The principle of effectiveness requires that national procedural rules must not render the exercise of rights conferred by EU law virtually impossible or excessively difficult. The principle of effectiveness is to be applied by reference to the whole corpus of national law. The principle does not dictate either (a) which part or which provisions of national law are to contain the remedy that is to be provided, or (b) which national court or tribunal is to be the forum in which the remedy may be obtained.

30. The principle of equivalence requires that the procedural conditions governing actions intended to ensure the protection of the rights which citizens have from the direct effect of European Union law be not less favourable than those relating to similar actions of a

domestic nature: Case 33/76 *Rewe-Zentralfinanz eG and Rewe-Zentral AG v Landwirtschaftskammer für das Saarland* [1976] ECR 1989 at paragraphs 5 and 6.

31. Moreover it is for the national court to apply the requirements of the principles of effectiveness and equivalence to the case before it.

32. The points above are sufficient to dispose of this question. There is no further guidance that is to be given as to the meaning/effect of the principle of effectiveness. The content of that principle has been consistently re-stated by this Court. The application of the principle to the particular features of national law is a matter for the national court, which is much better equipped than the Court of Justice to perform a task that requires evaluation of the practical consequences of the provisions of national law. The content of the principle of equivalence has also been consistently re-stated by this Court and, similarly, it is for the national court to apply that principle.

33. However, if it is necessary to go further than this, the Commissioners will contend as follows. Applied to the facts of the present case, the principle of effectiveness does not require the rules of national law that give effect to the remedy required by EU law to be found in a single legislative instrument. This is a matter of form, not a matter of substance, and the principle of effectiveness has nothing to say about it.

34. With respect to the principle of effectiveness, if it is assumed that the answers to the questions referred to this Court in *Case C-591/10 Littlewoods* are to the effect that the provisions of sections 78 and 80 VATA do not satisfy the requirements of EU law, the position in English law will be as follows:

(1) The taxpayer will retain the rights presently provided under sections 78 and 80 VATA and be able to enforce those rights in proceedings before the Tax Tribunal. (In fact, section 78 provides a straightforward and uncomplicated remedy. Disputes as to the calculation of the sum due are rare, and proceedings before the Tax Tribunal to recover the amount due under section 78 are also rare. There is no reason to suspect that this will change regardless of the way in which the Court answers the questions referred to it in *Case C-591/10 Littlewoods*.)

(2) The taxpayer will also be able to pursue a claim in restitution before the High Court or the County Court to the extent that it is necessary to do so to recover any further amount he is entitled to by reason of EU law.

This state of affairs would be entirely consistent with the principle of effectiveness. See the judgment of this Court in Case C-268/06 *Impact* [2008] ECR 2008 Page I-02483. It is clear from the judgment in that case that the possibility that it might be necessary to commence two claims is not *per se* contrary to the requirements of the principle of effectiveness.

35. With respect to the principle of equivalence, there can be no breach of that principle in a case such as the present, where a taxable person bringing a claim for the repayment of VAT overpaid contrary to EU law ("the EU Law Claimant") may obtain the full remedy available to a taxable person bringing a claim for the repayment of VAT based on national law ("the National Law Claimant") to precisely the same extent and under precisely the same conditions.

(1) Under sections 78 and 80 VATA, both the EU Law Claimant and the National Law Claimant are entitled both to (a) repayment of the principal sum; and (b) simple interest thereon at the same rates and subject to the same time limits and other procedural conditions.

(2) Insofar as the EU Law Claimant may in addition be entitled to compound interest as a matter of EU law, that is not a remedy which is available to a taxable person with a claim based solely on national law because the applicable national law provisions (sections 78 and 80 VATA), prevent a person with a claim based solely on national law pursuing any domestic claims or remedies to recover compound interest.

(3) In the premises, it is no breach of the principle of equivalence for the EU Law Claimant to pursue the additional claim available to him by means of other proceedings. In this regard he is not in a materially similar position to the National Law Claimant who is not entitled to recover compound interest at all.

ROGER BERNER
TRIBUNAL JUDGE
RELEASE DATE: 31 October 2011