TC02183

Appeal number: TC/2010/05085

INCOME TAX - claim for foreign tax credit relief for Guernsey tax - appeal against closure notice – whether valid claim made for one-ninth tax credits under ICTA s 231 – on the facts, no – jurisdiction of the Tribunal considered

FIRST-TIER TRIBUNAL
TAX CHAMBER

VANESSA BUXTON **Appellant**

- and -

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

TRIBUNAL: JUDGE CHRISTOPHER STAKER
MS ANNE REDSTON

Sitting in public at 45 Bedford Square, London WC1 on 3 July 2012

Sarah Dunn of Counsel, instructed by Taxation Practical Service Limited, for the Appellant

James Rivett of Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. This case concerns a claim by Ms Buxton for tax relief in respect of a dividend that she received in 2003, paid by a company out of profits taxed in Guernsey. Her appeal to the Tribunal was substantially based on her claimed rights under European Union ("EU") law.

2. Mr Rivett, for HMRC, argued that the claim based on EU law was invalid and/or out of time and that the Tribunal therefore had no jurisdiction to determine that claim. Ms Dunn, for the Appellant, resisted that contention.

3. The Tribunal heard argument on these matters as preliminary issues, and this decision deals only with those questions.

4. The oral submissions on these issues made at the hearing were supplemented by subsequent written submissions from both parties. The Tribunal is grateful to both counsel for these helpful submissions.

The evidence

5. We were provided with Ms Buxton's 2003-04 tax return, the correspondence between the parties, and between the parties and the Tribunal. After the hearing, HMRC provided a copy of the Guidance Notes for the 2003-04 tax return and also the Notes for the 2003-04 Foreign Pages.

6. Based on that evidence we find the following facts.

The facts

7. On 4 June 2003, Ms Buxton received a dividend of £25,000 from a company which we were told was resident in Guernsey (we make no finding as to its residence). The company had paid 20% corporate tax on its profits, so the dividend was £31,250 if grossed up by the corporate tax suffered.

8. In her 2003-04 self-assessment ("SA") tax return, Ms Buxton (through her agent) completed the box headed "foreign tax credit relief for foreign tax suffered" at page 5 of the Foreign Pages. She included £31,250 as the amount chargeable, £6,250 as the tax suffered and ticked the box claiming foreign tax credit relief.

9. Ms Buxton's total income after her personal allowance was £38,511. This was £8,011 above the 2003-04 basic rate threshold.

10. By notice dated 26 May 2005, HMRC opened an enquiry into Ms Buxton's tax credit relief claim, and on 7 July 2005 issued a closure notice denying foreign tax credit relief. On the same day they amended her SA return, increasing the tax due by £2,939.58.

11. On 25 July 2005, Ms Buxton's agent appealed against the closure notice. Various correspondence ensued: the agent disputed the denial of foreign tax credit relief, while HMRC relied on Income and Corporation Taxes Act 1988 ("ICTA") s 790(5)(c)(i) which only allowed relief to be claimed by an individual if the overseas tax charged "represents tax which neither the company nor the recipient would have borne if the dividend had not been paid."

12. In 2006 a hearing was listed before the General Commissioners but adjourned at the request of Ms Buxton's agent. A further hearing was listed in 2007, and adjourned for the agent to obtain counsel's opinion.

13. On 11 June 2007, the agent wrote to HMRC setting out extracts from counsel's opinion, including the following:

> ... it is clear enough from the case law of the ECJ that the lack of relief from economic double taxation in this case contravenes the prohibition under article 56 of the EC Treaty. A UK resident shareholder in a UK company receives a tax credit which discharges his or her liability to basic rate income tax...a UK resident shareholder in a foreign company is in a comparable position yet the relief does not extend to him or her...the way forward would be to raise the European point in an appeal to the General Commissioners or Special Commissioners and ask them to make a direct reference to the ECJ.

14. The letter concluded by asking HMRC "to take advice on this fundamental point of European law" and confirming that if no agreement could be reached, the agents "intend instructing Counsel to appear before the Commissioners to take the above point of law on our client's behalf."

15. Correspondence on the EU law issue and other matters continued, although there was a ten month delay between 19 November 2007 and 17 September 2008, during which the HMRC officer took specialist internal advice.

16. On 13 November 2009, HMRC wrote a "formal letter" to Ms Buxton's agent setting out "the findings of the enquiry and the decision made for the issue under dispute." Under the heading "Decision" the letter said:

> No foreign tax credit relief is due in respect to the Guernsey dividend income. It is company tax deducted and unilateral relief is not due to a shareholder since the whole of it represents tax which the company would have borne if the dividend had not been paid. ICTA99/S790 refers.

17. The letter also informed the agent that the appeals procedure had changed and offered the appellant a review of the decision set out in that letter. The decision in that letter did not address any EU law point.

18. On 9 December 2009, the agent wrote to HMRC enclosing "a formal submission for consideration when undertaking a Review against the decision contained within your letter." Paragraph 4 of that submission repeated the extract from counsel's

opinion set out in paragraph 13 above, and the point was then further developed. The submission concluded with the words "it would therefore be intended to appeal to the First-tier Tribunal and take the above and certain further points of European law."

19. On 25 January 2010, HMRC sent a letter to Ms Buxton in terms materially identical to the 13 November 2009 letter, along with a letter to the agent saying that the decision should in fact have been issued directly to the taxpayer and not to the agent. Like the 13 November 2010 letter, the 25 January 2010 letter did not address any EU law point.

20. On 15 April 2010, HMRC informed the agent that they had received "guidance" on the submissions sent with the letter of 9 December 2009. This was then set out in a further letter dated 16 April 2010 which included the following paragraphs:

> The matter of European law...was first raised in [the agent's] letter of 11 June 2007 [extract from that letter quoted]. It seems from this that the argument which those advising Miss Buxton wish to advance is that she is entitled to a 1/9th divided tax credit because Section 2 European Communities Act 1972 requires that the UK legislation on 1/9th dividend tax credits be read down to include dividends from the Guernsey company...in order to give effect to Ms Buxton's community law right of freedom of movement of capital.
>
> ... However, the claim made in Miss Buxton's 2003-04 ITSA is a claim to unilateral double tax credit relief in respect of the Guernsey dividend. It is that claim that has been refused and an appeal made against refusal. There is nothing I can see in the papers which amounts to a withdrawal of that claim and its replacement by a claim in figures for a 1/9 dividend tax credit. Miss Buxton is now out of time to make a claim in an amended ITSA return. As it seems to me, her only route to adjudication of a 1/9 dividend tax credit claim is the withdrawal of the unilateral double tax credit claim originally made accompanied by an error or mistake claim for 2003-04, the base [sic] of the error or mistake being that the 1/9 dividend was due but not claimed in the return. The 6 year time limit for a 2003-04 error or mistake expires on 6 April 2010. If no error or mistake claim is made, the appeal is against the refusal of unilateral double tax credit relief.
>
> Although the time limit has technically passed on any claim we would be inclined to accept a late application which requests the 1/9 credit to be considered on appeal rather than unilateral double tax credit relief. Any claim would need to be in writing stating revised figures for consideration. If I do not hear from you by 23 April 2010, I will presume you wish the appeal to be considered on the original basis and will arrange for the review to proceed accordingly.

21. By letter dated 21 April 2010, the agent replied, saying that:

> The original claim is for relief in respect of the tax withheld on the dividend by way of unilateral double taxation relief. Counsel considered that the relief should be granted.

> Counsel also considered in the alternative that a one-ninth credit should be available to the taxpayer...on appeal we would argue our original claim but in the alternative make a claim for a one ninth credit...
>
> To the extent that we need to signal that this claim is applicable to the year 2003-04 we formally claim that section 33 TMA is hereby applied.

22. The letter also attached a calculation setting out the liability if the one-ninth tax credit applied rather than the foreign tax credit originally claimed on the return. The calculation increased the tax liability by £1,049.74.

23. On 14 May 2010, HMRC wrote to Ms Buxton. The letter was headed "Review of 2003-04 Self Assessment Enquiry Conclusion." The first paragraph informed Ms Buxton that the decision in the letter dated 25 January 2010 should be upheld because "there is no foreign tax credit relief due in respect of Guernsey dividend income."

24. The following two paragraphs explained the law. The third read as follows:

> Your accountants [name] have also suggested that the lack of relief from economic double taxation contravenes the prohibition under Article 56 of the European Community Treaty. HM Revenue & Customs consider that ... [the letter then proceeded to set out reasons for rejecting the arguments] and so in HM Revenue & Customs view there is no merit in the community law point advanced on your behalf.
>
> A claim has been made by your accountants for error or mistake relief under Section 33 Taxes Management Act 1970 for 2003/4 for 1/9 tax credit relief as an alternative to the unilateral relief claimed. Unfortunately the time limits for such a claim expired on 31 January 2010 not 6 April 2010 as shown on my colleague's letter of 16 April 2010. HM Revenue & Customs apologise for any inconvenience caused by this ...
>
> If you accept my conclusion please write and let me know
>
> If you do not agree with my conclusion you can ask an independent tribunal to decide the matter...

25. The agent instructed another firm, Taxation Practical Service Limited ("TPS"), to deal with the issue. By letter dated 8 June 2010, TPS wrote to HMRC saying:

> In accordance with your review dated 14 May please take this letter as an appeal on behalf of Miss VA Buxton against the conclusion of HMRC. We enclose a copy of our Notice of Appeal to the Tribunals Service.

26. The notice of appeal sent to the Tribunal has the same date, 8 June 2010. In that notice of appeal, the grounds of appeal are as follows:

> (a) the review decision of HMRC is not in accordance with the applicable law

(b) the review decision is not in accordance with European jurisprudential precedent in respect of Freedom of Movement of capital

(c) the review decision specifically is in breach of Article 56 of the European Treaty.

The law

27. The statutory provisions are set out in an Appendix to this decision.

The Appellant's case

28. Ms Dunn accepted that ICTA s 790(5)(c)(i) meant that Ms Buxton had no statutory entitlement to foreign tax credit relief. However, she submitted that Ms Buxton had a valid claim to one-ninth tax relief under ICTA s 231.

29. She also accepted that the time limit for a valid claim was 31 January 2010, and that therefore if the claim was not made until the letter dated 21 April 2010, it was outside the statutory time limit. As has been indicated above, this limitation issue has been taken as a preliminary matter by the Tribunal.

30. Ms Dunn's submissions on limitation were that:

(1) the claim on Ms Buxton's tax return could be read as being a claim under ICTA s 231 ("the original claim argument"); or

(2) one or both of the letters sent to HMRC on 11 June 2007 and 9 December 2007 constituted an amendment to that claim ("the amendment argument"; or

(3) one or both of those letters constituted a new claim for relief under ICTA s 231 ("the new claim argument").

31. We have set out below the parties' submissions and our decision on each of these three arguments in turn.

The original claim argument

Submissions on behalf of the Appellant

32. In the course of the hearing before the Tribunal, Ms Dunn accepted that:

(1) Ms Buxton's intention when she (or her agent) filled in the tax return was to make a claim under ICTA s 790 and that this intention was "misconceived". However, she submitted that there was nowhere on the return for a taxpayer to make a claim under ICTA s 231 as the section was specifically stated to apply only to UK companies and this was reflected in the design of the tax return form. It is only the subsequent jurisprudence of the European Court that has made it clear that ICTA s 231 must be "read down" to apply to certain foreign dividends.

(2) The quantum of relief originally claimed under ICTA s 790 was more than the relief which would be given by way of an ICTA s 231 claim, because

> Ms Buxton was a higher rate taxpayer. The one-ninth tax credit thus did not extinguish her tax liability on the dividend.

33. Ms Dunn therefore accepted that both the current basis for the claim and its quantum were different from that set out in the SA return: in her words the claim was "on the wrong basis and for the wrong amount".

34. However, she argued that these problems did not prevent the claim in the the SA return from being a claim under ICTA s 231. She said that, looking at the position "on a sensible basis", Ms Buxton had claimed relief from income tax on her Guernsey dividend, and the appeal was against HMRC's refusal to allow that relief. If the EU law arguments were correct, then HMRC's adjustment to the tax return was wrong.

35. Ms Dunn further submitted that Ms Buxton had appealed against the amendment to her return, and that once a matter is under appeal a taxpayer can argue "any point of law he thinks appropriate", in accordance with the recent Supreme Court decision in *Tower MCashback LLP 1 v Revenue and Customs Commissioners* [2011] 2 AC 457, [2010] STC 1143 ("*Tower MCashback*") at [15]-[18].

36. Although specific passages of *Tower MCashback* were not drawn to our attention, we infer that Ms Dunn is relying in particular on [16], where Lord Walker noted that in the decision of the Court of Appeal below ([2010] EWCA Civ 32; [2010] STC 809), Moses LJ had approved and followed *D'Arcy v Revenue and Customs Commissioners* [2006] STC (SCD) 543 ("*D'Arcy"*) and had said at [41], that it was for the First-tier Tribunal (previously the Special Commissioner) to identify "the subject matter of the enquiry" and that:

> The closure notice completes that enquiry and states the inspector's conclusions as to the subject matter of the enquiry. The appeal against the conclusions is confined to the subject matter of the enquiry and of the conclusions. But I emphasise that the jurisdiction of the special commissioners is not limited to the issue whether the reason for the conclusion is correct. Accordingly, any evidence or any legal argument relevant to the subject matter may be entertained by the special commissioner subject only to his obligation to ensure a fair hearing.

37. We also note that in *Tower MCashback* at [18], Lord Walker approved the following observations of Dr Avery Jones, the Special Commissioner in *D'Arcy:*

> It seems to me inherent in the appeal system that the tribunal must form its own view on the law without being restricted to what the Revenue state in their conclusion or the taxpayer states in the notice of appeal. It follows that either party can (and in practice frequently does) change their legal arguments. Clearly any such change of argument must not ambush the taxpayer and it is the job of the Commissioners hearing the appeal to prevent this by case management.

38. In her subsequent written submission, Ms Dunn relied on *Gallic Leasing Ltd v Coburn* [1991] 1 WLR 1399, 64 TC 399 (HL) ("*Gallic Leasing*"). In *Gallic Leasing*

the taxpayer had claimed group relief sufficient to eliminate the corporation tax payable. The House of Lords found that this constituted a valid group relief claim, and that it was not necessary to identify the surrendering companies, the amount of relief surrendered by each or the particular type of relief surrendered.

39. Ms Dunn pointed out that the expression "group relief" does not actually specify the relief sought. As Lord Oliver said at [1991] 1 WLR at 1402, 64 TC at 421:

> The types of group relief are enumerated in s 259. It covers, for instance, relief for trading losses, capital allowances, management expenses of an investment company and charges on income.

40. Ms Dunn argued that by analogy, just as group relief is an umbrella term covering a number of possible types of relief, Ms Buxton in her original SA tax return claimed "tax credit relief", an ambiguous term the meaning of which could include double taxation relief, or relief under ICTA s 231. It is, she says, clear from *Gallic Leasing* that "the claim does not need to identify the nature of the relief sought, just the profits against which it is claimed, the amount of the relief and the claimant."

Submissions on behalf of HMRC

41. Mr Rivett said that the only claim made by Ms Buxton was for foreign tax credit relief. This claim had been denied by the HMRC closure notice issued in 2005. Mr Rivett further submitted as follows.

42. Ms Buxton's appeal, made on 25 July 2005, was against the conclusion stated in that closure notice, namely the denial of her claim to foreign tax credit relief. It has been accepted, on behalf of Ms Buxton, that her intention at the time that she completed the SA tax return was to claim foreign tax credit relief, and it has been conceded that there is no valid claim for this relief. The closure notice was therefore correctly issued.

43. No claim was made in the SA tax return for relief under ICTA s 131, and Ms Dunn is attempting to "smuggle" another claim inside the claim which has actually been made. Double taxation relief was an entirely different form of relief from a claim for credits under s. 231 ICTA and computed on an entirely different basis.

44. It is accepted that there was no place on the tax return form for a taxpayer to claim credit for a foreign dividend under ICTA s 231, but a taxpayer who wanted to make such a claim could have done so by completing page 3 of the Foreign Pages (which provided for UK companies to make such a claim). Ms Buxton could then have explained in the "white space" of the return that, in reliance on her EU rights, she was claiming relief and asking that the section be "read down" in compliance with European law. Had Ms Buxton completed her SA return in this manner, she would have made an explicit claim for ICTA s 231 relief. In fact, her return contained no such claim.

45. In his written submission, Mr Rivett argued that the decision in *Gallic Leasing* is distinguishable from the position in this case. In *Gallic Leasing* the taxpayer had claimed group relief, but had not provided details of the companies involved in the claim. However, Lord Oliver made clear that there were limits to the elasticity of the concept of "a claim", pointing out ([1991] 1 WLR at 1406, 64 TC at 425) that it:

> ... cannot, for instance, consist of a general assertion that for all future years group relief against whatever profits are made is claimed.

46. Mr Rivett submitted that *Gallic Leasing* does not provide a mandate for a taxpayer retrospectively to "construe" a claim made for relief under one statutory code as a claim for an entirely different relief under an entirely different statutory code, so as to avoid the application of the strict statutory time limits.

Consideration of the original claim argument

47. It is clear that Ms Buxton's original claim was for foreign tax credit relief. It has also been accepted by Ms Dunn that no foreign tax credit relief is due, as the underlying tax suffered by a Guernsey company does not meet the statutory conditions for relief under ICTA 790. This is clearly right.

48. However, Ms Dunn's submission is that this original claim for foreign tax credit relief can be read as being a claim under ICTA 231.

49. Ms Dunn submits that the duty of the Tribunal is to determine the "subject matter" of the appeal, and that we have jurisdiction to consider any evidence or legal argument relevant to that subject matter (*Tower MCashback*). We accept that submission.

50. Ms Dunn goes on to argue that the "subject matter" of this appeal is the taxability of the Guernsey dividend and the amount of tax which should correctly be levied thereon. In order for us to determine that question, she submits, we should consider not only ICTA s 790 but also ICTA s 231. She cites in her support the *Gallic Leasing* judgment. Mr Rivett says that the subject matter of the appeal is the refusal of Ms Buxton's claim to foreign tax credit relief, and seeks to distinguish the instant case from *Gallic Leasing.*

51. We agree with Mr Rivett that Ms Buxton's claim is not analogous to that in *Gallic Leasing*. There is a distinction between group relief – which may result from the surrender of losses, management expenses, capital allowances and/or charges on income – and the relief here claimed, for the following reasons.

52. Ms Buxton claimed "foreign tax credit relief". This is the heading on that part of the Foreign Pages of the SA tax return, and the box headed "tick box to claim foreign tax credit relief" has been ticked. The rules for foreign tax credit relief are set out at ICTA Part XVIII, which covers both treaty relief (s 788) and unilateral relief (s 790, supplemented by extensive, detailed provisions in Chapter II of Part XVIII (ss 792-806). Both treaty relief and unilateral relief are thus types of foreign tax credit relief,

which apply where the same item of income or gains has been subjected both to UK tax and to overseas tax.

53. The relief provided by ICTA s 231 is a different kind of relief. It does not fall within the statutory regime set out at ICTA Part XVIII, and it does not operate by providing relief for dividends which have been subject to both UK tax and overseas tax.

54. In coming to this conclusion we have also taken into account the following:

(1) The fact that relief under s 231 has been extended, by virtue of EU case law, in particular Case C-319/02 *Manninen* [2004] ECR I-7477, [2005] Ch 236, [2004] STC 1444 and Case C-35/98 *Staatssecretaris van Financiën v Verkooijen* [2000] ECR I-4071, [2002] STC 654, to encompass dividends received from certain overseas companies does not mean that relief under s 231 is a type of foreign tax credit relief.

(2) Before 6 April 1999 there was a direct connection between tax suffered by the payer and that reclaimed by the recipient: when ICTA s 231 was introduced, it provided a 25% tax credit for individuals, but only if the company had first paid corporation tax, either as "mainstream" tax or as advance corporation tax ("ACT"), also at 25%. (*Test Claimants in the FII Group Litigation v R&C Comrs* [2012] UKSC 19 at [28]. Historically some allowance was made for foreign taxes borne in calculating the mainstream tax, but this did not change the amount of ACT payable, see for example the discussion in *Collard v Mining and Industrial Holdings Ltd*. (1989) 62 TC 448.) However, this link was broken with the abolition of ACT and is thus not relevant to 2002-03.

(3) Although the paying company, to have profits available for dividend, is *likely* to have had taxable profits and to have paid corporation tax or an overseas equivalent, this is not a necessary condition for obtaining s 231 relief.

55. Thus, even to the extent that the expression "foreign tax credit relief" might be argued to be a compendium term encompassing more than one kind of tax relief, the relief provided by s 231 would not fall within that compendium term. The two are separate and structurally different.

56. We also disagree with Ms Dunn's interpretation of the final paragraph of Lord Oliver's judgment in *Gallic Leasing*, in which he said that to be a valid claim it is sufficient simply to identify "the profits against which it is claimed, the amount of the relief and the claimant." It is clear from the context that Lord Oliver was referring, not to all and any claims, but to group relief claims.

57. Finally, we note that since *Gallic Leasing* was decided, subsection 1A has been added to TMA s 42. Subsection 1A was added by FA 1995, s107(1), and applies in relation to income tax for 1996-97 and subsequent years of assessment. Subsection 1A states that the claim "shall be for an amount which is quantified at the time when the claim is made". The s 231 claim was not quantified until the letter of 21 April

2010, and the quantification showed that s 231 relief was less than the amount claimed on Ms Buxton's tax return by £1,049.74.

Decision on the original claim argument

58. For the reasons above, we find that the claim which was made by Ms Buxton was a claim for foreign tax credit relief and not a claim under ICTA s 231. It has been accepted that no foreign tax credit relief is due.

59. The original claim argument is therefore rejected.

The amendment argument

The parties' submissions

60. In her written submission, Ms Dunn said that the rejection of formalism shown in the House of Lords' decision in *Gallic Leasing* must also extend to amendments. As a result, one or both of the letters of 11 June 2007 and 9 December 2009 must be read as an amendment, since "it is clear that the amount of relief claimed remains as submitted in the tax return (albeit perhaps excessive) and that the legislative basis for that claim has changed". We read this as a submission that the claim was, in fact, quantified for the purposes of s 42(1A) TMA, despite the fact that the quantification was incorrect.

61. Mr Rivett submitted that a taxpayer can only amend a return during the period under enquiry (TMA s 9B(1)), and cannot make an amendment after a closure notice has been issued (TMA s 9B(4) and s 28). Since the closure notice in this case was issued on 7 July 2005, neither letter could constitute an amendment to the claim.

Decision on the amendment argument

62. We find that Ms Dunn's submissions are not supported by the facts. The agent's letter of 21 April 2010 said that Ms Buxton was continuing with her original claim for "tax withheld on the dividend by way of unilateral tax double tax relief", and that the ICTA s 231 claim was in the alternative.

63. There was therefore no amendment of the original claim, but if anything at all, the addition of a new claim "in the alternative". We therefore reject Ms Dunn's argument that either letter constituted an amendment to the claim.

64. As a result, we have not needed to consider Mr Rivett's submissions on the statutory provisions relating to amendments.

The new claim argument

Submissions on behalf of the Appellant

65. Ms Dunn argued that if neither of her first two arguments succeeded, then one or other of the letters of 11 June 2007 or 9 December 2009 constituted a free-standing claim to relief under ICTA s 231.

66. She submitted that the letters made clear the basis of the claim and that HMRC already knew its quantum because they had received the tax return. When challenged by Mr Rivett as to Ms Buxton's compliance with TMA Sch 1A, Ms Dunn said that para 2(1) of that Schedule required that the claim be made "to an officer of the Board", and this requirement had been satisfied. The para 2(3) requirement that the claim be "in such form as the Board may determine" was, she submitted, irrelevant as there was no prescribed form which a person could use to claim one-ninth tax credits for dividends from an overseas company. As for subparagraphs (4) and (5) of para 2, she submitted that these were directed at HMRC, not the taxpayer.

67. In her subsequent written submission she added that, if this is the Tribunal's finding, the consequence is that the claims have not been enquired into within the statutory deadlines, and so "must be accepted in the (probably excessive) amounts claimed".

Submissions on behalf of HMRC

68. Mr Rivett made a number of submissions on this question during the hearing. In his supplementary paper he narrowed the issue to one of jurisdiction, saying that if either of the 11 June 2007 or 9 December 2009 letters constituted a new claim, that claim was not the subject of these appeal proceedings.

69. Mr Rivett submitted as follows. The appeal before this Tribunal is Ms Buxton's appeal against the closure notice issued on 7 July 2005. As a result, the Tribunal has no jurisdiction to consider whether the letters constituted a new claim. This is the case despite the fact that the notice of appeal refers only to Ms Buxton's EU law arguments, and to the review decision rejecting the taxpayer's submissions on these EU law points. TMA s 31 provides no right of appeal against a review decision.

70. We have treated the lack of jurisdiction argument as Mr Rivett's primary submission.

71. For completeness we also record that, during the hearing, he submitted that neither letter constituted a new claim. He said that if Ms Buxton had wished to claim relief under ICTA s 231 then she was required to follow the statutory procedures, which (so far as relevant to this case) were as follows:

(1) A claim for relief must be quantified at the time it is made (TMA s 42(1A)).

(2) If a claim can be made within a return, this is the only way in which it can be made (TMA s 42(2)).

(3) If claimant subsequently discovers that an error or mistake has been made in the claim, a supplementary claim can be made as long as it is within the time limits for the original claim (TMA s 42(9)).

(4) If such a supplementary claim is made otherwise than by being included in a return, TMA Sch 1 applies (TMA s 42(11)). This Schedule requires that the claim be made "in such form as the Board may determine" and that that form "shall provide" for the taxpayer to make a declaration that

the particulars given are correct to the best of her knowledge and belief (TMA Sch 1 para 2(3) and (4)).

72. Mr Rivett said that neither of the 11 June 2007 or 9 December 2009 letters quantified the claim, and so neither met the statutory requirements. He pointed to the difference between these two letters, and said that the claim was not quantified until 21 April 2010, when the agent provided a schedule quantifying the relief claimed and its effect on the taxpayer's liability.

Discussion and decision on the new claim argument

73. The notice of appeal initiating the present appeal states that it is an appeal against an HMRC decision dated 25 January 2010, and that the date of the HMRC notice of conclusions of review of the decision appealed against was dated 14 May 2010.

74. The 25 January 2010 HMRC letter, as noted above, is a letter sent to Ms Buxton in terms materially identical to a 13 November 2009 letter sent to Ms Buxton's agent. As the first line of that letter makes clear, it relates "to the appeal against the amendment made to your 2003-04 tax return". That is, it related to the appeal against the closure notice. Neither the 25 January 2010 HMRC letter nor the 13 November 2009 letter referred to any point of EU law.

75. The 14 May 2010 HMRC letter was the HMRC review of the 25 January 2010 HMRC letter. In other words, it also related to Ms Buxton's appeal against the closure notice.

76. We agree with the submission of Mr Rivett that there is no appeal to the Tribunal against a review decision. Rather, the appeal to the Tribunal is against the original decision of HMRC to which the review decision relates. Thus, the present appeal before the Tribunal is against the closure notice issued in 2005, which related to a claim for foreign tax credit relief. For the reasons above, we find that at the time that the closure notice was issued, there was no s 231 claim by the Claimant, and the closure notice did not relate to any actual or potential s 231 claim. The 25 January 2010 decision accordingly related solely to the claim for foreign tax credit relief, and made no reference to any point of EU law.

77. We find that the substance of what is before us in the present appeal is thus the rejection by HMRC of Ms Buxton's claim for foreign tax credit relief.

78. We are not satisfied that Ms Buxton has since made any valid s 231 claim. The 11 June 2007 letter of Ms Buxton's representative set out quotes from an opinion received by Ms Buxton's counsel and then simply requested HMRC "to take advice on this fundamental point of European law and having done so explore what agreement we can reach" and stated that if no agreement could be reached, the agents "intend instructing Counsel to appear before the Commissioners to take the above point of law on our client's behalf". This was said in the context of a letter dealing with the appeal against the closure notice, which began by stating that HMRC had agreed to an adjournment of the appeal hearing while Ms Buxton took counsel's opinion. The 9 December 2009 letter also clearly related to the appeal against the

closure notice. It contained a brief reference to HMRC's letter of 13 November 2009 (which related to that appeal against the closure notice), and said that it was enclosing a "formal submission" for HMRC consideration when undertaking a review of that decision. That formal submission made various general points of law, and then concluded by stating that "It would therefore be intended to appeal to the First Tier Tribunal and take the above and certain further points of European law".

79. Neither of these letters, both of which related to a pending appeal against a closure notice rejecting a foreign tax credit relief claim, appears to be a new claim for relief under s 231. It would be difficult to argue that they are. However, apart from anything else, one matter that in our view makes this argument impossible is that neither letter quantifies the amount that Ms Buxton was seeking to claim in any new s 231 claim. Section 42(1A) TMA expressly provides that "a claim for a relief, an allowance or a repayment of tax shall be for an amount which is quantified at the time when the claim is made".

80. In Ms Dunn's subsequent written submission she argued – albeit in the context of her submissions on the amendment argument - that "it is clear that the amount of relief claimed remains as submitted in the tax return (albeit perhaps excessive)". We have taken this as a submission the claim was, in fact, quantified (because the original numbers had not been amended), albeit the quantification was incorrect.

81. We do not accept this argument. In our judgment, any new claim made by Ms Buxton necessarily had to be accompanied by a new quantification for that new claim. A separate calculation was required, because the methodology for calculating the two types of claims is different. It could not simply be assumed that quantification for an entirely separate claim was to serve also as the claimed quantification for the s 231 claim. Indeed, this is made obvious by the fact that Ms Buxton's representatives' subsequent letter of 21 April 2010 indicated that under a s 231 claim, her tax liability would be increased by £1,049.74.

82. During the hearing, Ms Dunn took a different approach, saying that to require formal quantification was to take an overly narrow view. She argued that HMRC had been informed of the quantum of the net dividend received by Ms Buxton and that they could easily establish the amount of relief which would be due under ICTA s 231. However, we find that this argument ignores the plain terms of s 42(1A) TMA which came into force after *Gallic Leasing* was decided. Subsection 1A states clearly that the claim "shall be for an amount which is quantified at the time when the claim is made".

83. We therefore find that neither the letter of 11 June 2007 nor that of 9 December 2009 amounts to a claim under ICTA s 231 since, apart from anything else, neither quantifies the amount of relief which is now said to be claimed by Ms Buxton under ICTA s 231.

84. Ms Buxton's representatives' subsequent letter of 21 April 2010 did expressly state that "we would ... in the alternative make a claim for a one ninth credit" and said that "To the extent that we need to signal that this claim is applicable to the year

2003-04 we formally claim that section 33 TMA is hereby applied". That letter also quantified the amount of the claim being made "in the alternative", and that quantification showed that s 231 relief was less than the amount claimed on Ms Buxton's tax return by £1,049.74.

85. However, even assuming that the 21 April 2010 letter could be shown to meet all other requirements for a valid s 231 claim, Ms Buxton's difficulty is that it is common ground that the time limit for making any new claim expired on 31 January 2010 under s 43(1) TMA, as did the time limit for correcting any error or mistake in her 2003-04 SA tax return (under s 33(1) TMA as in force at the time of expiry of that time limit). The claim, if it was otherwise a valid claim, was thus out of time.

86. HMRC referred to this 21 April 2010 letter in its review letter of 14 May 2010. It is convenient to set out again exactly what it said:

> Your accountants [name] have also suggested that the lack of relief from economic double taxation contravenes the prohibition under Article 56 of the European Community Treaty. HM Revenue & Customs consider that as all the beneficiaries are related the community law fundamental freedom which applies is freedom of establishment rather than freedom of movement of capital. Freedom of Establishment does not extend to the Channel Islands and so in HM Revenue & Customs view there is no merit in the community law point advanced on your behalf.
>
> A claim has been made by your accountants for error or mistake relief under Section 33 Taxes Management Act 1970 for 2003/4 for 1/9 tax credit relief as an alternative to the unilateral relief claimed. Unfortunately the time limits for such a claim expired on 31 January 2010 not 6 April 2010 as shown on my colleague's letter of 16 April 2010. HM Revenue & Customs apologise for any inconvenience caused by this ...

87. The Tribunal does not consider that these paragraphs in a review letter dealing with an appeal against the closure notice can be considered as a formal decision rejecting on its merits a new s 231 claim by Ms Buxton. Rather, as the second of the two quoted paragraphs make clear, it is if anything at all a refusal to consider any new claim on the basis that the time limit for making any new claim has now passed. While the first of the two paragraphs quoted above does express a view on the effect of EU law, we consider that this paragraph in context cannot be regarded as any kind of acknowledgment that a new s 231 claim has been validly made, and as a formal decision on such a claim.

88. In her statement of case, Ms Dunn said that if the Tribunal found that no s 231 claim had been made within the time limit, then "the principle of effectiveness requires the Appellant to be given a reasonable time to make a claim after it is first established that she is entitled to make a claim, or after she first became aware of the possibility that she is so entitled. As a result, it is said that the time for making a claim

cannot be allowed to run against a person when the legislation, on its face and in breach of EU law, does not allow the person to make that claim.

89. However, before us Ms Dunn accepted that her case rested on there being a valid, in-time claim and so there was no need for this further submission. She was aware that a similar issue had been raised in *Trustees of the BT Pensions Scheme v R&C Commrs (No 2)* [2011] UKFTT 392 (TC) ("*BT Pensions*") and that this First-tier Tribunal decision was currently under appeal to the Upper Tribunal. Although stating that she "did not concede" the point, she provided no arguments in respect of it.

90. Mr Rivett did not address the Tribunal on whether the principle of effectiveness requires Ms Buxton to be given a reasonable time to make a claim, as Ms Dunn had not put forward any submissions on this point.

91. In the circumstances, we are satisfied that no valid s 231 claim has been made by Ms Buxton.

92. However, even if we are wrong about this, and even if the 21 April 2010 letter *did* constitute a valid s 231 claim, we still find that there has been no formal decision by HMRC on the merits of any such claim. We find that to the extent that HMRC has considered the matter at all, HMRC has decided to refuse to consider the claim on the ground that it was not made within the applicable time limit. There is no decision of HMRC on the merits of any s 321 claim that is or could be the subject of any appeal in the present proceedings in which the Tribunal could in turn consider the merits of such a claim. We find that in an appeal against the closure notice rejecting her foreign tax credit claim, Ms Buxton cannot ask the Tribunal to determine at first instance the merits of an entirely separate claim, the merits of which have not been the subject of any prior decision by HMRC.

Our decision

93. We find that the claim made in Ms Buxton's 2003-04 SA tax return was a claim for foreign tax credit. We find that the claim made in the 2003-04 SA tax return was not claim under s 231 ICTA. We find that the closure notice issued in 2005 against which she now appeals was a decision by HMRC refusing the foreign tax credit claim.

94. The instant appeal is against the closure notice, which related solely to Ms Buxton's claim for foreign tax credit relief. As it has been accepted on behalf of Ms Buxton (in our view rightly) that the foreign tax credit relief claim is without merit, the appeal is dismissed.

95. We find that there has been no decision by HMRC on the merits of any s 231 claim that is or could be the subject of this appeal, and that the Tribunal has no jurisdiction to determine at first instance the merits of any such claim.

Appeal rights

96. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

CHRISTOPHER STAKER
TRIBUNAL JUDGE

RELEASE DATE: 13 August 2012

The applicable legislation

(1) The provisions relating to foreign tax credit relief which applied in 2003-04 were set out at ICTA s 790, which so far as relevant to this case, read as follows:

> **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) ...
>
> (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...
>
> (5) Subsection (4) above shall have effect subject to the following modifications, that is to say–
>
> (a) –(b) ...
>
> 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...

(2) The statutory position relating to claims for the one-ninth tax credit was set out at ICTA s 231.

> **231 Tax credits for certain recipients of qualifying distributions**
>
> (1) ...where, in any year of assessment for which income tax is charged a company resident in the United Kingdom makes a qualifying distribution and the person receiving the distribution is another such company or a person resident in the United Kingdom, not being a company, the recipient of the distribution shall be entitled to a tax credit equal to such proportion of the amount or value of the distribution as corresponds to the tax credit fraction in force when the distribution is made.
>
> (1A) The tax credit fraction is one-ninth.

(3) The Taxes Management Act 1970 ("TMA") s 42 set out the procedure which applied generally for claims:

> **42 Procedure for making claims etc**
>
> (1) Where any provision of the Taxes Acts provides for relief to be given, or any other thing to be done, on the making of a claim, this section shall, unless otherwise provided, have effect in relation to the claim.
>
> (1A) Subject to subsection (3) below, a claim for a relief, an allowance or a repayment of tax shall be for an amount which is quantified at the time when the claim is made.
>
> (2) Subject to subsections (3) and (3A) below, where notice has been given under section 8, 8A or 12AA of this Act, a claim shall not at any time be made otherwise than by being included in a return under that section if it could, at that or any subsequent time, be made by being so included.
>
> (3) Subsections (1A) and (2) above shall not apply in relation to any claim which falls to be taken into account in the making of deductions or repayments of tax under PAYE regulations
>
> (4) ...
>
> (5) The references in this section to a claim being included in a return include references to a claim being so included by virtue of an amendment of the return
>
> (6)-(8) ...
>
> (9) Where a claim has been made (whether by being included in a return under section 8, 8A, 5 or 12AA of this Act or otherwise) and the claimant subsequently discovers that an error or mistake has been made in the claim, the claimant may make a supplementary claim within the time allowed for making the original claim.
>
> (10) ...
>
> (11) Schedule 1A to this Act shall apply as respects any claim or election which—
>
> (a) is made otherwise than by being included in a return under section 8, 8A or 12AA of this Act...

(4) TMA Schedule 1A prescribed how claims should be made if they were not included in a return:

> 1. In this Schedule—
>
> "claim" means a claim or election as respects which this Schedule applies...
>
> 2.(1) Subject to any provision in the Taxes Acts for a claim to be made to the Board, every claim shall be made to an officer of the Board.
>
> (2) No claim requiring the repayment of tax shall be made unless the claimant has documentary proof that the tax has been paid by deduction or otherwise.

(3) A claim shall be made in such form as the Board may determine.

(4) The form of claim shall provide for a declaration to the effect that all the particulars given in the form are correctly stated to the best of the information and belief of the person making the claim.

(5) The form of claim may require—

(a) a statement of the amount of tax which will be required to be discharged or repaid in order to give effect to the claim;

(b) such information as is reasonably required for the purpose of determining whether and, if so, the extent to which the claim is correct;

(bb) the delivery with the claim of such accounts, statements and documents, relating to information contained in the claim, as are reasonably required for the purpose mentioned in paragraph (b) above; and

(c) ...

(6) ...

(5) TMA s 43 set out the general time limit for making claims which applied until 1 April 2010:

43 Time limit for making claims

(1) Subject to any provision of the Taxes Acts prescribing a longer or shorter period, no claim for relief in respect of income tax or capital gains tax may be made more than five years after the 31st January next following the year of assessment to which it relates....

(6) TMA s 33 as in force to 31 March 2010 provided:

33 Error or mistake

(1) If a person who has paid income tax or capital gains tax under an assessment (whether a self-assessment or otherwise) alleges that the assessment was excessive by reason of some error or mistake in a return, he may by notice in writing at any time not later than five years after the 31st January next following the year of assessment to which the return relates, make a claim to the Board for relief.