[2014] UKFTT 0679 (TC)

TC03801

Appeal number: LON/2006/1586

VAT - INTEREST – application for interest under section 84(8) VAT Act 1994 - whether right to interest acquired before 1 April 2009 – whether repeal of section 84(8) from 1 April 2009 removed right to interest – effect of section 16 Interpretation Act 1978 - whether right to interest under EU law – whether interest calculated on simple or compound basis – rate of interest - application granted

FIRST-TIER TRIBUNAL
TAX CHAMBER

EMBLAZE MOBILITY SOLUTIONS LIMITED

Appellant

- and -

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

TRIBUNAL: JUDGE GREG SINFIELD

Sitting in public at 45 Bedford Square, London WC1 on 19, 20 and 21 November 2013 and after consideration of the parties' written submissions received on 24 and 29 April 2014

Paul Lasok QC, instructed by the Khan Partnership LLP for the Appellant

Philip Moser QC, Imran Afzal and Michael Firth, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. By a Notice of Application dated 25 July 2012, the Appellant ("Emblaze") applied for an award of interest under Section 84(8) Value Added Tax Act 1994 ("VATA") in relation to a claim for repayment of input tax which the Respondents ("HMRC") had refused to pay but to which the First-tier Tribunal ("FTT") later decided Emblaze was entitled. For the reasons set out below, I have decided that Emblaze is entitled to interest under section 84(8) from 28 April 2006 until 21 July 2011 in respect of £6,911,434 and from 28 April 2006 until 9 May 2012 in respect of £1,533,217 at the Bank of England base rate plus 1.75% calculated on the simple basis.

Background

2. On 13 April 2006, Global Telecoms Distributions plc ("Global") submitted a VAT return for VAT accounting period 03/06 in which it claimed a repayment of £8,444,651. The repayment was the amount by which input tax of £10,075,164 incurred by Global on purchases of mobile phones during period 03/06 exceeded output tax due on sales during the same period. On 29 November 2006, HMRC refused the repayment claim on the ground that Global, through its then managing director, John Drinkwater, knew or should have known that its transactions were connected with the fraudulent evasion of VAT. Global filed a notice of appeal with the VAT and Duties Tribunal on 20 December 2006.

3. On 30 May 2007, Global was placed into administrative receivership. On 16 January 2008, Global, acting by its receivers, assigned all its rights, interest and title in the appeal to Emblaze, which was a 51% shareholder in Global and also an unsecured creditor. The assignment was subject to charges in favour of two banks and an agreement that, after payment of certain sums, any proceeds of the claim would be shared between Emblaze and the receivers.

4. On 29 February 2008, the VAT and Duties Tribunal directed that Emblaze should be substituted for Global as the appellant in the proceedings. The appeal was heard by the FTT, which had taken over the jurisdiction of the VAT and Duties Tribunal with effect from 1 April 2009, on 12 days between January and July 2010. In a decision released on 25 August 2010, the FTT (Judge Theodore Wallace and Mr Tym Marsh) decided that they were not satisfied that Global, through Mr Drinkwater, knew or ought to have known that the transactions were connected with fraud and allowed the appeal with costs.

5. Although they did not appeal against the FTT's decision, HMRC did not pay the repayment to Emblaze. HMRC continued to withhold the repayment on the grounds that the assignment of the right of action by Global had been invalid and HMRC had a right of set-off in relation to other liabilities. Emblaze lodged a claim in the High Court. The litigation was concluded in part by a consent order dated 18 July 2011 under which HMRC agreed to pay Emblaze £7,333,716.84, being £6,911,433.66 in respect of the input tax repayment claim and £422,282.52 by way of repayment

supplement under section 79 VATA. On 18 August and 27 September, Emblaze wrote to HMRC asking for pre-judgment and post-judgment interest on the amount repaid under section 85A VATA. On 9 December 2011, HMRC issued a decision refusing Emblaze's request for payment of interest under section 85A VATA.

6. Following a hearing in the High Court in March 2012, HMRC were ordered to pay the balance of the input tax repayment claim (£1,534,216.78) to Emblaze and did so on 9 May 2012.

7. On 25 July 2012, Emblaze applied to the FTT for an award of interest under Section 84(8) VATA on all amounts held by the FTT to be payable to Emblaze. On 18 September 2012, HMRC filed a Notice of Objection to the application on the ground that it had been subject to an inexcusable delay. In a decision released on 19 October 2012, the FTT held that Emblaze should be permitted to make its application.

Issues

8. In its Notice of Application, Emblaze asked the FTT to make an award of interest under Section 84(8) VATA and, further or alternatively, under EU law at varying rates calculated on a compound basis. Section 84(8) was repealed with effect from 1 April 2009 by the Transfer of Tribunal Functions and Revenue and Customs Appellants Order 2009 SI 2009/56 ("the 2009 Order"). In order to decide whether Emblaze is entitled to interest under section 84(8), it is necessary to determine whether Emblaze had any right to interest under section 84(8) before 1 April 2009 and, if so, what effect, if any, the 2009 Order had on that right. Whether or not Emblaze is entitled to interest under section 84(8), it is also necessary to consider whether Emblaze is entitled to interest, or an equivalent amount, under EU law as compensation for the late payment by HMRC of the input tax to which Global, later Emblaze, was entitled. If Emblaze is entitled to interest on either basis, it will be necessary to consider whether the interest should be simple or compound and what rate or rates should apply.

Legislation

9. Until 1 April 2009, section 84(8) VATA provided, in so far as relevant, as follows:

> "(8) Where on an appeal it is found
>
> (a) …
>
> (b) that the whole or part of any VAT credit due to the appellant has not been paid,
>
> so much of that amount as is found not to be due or not to have been paid shall be repaid (or, as the case may be, paid) with interest at such rate as the tribunal may determine …"

10. With effect from 1 April 2009, Section 84(8) was repealed and Section 85A was inserted into the VATA which provided (and still provides) as follows:

"(1) This section applies where the tribunal has determined an appeal under section 83.

(2) Where on the appeal the tribunal has determined that—

(a) the whole or part of any disputed amount paid or deposited is not due, or

(b) the whole or part of any VAT credit due to the appellant has not been paid,

so much of that amount, or of that credit, as the tribunal determines not to be due or not to have been paid shall be paid or repaid with interest at the rate applicable under section 197 of the Finance Act 1996.

…

(5) Nothing in this section requires HMRC to pay interest

(a) on any amount which falls to be increased by a supplement under section 79 (repayment supplement in respect of certain delayed payments or refunds); or

(b) where an amount is increased under that section, on so much of the increased amount as represents the supplement."

11. Section 84(8) VATA was replaced by Section 85A by the provisions of the 2009 Order. Section 84(8) was repealed by paragraph 221(10) of Schedule 1 to the 2009 Order. Section 85A VATA was inserted by paragraph 223 of Schedule 1. The changes were subject to the transitional and savings provisions contained in Schedule 3 to the 2009 Order.

12. Paragraph 4 of Schedule 3 to the 2009 Order provided as follows:

"(1) This paragraph applies if, before the commencement date [ie 1 April 2009]

(a) HMRC have notified a decision relating to a matter to which section 83 of the Value Added Tax Act 1994 applies, and

(b) no party has served notice on a VAT and duties tribunal for the purpose of beginning proceedings before such a tribunal in relation to that decision.

(2) On and after the commencement date, the following enactments continue to apply … as they applied immediately before that date

(a) the Value Added Tax Act 1994,

(b) rule 4(2) of the VAT Tribunals Rules 1986, and

(c) any other enactments that are applicable to the decision."

13. Paragraph 6 of Schedule 3 to the 2009 Order provided that any current proceedings were to continue on and after the commencement date, ie 1 April 2009, as proceedings before the FTT. Paragraph 1(2) of Schedule 3 provided that:

"… there are "current proceedings" if, before the commencement date

> (a) any party has served notice on an existing tribunal for the purpose of beginning proceedings before the existing tribunal, and
>
> (b) the existing tribunal has not concluded proceedings arising by virtue of that notice."

14. Paragraph 7 of Schedule 3 to the 2009 Order applied to proceedings that were continuing proceedings by virtue of paragraph 6. Paragraph 7(3) provided that the tribunal could apply any provision in procedural rules which applied to the proceedings before 1 April 2009 or disapply any provision of the Tribunal Procedure Rules. Paragraph 7(7) provided that an order for costs could only be made if and to the extent that it could have been made before 1 April 2009 (assuming that costs incurred after that date were incurred before it).

15. Paragraph 9 of Schedule 3 to the 2009 Order provided as follows:

> "(1) This paragraph applies in relation to any decision of a VAT and duties tribunal made before the commencement date.
>
> (2) On and after that date, the following provisions continue to apply as they applied immediately before that date
>
> (a) section 84(8) of the Value Added Tax Act 1994 (VAT);
>
> (b) …"

16. Section 16(1) of the Interpretation Act 1978 ("IA") relevantly provides as follows:

> "(1) Without prejudice to section 15, where an Act repeals an enactment, the repeal does not, unless the contrary intention appears,
>
> ...
>
> (c) affect any right, privilege, obligation or liability acquired, accrued or incurred under that enactment;
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> ...
>
> and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed, as if the repealing Act had not been passed."

Summary of submissions

17. Mr Paul Lasok QC, who appeared for Emblaze, submitted that Emblaze was entitled to interest on the amount repaid by HMRC under section 84(8) VATA because Global's right to interest, at a rate to be determined by the tribunal, under section 84(8) had accrued before the section was repealed with effect from 1 April 2009. That right continued to apply as there was no contrary intention in the 2009 Order to displace the operation of section 16(1) IA. He further contended that the right had been assigned to Emblaze, which was entitled to rely on it. Further or in the alternative, Mr Lasok submitted that Emblaze was entitled under EU law to compensation for Global (and, after the assignment of its interest, Emblaze) wrongly not being paid the amount due from HMRC. He contended that the FTT must ensure

effective protection of Emblaze's EU law rights, which required an adequate indemnity for the loss occasioned. In his submission, an adequate indemnity would be interest at varying rates throughout the period calculated on a compound basis. If its submissions are accepted, Emblaze would be entitled to interest of £2,534,162, of which £2,348,338 relates to the pre-judgment period and £185,824 relates to the post-judgment period.

18. Mr Philip Moser QC, who appeared with Mr Imran Afzal and Mr Michael Firth, for HMRC, submitted that Emblaze was not entitled to any interest under section 84(8) VATA because it had been repealed and replaced by section 85A which applied to Emblaze's claim. Section 85A(5)(a) provided that HMRC were not required to pay interest on any amount in respect of which a repayment supplement was payable, as was the case in respect of Emblaze's claim. Mr Moser also submitted that Emblaze did not have any right to interest or any other payment under EU law. He contended that EU law did not require HMRC to pay anything more than the repayment supplement and that the FTT has no power to order HMRC to pay any additional amount. If, contrary to HMRC's submissions, interest is payable then Mr Moser submitted that it should be calculated on the simple basis having regard to the cost of borrowing of the taxpayer, ie Global.

19. I consider that submissions in more detail when I discuss the issues below.

Is Emblaze entitled to interest under section 84(8) VATA?

20. Until 1 April 2009, Section 84(8) VATA provided that, where a VAT tribunal found that HMRC had not paid an amount due to a person, HMRC should pay the amount with interest at such rate as the tribunal determined. Section 84(1) stated that the section applied "where the tribunal *has determined* an appeal" (emphasis supplied). The effect of section 85A VATA is that, from 1 April 2009, where the FTT determines that HMRC had not paid an amount due to a person, the person is entitled to interest under section 197 of the Finance Act 1996 except where the person is entitled to repayment supplement under section 79 VATA in relation to such amount. Following the coming into force of section 85A, the FTT has no power under the VATA to determine the rate of interest payable by HMRC on amounts found on appeal to be due to a person and there is no entitlement to interest at all where the person is entitled to repayment supplement.

21. Mr Moser's primary submission on this point was attractively simple. A person does not have any right to interest under section 84(8) VATA until there is a tribunal determination in that person's favour. Global never had a tribunal determination in its favour and Emblaze did not have one until 25 August 2010, which was after 1 April 2009 when section 84(8) was replaced by section 85A. Accordingly, Emblaze has no entitlement to interest and the FTT has no power to award it.

22. Mr Lasok submitted that Global had acquired an entitlement to interest, subsequently assigned to Emblaze, at or shortly after the time Global made its claim for repayment of input tax or at the time of lodging its appeal with the VAT and

Duties Tribunal. Whichever date was correct, the right to interest came into existence before 1 April 2009 and that right was preserved after that date by section 16 IA.

Was Emblaze entitled to interest under section 84(8) VATA before 1 April 2009?

23. Mr Lasok submitted that the right to interest under section 84(8) VATA was inherent in the right to deduct input tax. The entitlement to interest arose where a tribunal found that HMRC had not paid an amount due to a person. The interest was calculated from the date on which the person should, in the normal course of events, have been paid the amount until the date that it was paid. Mr Lasok submitted that the fact that interest under section 84(8) VATA was calculated from a date before the date of the decision of the tribunal shows that the right to interest accrued earlier than the date of the decision. He contended that the right to interest accrued at the point at which there was a delay in payment by HMRC and that section 84(8) was merely the procedural means of giving effect to that accrued right. In this case, the entitlement to interest arose as a consequence of HMRC's refusal to pay an amount claimed by and due to Global. On any view, the start date for the calculation of interest under section 84(8) VATA in respect of Global's claim was before 1 April 2009.

24. Mr Lasok relied on two authorities in support of his submission that the right to interest under section 84(8) VATA had been acquired by Global and then, on assignment, by Emblaze before 1 April 2009. First, *In re a Debtor* [1936] 1 Ch 237 which concerned the effect of an amendment to the Bankruptcy Act 1914. Section 125(1) of the 1914 Act provided that married women were not subject to the bankruptcy laws unless they carried on a trade or business. The debtor, a married woman, entered into some unsuccessful transactions on the stock exchange which resulted in her owing £3,500. When her creditors sought to enforce the debt in bankruptcy, the debtor claimed that she had not carried on a trade or business so could not be made bankrupt. At first instance, the registrar held that the debtor had carried on a business. The debtor appealed. Before the appeal was heard, the provision in the 1914 Act was repealed by the Law Reform (Married Women and Tortfeasors) Act 1935. The creditors argued that the Court of Appeal should apply the law as amended. Lord Wright MR considered section 4(1)(c) of the Interpretation Act 1889 (which was in identical terms to section 16(1)(c) IA) and held:

> "In my opinion that subsection has the effect of saving every liability which attached to a debtor to be adjudicated bankrupt or to have a receiving order made against him and all rights of a creditor to claim a receiving order and an adjudication in bankruptcy in proper cases. This would be so where there was an available act of bankruptcy before the passing of the Act of 1935 but it is a fortiori so in the present case where the receiving order was made before the Act of 1935 was passed, and what is now in issue is merely an appeal against that order. The meaning of a 'right accrued' under the Interpretation Act 1889 … is illustrated by *Hamilton Gell v White* [1922] 2 KB 422, where it was held that a tenant had acquired a right to compensation under s11 of the Agricultural Holdings Act 1908 as soon as he received notice to quit, although he took no proceedings until after the Act was repealed. Atkin LJ there said (ibid 431):

> 'It is obvious that that provision was not intended to preserve the abstract rights conferred by the repealed Act, such for instance as the right of compensation for disturbance conferred upon tenants generally under the Act of 1908, for if it were the repealing Act would be altogether inoperative. It only applies to the specific rights given to an individual upon the happening of one or other of the events specified in the statute. Here the necessary event has happened, because the tenant has 'acquired a right,' which would 'accrue' when he quitted his holding, to receive compensation.'
>
> The same reasoning would, I think, justify the Court in proceeding under s125 of the Bankruptcy Act 1914, even though the bankruptcy proceedings were not commenced until after the Act of 1935 came into operation so long as the act of bankruptcy was anterior to that Act."

25. Mr Lasok submitted that Lord Wright's comment in the last paragraph quoted above showed that the rights came into existence when the act of bankruptcy took place even if the bankruptcy proceedings were not commenced until after the repeal.

26. Mr Lasok also relied on *Chief Adjudication Officer v Maguire* [1999] EWCA Civ 1060, 2 All ER 859 ("*Maguire*") to support his submission that a right is an accrued or acquired right even if it is contingent upon an event which occurs only after the repeal of the enactment. Mr Maguire was diagnosed as suffering from vibration white finger, which had been prescribed as an industrial disease in April 1985. The condition entitled him to claim a serious hardship allowance under section 60 of the Social Security Act 1975 but he did not make a claim before the allowance had been abolished in 1986. Mr Maguire subsequently made a claim for the successor allowance backdated to April 1985. Mr Maguire relied on section 16(1)(c) IA and the Chief Adjudication Officer argued that the section could only assist a person who had made a claim before the repeal. In *Maguire*, it does not seem that *In re a Debtor* was cited to the Court but Simon Brown LJ considered other authorities including *Hamilton Gell v White* at 864 as follows:

> "The next helpful authority is this court's decision in *Hamilton Gell v White* [1922] 2 KB 422 where an agricultural tenant was found to have an acquired right against his landlord. The landlord had given the tenant notice to quit. As it was given because of the landlord's wish to sell, the tenant became entitled to compensation under s.11 of the Agricultural Holdings Act 1908. Section 11 imposed upon the tenant two conditions, first that he should within two months of the notice to quit give the landlord notice of his intention to claim compensation, second that he should make his compensation claim within three months of quitting the holding. The tenant duly complied with the first of those conditions but, before the tenancy had expired and before therefore he could satisfy the second condition, s.11 was repealed. All three members of the court (Bankes, Scrutton and Atkin LJJ) held that the tenant had acquired a right by the fact of his landlord giving notice to quit with a view to sale. As Scrutton LJ put it:
>
> '... what gave him the right was the fact of the landlord having given a notice to quit in view of the sale. The conditions imposed by s.11

were conditions, not of the acquisition of the right, but of its enforcement.'

Hamilton Gell v White was distinguished by the Privy Council in *Director of Public Works v Ho Po Sang* [1961] AC 901. The position there was that under the relevant Hong Kong legislation prior to its repeal the lessee was entitled to call on his under-lessees to quit if the Director of Public Works gave a rebuilding certificate. The lessee applied for such a certificate and was notified by the Director that he intended to give it. Thereupon, in compliance with the legislation, the lessee served notices of that intention upon his under-lessees who, again as provided for in the legislation, appealed by way of petition to the Governor in Council, his under-lessees cross-petitioning. It was at that stage that the legislation was repealed, no decision having by then been taken by the Governor in Council with regard to the petitions. The Privy Council held that the lessee (and the Director of Public Works) had no accrued right at that stage. Giving the judgment of the Board Lord Morris of Borth-y-Gest said:

> 'The issue rested in the future. The lessee had no more than a hope or expectation that he would be given a rebuilding certificate even though he may have had grounds for optimism as to his prospects (page 922) ... he did not have any right even of a contingent nature (page 924) ... The difference between that case [*Hamilton Gell v White*] and the present is that in that case a right existed and the investigation, which was unaffected, was an investigation in respect of it; whereas in the present case no right existed or had accrued, and the intended investigation which had not taken place before the time of the repeal (i.e. the consideration by the Governor in Council) was an investigation in order to decide whether a right should or should not be given. It was not itself a right or privilege which was preserved by the Interpretation Ordinance. [The Hong Kong legislation corresponding to s.16(1)(c)]'"

27. At 868, Simon Brown LJ held that:

> "… the court is concerned with a single question: has the claimant established that at the time of repeal he had a right? … A mere hope or expectation of acquiring a right is insufficient. An entitlement, however; even if inchoate or contingent, suffices. The fact that further steps may still be necessary to prove that the entitlement existed before repeal, or to prove its true extent, does not preclude it being regarded as a right."

28. Simon Brown LJ concluded, at 869, that:

> "What to my mind all these cases establish is essentially this: that whether or not there is an acquired right depends upon whether at the date of repeal the claimant has an entitlement (at least contingent) to money or other certain benefit receivable by him provided only that he takes all appropriate steps by way of notices and/or claims thereafter. … Mr Maguire's right accrued on 1st April 1985 when VWF (a disease from which he already suffered) was first prescribed. It matters not that he claimed only after repeal."

29. Waller and Clarke LJJ agreed. Whereas Simon Brown LJ had confessed that he could see no distinction between "acquired" and "accrued", Waller LJ observed:

> "In my view there is a distinction between a "right acquired" by virtue of something that has happened to the claimant (as in this case an injury at work), and a 'right accrued' whereby I would understand the claimant may have had to fulfil certain further conditions in order to make that right fully enforceable. This seems to me what Atkin LJ had in mind in *Hamilton Gell v White* in the passage of his judgment at 431 where he said that the tenant has 'acquired' a right, which would 'accrue' when he has quitted his holding.
>
> It does not make any material difference in the context of this case, but I confess to feeling that in fact Mr Maguire had 'acquired' a right which would have 'accrued' once he made the claim that provided the entitlement to it."

30. Mr Moser submitted that the position of the claimant in *Maguire* was very different to Emblaze's situation in that Mr Maguire had an entitlement by reason of his disability which only required a claim to make it fully enforceable. Emblaze had no entitlement to interest until the FTT found that the VAT credit was due. Accordingly, Emblaze did not have any accrued right to interest at the time of the repeal of section 84(8) VATA. He contended that legislation in *Maguire* provided that the qualifying person "shall be entitled to disablement benefit" with separate provision requiring the person to make a claim. Mr Moser emphasised the passage from the judgment of Simon Brown LJ in which he referred to the requirement that, at the time of repeal, the claimant has an entitlement subject only to taking "all appropriate steps by way of notices and/or claims thereafter". Mr Moser contended that Emblaze did not have a right to a favourable decision by the FTT at any point and it was only when such a decision was issued that Emblaze would (if section 84(8) had still been in force) have had an entitlement to interest subject only to taking the appropriate steps. Mr Lasok submitted that the tribunal had no discretion whether to award interest where an amount was found to be payable to an appellant. The tribunal's discretion was limited to determining the rate of such interest. HMRC's position at the hearing in October 2012 was that the right to interest under section 84(8) was automatic, the Tribunal could not refuse to award interest as it only had discretion over the rate of interest not whether it is payable.

31. Notwithstanding Mr Moser's submissions, I do not accept that a person's entitlement to interest arises only after there is a tribunal determination even though the interest runs from an earlier date. I consider that Global's position in 2006 was not materially different from that of the tenant in *Hamilton Gell v White* or Mr Maguire. Adapting the words of Scrutton LJ in *Hamilton Gell v White*, what gave Global the right to interest under section 84(8) was the fact that HMRC wrongly refused Global's claim for repayment of an amount of input tax. I consider that the requirement under section 84(8) that it is found on appeal that an amount was due to a person was not a condition of the entitlement to interest but a necessary step in enforcing the claim for payment of the amount with interest. To make use of the words of Simon Brown LJ in *Maguire*, the fact that further steps, namely an appeal, were necessary to prove that Emblaze was entitled to a repayment of input tax, with

interest under section 84(8), did not preclude it being regarded as a right, albeit inchoate or contingent. Where the VAT and Duties Tribunal found that an amount that was due to a person had not been paid, Section 84(8) required the amount to be paid with interest. Although the Tribunal could, in theory, set the rate of interest at 0%, I do not consider that negates the person's right to interest under the section and it would not be appropriate in this case. In the case of Global, the right to interest arose when HMRC wrongly refused to pay the amount of input tax claimed. I discuss the date from which interest runs in more detail at [71] – [77] below but, for the purposes of this issue, it is sufficient to say that, on any view, the start date for calculating interest is before 1 April 2009. Accordingly, I conclude that Global acquired a contingent right to interest before 1 April 2009 and that right was subsequently acquired by Emblaze in January 2008.

If Emblaze had a right to interest before 1 April 2009, what effect did the 2009 Order have on that right?

32. Even if Emblaze had a right to interest before 1 April 2009, interest is only payable and the FTT can only determine the rate of interest under section 84(8) VATA if that provision continued to apply to Emblaze's appeal notwithstanding its repeal by the 2009 Order. Section 16(1) IA provides that the repeal of an enactment does not affect any right acquired or accrued under that enactment unless the contrary intention appears. Accordingly, even if Emblaze had a right to interest under section 84(8) before 1 April 2009, that right would have been lost when the section was repealed if a contrary intention appeared in the 2009 Order to displace the operation of section 16(1) IA.

33. Mr Lasok submitted that Emblaze's right to interest under section 84(8) VATA was preserved notwithstanding the legislative changes introduced by the 2009 Order from 1 April 2009 because no contrary intention appeared in the 2009 Order. Mr Lasok referred to comments by Lord Wright in *In re a Debtor* in response to a submission that the Court of Appeal had no jurisdiction to apply the Bankruptcy Act 1914 because it had been repealed by an enactment that did not contain any saving provisions. At 241, Lord Wright held:

> "It is true that there are no express savings in the Act of 1935 but that is not necessary since the Interpretation Act 1889. That Act was passed to simplify the work of drafting Acts of Parliament and to shorten by enacting in general form certain standard provisions which should apply under every Act subsequently passed except where any particular Act contains provisions to the contrary."

34. Mr Lasok submitted that paragraph 221 of the 2009 Order which removed section 84(8) was a simple repealing provision with no intention to displace section 16(1) IA. Paragraph 221(10) simply provided that section 84 VATA should be amended to omit subsection (8). Paragraph 223 of the Order simply inserted a new section 85A into the VATA. There was nothing in those paragraphs to suggest that section 16 IA did not apply.

35. Schedule 3 to the 2009 Order contained transitional and saving provisions. Paragraphs 4, 6 and 9 of Schedule 3 specifically provided that the VATA or certain of its provisions, including section 84(8), continued to apply after 1 April 2009 in certain circumstances. Mr Lasok submitted that paragraph 4 showed that Parliament did not intend to withdraw the operation of section 84(8) in relation to appeals that had not commenced but were pending as at 1 April 2009. Mr Lasok submitted that the effect of paragraph 4 was that the VATA continued to apply after 1 April 2009 in its unamended form to appeals made after that date against decisions made by HMRC before 1 April 2009. That meant that a person who lodged a notice of appeal after 1 April 2009 against a decision by HMRC not to pay an amount made before that date would be entitled to interest under section 84(8) if the appeal were successful. In this case, both the decision and the appeal had been made before 1 April 2009 so Emblaze could not rely on paragraph 4. Mr Lasok submitted that, if section 16 IA did not preserve Emblaze's right to interest under section 84(8) then Emblaze would be in a worse position than an appellant who appealed after the section had been repealed.

36. Paragraph 6 of Schedule 3 to the 2009 Order provided that current proceedings, ie an appeal that began before 1 April 2009 but had not concluded by that date, continued before the FTT. In *The Hira Company Ltd v. HMRC* [2012] UKFTT 610 (TC), the successful appellant applied for interest in circumstances that were very similar to this case, ie an appeal lodged before 1 April 2009 and a decision in its favour issued by the FTT after that date. The appellant applied for interest under section 84(8) VATA on the basis that paragraph 7(3) of Schedule 3 to the 2009 Order gave the FTT power to apply section 84(8). The appellant in *The Hira Company* did not argue that section 16 IA applied or that it had any general right to interest under EU law. The FTT (Judge Poole) decided that paragraph 7 was concerned with matters of procedure, not substantive law, and the entitlement to interest under section 84(8) was a matter of substantive law. Accordingly, the FTT held that it had no power under paragraph 7 to direct the payment of interest. The FTT went on to hold that:

> "Parliament has made it clear that the 'old rules' in relation to interest do not apply in relation to any appeal decided after 31 March 2009 and accordingly the Appellant's entitlement to repayment supplement under section 79 VATA 94 (which is not disputed) removes any entitlement to interest under the new interest provisions in section 85A VATA 94."

37. Paragraph 9 of Schedule 3 to the 2009 Order applied to any decision of the VAT and Duties Tribunal made before 1 April 2009. It provided that section 84(8) VATA continued to apply after 1 April 2009 in relation to such a decision as it had applied before that date. Mr Lasok submitted that paragraph 9 showed that Parliament intended section 84(8) to continue to apply where there had been a decision before the section was repealed but the question of interest was not dealt with until after that date.

38. Mr Lasok contended that paragraphs 4, 6 and 9 of Schedule 3 to the 2009 Order must be read in the light of section 16(1) IA which preserved the operation of section 84(8) where a person had an existing entitlement to interest before 1 April 2009. The appeal by Global, later Emblaze, was current proceedings for the purposes of

paragraph 6 but Emblaze did not rely on paragraph 7. Mr Lasok contended that there was no clear contrary intention in the 2009 Order and that section 84(8) continued to apply in relation to current proceedings, such as Emblaze's appeal, by virtue of section 16(1) IA.

39. Mr Moser submitted that a contrary intention did appear in the 2009 Order. He submitted that paragraph 4 of Schedule 3 to the 2009 Order simply provided for continuity of procedure for appeals against existing HMRC decisions and did not preserve the whole of VATA, particularly section 84(8). Paragraph 9 provided that section 84(8) VATA continued to apply to any decision of the VAT and Duties Tribunal made before 1 April 2009. He contended that the clear implication was that section 84(8) did not apply to any decision of the FTT made after 1 April 2009. Mr Moser also submitted that a contrary intention could be discerned from the fact that, from 1 April 2009, Emblaze clearly fell within the new section 85A and it could not have been the intention of Parliament that a person should simultaneously have a right to interest under section 84(8) and under section 85A. It followed, in Mr Moser's view, that Parliament must have intended persons who come within section 85A to lose any rights they previously had under section 84(8). He contended that that remained the position even where the application of section 85A(5) meant that the person had no right to interest, having instead only an entitlement to repayment supplement.

40. I accept Mr Lasok's submissions on this issue. The 2009 Order does not provide explicitly for the continued application of section 84(8) in the case of current proceedings under paragraph 6 but, as Lord Wright observed in *In re a Debtor*, it does not have to because section 16(1) IA does the job. I also agree with the FTT in *The Hira Company* that paragraph 7 of Schedule 3 to the 2009 Order was concerned with matters of procedure, not substantive law, and the entitlement to interest under section 84(8) was a matter of substantive law. That view leads me to conclude that no contrary intention can be inferred from paragraphs 6 and 7 which, in turn, reinforces my view that section 16(1) IA applies to preserve a substantive law right acquired or accrued in the case of current proceedings within paragraph 6. It would, in my opinion, be plainly unsatisfactory if section 84(8) continued apply to:

> (1) appeals lodged with the FTT after 1 April 2009 against decisions of HMRC made before that date (paragraph 4 of Schedule 3 to the 2009 Order); and
>
> (2) appeals decided by the VAT and Duties Tribunal before 1 April 2009 but without determining the rate of interest until after that date (paragraph 9 of Schedule 3 to the 2009 Order);

but did not apply to current proceedings, ie appeals started before 1 April 2009 and not concluded by that date.

If HMRC's view is correct then, in relation to appealable decisions made before 1 April 2009, the only persons who could not rely on section 84(8) VATA are those who had appealed before 1 April but had not obtained a decision before that date. I consider that it would require a very clear contrary intention to produce such a result.

In my view, neither the 2009 Order nor section 85A VATA contains, either expressly or by necessary implication, any contrary intention that would displace the operation of section 16(1) IA. I do not accept that the application of section 16(1) IA would mean that Emblaze would fall within both section 84(8) and section 85A. In the context of the amendments introduced by the 2009 Order and the facts of the appeal, only one or other of the provisions applies to Emblaze. The contrary argument would mean that a person within paragraph 9 of Schedule 3 to the 2009 Order, which preserves section 84(8) after section 85A has effect, would also fall within both sections which clearly cannot be the intent of paragraph 9.

Decision on whether Emblaze was entitled to interest under section 84(8) VATA

41. In summary, I have found that Emblaze had a right to interest under section 84(8) VATA before 1 April 2009. That right was not affected by the repeal of section 84(8) by the 2009 Order with effect from that date. Section 16(1) IA applied to preserve Emblaze's right to interest under section 84(8), notwithstanding its repeal, in the absence of any contrary intention in the 2009 Order. In my opinion, no such contrary intention can be discerned from the 2009 Order. My interpretation of the 2009 Order is supported by my conclusion (see [58] – [61] below) that the removal of Emblaze's right to interest under section 84(8) with retrospective effect would be contrary to EU law. Accordingly, section 84(8) VATA continued to apply to Emblaze's appeal and the amount which the FTT found was due to Emblaze was payable to Emblaze with interest at such rate as the FTT may determine.

42. On the basis of my conclusions on this issue, I grant Emblaze's application for interest under section 84(8) VATA. I discuss whether interest should be simple or compound at [78] - [85] and the rate to be applied at [86] – [102] below. In case I am wrong on this issue and because I heard argument on the point, I will consider whether Emblaze also has a right to interest under EU law.

Is Emblaze entitled to interest under EU law?

43. Mr Lasok submitted that, whether or not it was entitled to interest under section 84(8) VATA, Emblaze was entitled under EU law to full compensation (ie compound interest at a commercial rate) for HMRC wrongly refusing to pay Global's claim for repayment of input tax. Emblaze's position was that, as it had a right to interest under EU law, section 16(1) IA and the 2009 Order must be construed, in so far as possible, so as not to remove that right. If such a construction was not possible then Mr Lasok submitted that paragraph 221(10) of schedule 1 to the 2009 Order must be disapplied.

44. Mr Moser accepted that if Emblaze had any entitlement to interest under section 84(8) VATA then it must be exercised in accordance with EU law. HMRC's position was that the FTT could not make any award of compensation, in the form of interest or otherwise, unless it had the statutory power to do so. Mr Moser submitted that there was no such power. In the absence of section 84(8), there was only section 85A which provided that Emblaze's remedy was not interest but repayment supplement under section 79. Mr Moser submitted that a disapplication of paragraph 221(10) of

schedule 1 to the 2009 Order in the way suggested by Emblaze would not be disapplication but legislation by the FTT.

Is there a right to interest under EU law?

45. It is now clear that there is an EU law right to interest on amounts of tax that are unlawfully levied and repayments of tax that are wrongly withheld by Member States. In Case C-591/10 *Littlewoods Retail and others v Commissioners of Her Majesty's Revenue and Customs* [2012] STC 1714 ("*Littlewoods CJEU*"), the Court of Justice of the European Union ("CJEU") stated (at [25] – [26]) that

> "25. The court has also held that, where a Member State has levied charges in breach of the rules of Community law, individuals are entitled to reimbursement not only of the tax unduly levied but also of the amounts paid to that state or retained by it which relate directly to that tax. That also includes losses constituted by the unavailability of sums of money as a result of a tax being levied prematurely (*Metallgesellschaft* (paras 87 to 89), and *Test Claimants in the FII Group Litigation* (para 205)).
>
> 26. It follows from that case law that the principle of the obligation of Member States to repay with interest amounts of tax levied in breach of EU law follows from that law."

46. When the case returned to the United Kingdom, Henderson J in *Littlewoods Retail Ltd and others v HMRC* [2014] EWHC 868 (Ch) ("*Littlewoods HC*") stated at [258] that the right to interest on tax levied contrary to EU law had been unambiguously recognised by the CJEU in *Littlewoods CJEU* as a right conferred by EU law. At [260], Henderson J said that he had no doubt that "the right under EU law to payment of interest on all kinds of unlawfully levied tax is now firmly entrenched in the jurisprudence of the ECJ." I respectfully agree and conclude that Emblaze also had a right under EU law to interest on amounts of input tax that were wrongly withheld by HMRC.

47. If, contrary to my decision above, section 84(8) VATA has been repealed and replaced by section 85A then my conclusion that Emblaze has an EU law right to interest does not, by itself, mean that Emblaze's application should be granted. HMRC's position is that the repayment supplement under section 79 VATA provides an "adequate indemnity" and discharges the United Kingdom's obligation to compensate taxable persons for the unavailability of money where repayment of input tax has not been made within a reasonable time. Emblaze submits that repayment supplement is not an adequate remedy and only compound interest at an appropriate rate can provide such a remedy. In order to exercise its right to interest under EU law in the FTT and obtain an award of interest, Emblaze must show that repayment supplement is not an adequate remedy and that the FTT has power to award interest. Even if I conclude that repayment supplement is not an adequate remedy, I accept HMRC's submission that the FTT does not have any statutory or common law power to award interest to Emblaze under existing legislation. Emblaze can only obtain interest if section 85A(5) can be disapplied and section 84(8) reinstated.

Is repayment supplement an adequate indemnity under EU law?

48. The CJEU in *Littlewoods CJEU* held at [27] that, in the absence of EU legislation, it is for each Member State to provide how interest on unlawfully levied tax should be paid, particularly the rate of interest and method of calculation, ie whether simple or compound, to be used. In *Littlewoods CJEU*, the CJEU stated, in [29], that

> "[the principle of effectiveness] requires that the national rules referring in particular to the calculation of interest which may be due should not lead to depriving the taxpayer of an adequate indemnity for the loss occasioned through the undue payment of VAT."

The CJEU did not say whether an adequate indemnity required interest to be compounded.

49. At [276] – [279] of the judgment in *Littlewoods HC*, Henderson J referred to the decision in *Marshall v Southampton and South West Hampshire Health Authority (No. 2)* [1994] QB 126 (Case C-271/91, [1993] ECR I-4367) ("*Marshall*"). *Marshall* was not a tax case but concerned a claim for compensation for sex discrimination. In that case, the CJEU equated financial compensation which is "adequate" with compensation which makes good "in full" the loss and damage actually sustained by the claimant. Having discussed *Marshall*, Henderson J then considered what the CJEU had meant by "an adequate indemnity" in [29] of its judgment in *Littlewoods CJEU*. In [291], Henderson J stated that

> "…the right to interest is now derived from, and protected by, EU law, in the same way as the right to repayment of unlawful tax. The strength of this principle is demonstrated by the recent decisions of the ECJ in *British Sugar* and *Irimie*. In those circumstances, the concept of an adequate indemnity must in my view mean an indemnity (or compensation) which is at least broadly commensurate with the loss of the use value of the overpaid money in the hands of the taxpayer."

50. At [295], Henderson J concluded:

> "Once it is recognised that EU law requires a similar remedy in all cases of overpaid tax (and not only when tax is paid prematurely), and that payment of compensatory interest is also a requirement of EU law, the conclusion may appear to follow inexorably: the only way to provide the taxpayer with adequate compensation for the lost use value of his money will be by an award of compound interest."

51. Henderson J then discussed why the CJEU did not simply say that EU law requires compound interest but instead left the choice between simple and compound interest to the national court. In summary, Henderson J considered that the CJEU had not said that Littlewoods were entitled to compound interest because that was not how Littlewoods had put its case and, secondly, there may be cases where simple interest is an adequate remedy, eg where the period is relatively short so that compounding would make little difference.

52. Henderson J set out his conclusion on this point at [302] as follows:

> "In sum, my overall conclusion on the difficult question of the meaning of the 'adequate indemnity' test in paragraph 29 of the ECJ's judgment is that it requires payment of an amount of interest which is broadly commensurate with the loss suffered by the taxpayer of the use value of the tax which he has overpaid, running from the date of payment until the date of repayment."

53. Section 85A VATA provides that where the FTT has determined that an amount is due to a person then that amount must be paid, or repaid, to the person with interest at the rate applicable under section 197 Finance Act 1996. Section 85A(5) provides that HMRC are not required to pay interest where the amount repayable falls to be increased by a repayment supplement under section 79 VATA.

54. Section 79(1) VATA provides that where a person is entitled to a VAT credit and the conditions in section 79(2) are satisfied then the amount of the VAT credit is increased by the addition of a repayment supplement. VAT credit is defined in section 25(3) as the amount by which input tax deductible by a taxable person in an accounting period exceeds output tax due, if any, from that person for the period. The conditions in section 79(2) are that:

> (1) the VAT return or claim giving rise to the VAT was received by HMRC on or before the due date;
>
> (2) HMRC did not issue any written instruction directing the payment of the VAT credit within 30 days of the later of the end of the VAT accounting period or date of receipt of the return; and
>
> (3) the amounts shown on the return did not exceed the VAT credit by more than 5% of the amount actually due.

The repayment supplement is the greater of £50 or 5% of the amount repayable. HMRC accept that Emblaze is entitled to repayment supplement.

55. I apply the same approach to the question of whether the repayment supplement constitutes an adequate indemnity for Emblaze as Henderson J did in *Littlewoods HC* although I acknowledge that the facts of that case were different to this one and he was not considering repayment supplement. Where a repayment has been unlawfully withheld, an adequate indemnity requires payment of an amount of interest that is broadly commensurate with the loss suffered by the person claiming the repayment of the use value of the unpaid amount. The repayment supplement is not calculated by reference to time. During a period when interest rates are significantly lower than 5%, a supplement of 5% of the amount repayable would be a more than adequate indemnity for a delay in repayment of many months, perhaps even some years. Where interest rates are higher than 5%, as they have been historically, and/or the period of non-payment extends over a period of several years, 5% of the amount repayable could be far less than the use value of that amount lost by the person to whom the repayment was properly due. This was the view of Auld J in *CCE v L Rowland & Co (Retail) Limited* [1992] STC 647 at 652 where he observed:

> "If the overrun is short, say only a few days, the supplement will more than compensate the taxpayer for the delay in his receipt of the

> repayment. But if the delay is long, say several months, the supplement will not be adequate compensation since it is likely to be less than the interest which that overdue repayment could have saved or earned during that period. It does not, therefore, have a precisely compensating effect."

56. It seems to me that the CJEU in *Littlewoods CJEU* did not say that an adequate indemnity required compound interest because, as just discussed, there may be situations where compensation calculated on a different basis may be found to provide an adequate indemnity. In this case, however, I conclude that the repayment supplement under section 79 deprived Emblaze of an adequate indemnity for the loss of the use of the unpaid amount of the repayment over a period of several years. I reach that conclusion for the same reasons as Henderson J in *Littlewoods HC*, namely that an adequate indemnity under EU law requires an award of interest at a rate that is broadly commensurate with the loss suffered by Global then Emblaze and compensates Emblaze for the lost use value of the unpaid repayment. Whichever basis of calculation, ie simple or compound, is used, it is clear that the repayment supplement does not provide an amount of interest at a rate that is broadly commensurate with the loss of the use of the unpaid repayment. It follows that, by restricting Emblaze's remedy to a repayment supplement, section 85A(5) deprives it of an adequate remedy.

57. In HMRC's further submissions following the release of the judgment in *Littlewoods HC*, Mr Moser accepted that Henderson J had rejected HMRC's submissions on the meaning of "adequate indemnity" in *Littlewoods CJEU*. HMRC's position on the subject remains the same, however, and they are appealing *Littlewoods HC* to the Court of Appeal.

Was the retrospective repeal of section 84(8) contrary to EU law?

58. Mr Lasok submitted that section 84(8) VATA gave effect to Emblaze's right to interest under EU law which, if HMRC's submissions in relation to the 2009 Order are correct, was repealed with retrospective effect and left Emblaze with inadequate compensation in the form of a repayment supplement under section 79. Mr Lasok contended that the retrospective withdrawal of Emblaze's EU law right to receive interest at a proper rate was contrary to EU law. Mr Moser's submission was, as set out above, that the repayment supplement provided an adequate remedy under EU law. It followed that the repeal of section 84(8) was not contrary to EU law.

59. Mr Lasok relied on certain passages from the judgment of the CJEU in Case C-107/10 *Enel Maritsa Iztok 3 AD v Direktor 'Obzhalvane i upravlenie na izpalnenieto' NAP* [2011] ECR I-3873 ("*Enel Maritsa*"). The case concerned a claim by a taxable person for interest on a repayment of input tax that had been withheld pending an investigation into the taxable person's liability to VAT and other taxes. Bulgarian legislation provided that a repayment of input tax had to be made within 45 days and, if not, then interest was payable from that time. In *Enel Maritsa*, the national legislation was changed, after the period in respect of which interest was payable had started to run, to provide that no interest was payable where there was an investigation

into a person's tax affairs until the investigation had been completed. The CJEU observed at [39]:

> "… it is perfectly permissible and, as a general rule, consistent with the principle of the protection of legitimate expectations for new rules to apply to the future consequences of situations which arose under the earlier rules .... However, a legislative amendment retroactively depriving a taxable person of a right he has derived from earlier legislation is incompatible with the principle of the protection of legitimate expectations."

60. In *Enel Maritsa*, the CJEU held, at [41], that:

> "… Article 183 of the VAT Directive, in conjunction with the principle of the protection of legitimate expectations, is to be interpreted as precluding national legislation which provides, with retrospective effect, for the extension of the period within which excess VAT is to be refunded, in so far as that legislation deprives the taxable person of the right enjoyed before the entry into force of the legislation to obtain default interest on the sum to be refunded."

61. If, as I have concluded, Emblaze had a right to an adequate indemnity, namely interest, under EU law that was given effect by section 84(8) VATA until 1 April 2009, it is clear from *Enel Maritsa* that the removal of that right with retrospective effect was contrary to EU law. The need to avoid a construction that results in a breach of EU law by the United Kingdom supports my interpretation of the 2009 Order, namely that it did not displace the operation of section 16(1) IA which preserved Emblaze's right to interest under section 84(8) after 31 March 2009. If I am wrong and section 16(1) IA does not apply, the question arises whether the FTT is required and has power to award interest to give effect to Emblaze's EU law right to an adequate indemnity.

Can the FTT disapply the 2009 Order?

62. Mr Lasok submitted that if section 16(1) IA and the 2009 Order cannot be construed so as to preserve Emblaze's EU law right to interest then the FTT must disapply paragraph 221(10) of schedule 1 to the 2009 Order. He contended that disapplication involved adding "without prejudice to EU law rights" after "omit subsection (8)" in paragraph 221(10). He submitted that such an approach would mean that the repeal of section 84(8) VATA was effective but only in relation to claims not based on EU law rights. He referred me to the summary of the case law on disapplication in *Vodafone 2 v HMRC* [2009] EWCA Civ 446 at [25] – [26].

63. The Court of Appeal in *Vodafone 2* recognised that there were two possible approaches where domestic legislation conflicts with an enforceable EU law right. The first approach is to construe the legislation so as to give effect to the EU law right and the second, if such sympathetic or conforming construction is not possible, is to disapply the offending provision of law by treating it as if it were expressed to be without prejudice to the EU law right. In *Vodafone 2*, the Court of Appeal decided that the legislation in issue could be construed so as to give effect to the Community

law right in issue and, accordingly, did not have to reach a decision on disapplication. Sir Andrew Morritt indicated that he would need a good deal of persuasion that it was appropriate simply to disallow the relevant United Kingdom legislation and Longmore LJ said that the High Court's order simply disapplying the legislation was too wide to stand.

64. Mr Moser submitted that the FTT had no power to award interest outside the provisions of the VATA. The FTT was a creature of statute and could only apply statutes not amend them. He referred to Case C-212/04 *Adeneler and others v Ellinikos Organismos Galaktos* [2006] ECR I-6091 in which the CJEU held, at [110] that:

> "It is true that 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*."

65. I note, however, that *Adeneler* concerned the provisions of a directive that did not have direct effect whereas the right to interest in *Littlewoods CJEU* was described by the CJEU, in [33], as "directly applicable EU law". The CJEU at [33] stated:

> "As is apparent from consistent case-law, when faced with a rule of law that is incompatible with directly applicable EU law, the national court is required to disapply that national rule, it being understood that that obligation does not restrict the power of the competent national courts to apply, amongst the various procedures of the internal legal order, those which are appropriate to safeguard the individual rights conferred by EU law."

66. Henderson J considered the subject of disapplication in *Littlewoods HC* and concluded, at [341] that sections 78 and 80 of VATA 1994 could not be construed to conform with EU law and they must be disapplied so as to allow Littlewoods to pursue the remedy of restitution under the common law *Woolwich* and mistake-based restitution claims.

67. It is not possible for the FTT to award interest without a statutory provision such as section 84(8) VATA. Section 84(8) could not be reinstated without disapplying paragraph 221(10) of schedule 1 to the 2009 Order. I consider that it is clear from *Vodafone 2* that it is not open to the FTT simply to disapply paragraph 221(10). That would go further than is necessary to give effect to the CJEU's decision in *Littlewoods CJEU* and restore Emblaze's right to interest under EU law. Disapplication of section 85A by itself would not be sufficient as the FTT would have no power to award interest. That was not the position of the High Court in *Littlewoods HC* which, if the statutory provisions were disapplied, was able to grant a restitutionary remedy. I cannot accept Mr Lasok's suggestion that I should simply add "without prejudice to EU law rights" after "omit subsection (8)" in paragraph 221(10). That would not be disapplication but legislation. In conclusion, I consider that, if section 16(1) IA and the 2009 Order cannot be construed so as to preserve

Emblaze's right to interest under section 84(8), the FTT has no power to award interest to Emblaze even if, as I have decided, it has a right to interest under EU law.

Decision on whether Emblaze was entitled to interest under EU law

68. In summary, I have found that Emblaze had a directly applicable EU law right to an adequate indemnity for the losses caused by the unavailability of the money that should have been repaid to Global. An adequate indemnity requires an award of interest that compensates Emblaze for the loss of the use of the repayment during the period when it should have been available to Global and then Emblaze. In the circumstances of this case, the repayment supplement under section 79 is not an adequate indemnity for the loss of the use of the repayment. Even if, as I have decided, Emblaze has a right to interest under EU law, the FTT has no power to award interest to Emblaze other than under section 84(8) VATA. It follows that if, contrary to my conclusion above, section 16(1) IA and the 2009 Order cannot be construed so as to preserve Emblaze's right to interest under section 84(8) then the application for interest must be refused.

If interest is payable, what is appropriate basis of calculation and rate?

69. If, as I have decided, Emblaze is entitled to interest under section 84(8) VATA at such rate as the FTT may determine, it is necessary to consider when interest should start to run, whether the interest should be simple or compound and what rate or rates should apply.

When does interest run?

70. It was agreed that the end dates for calculating interest were the dates of the payments to Emblaze, namely 21 July 2011 in respect of £6,911,434 and 9 May 2012 in respect of £1,533,217. Mr Lasok contended that the start date for the calculation of interest was the date on which the input tax would ordinarily have been repaid to Global, ie 28 April 2006. Mr Moser submitted that the start date should be the date of HMRC's decision that Global was not entitled to deduct and would not be paid the input tax claimed, namely 29 November 2006. Mr Moser acknowledged that the start date was not open-ended and assumed that HMRC enquiries had not taken an unreasonably long time.

71. In relation to the start date for interest, Mr Lasok relied on passages from two decisions of the CJEU, namely *Enel Maritsa* and Case C-431/12 *Agentia Nationala de Administrare Fiscala v SC Rafinaria Steaua Romana SA* ("*Rafinaria Steaua*").

72. The CJEU held at [51] and [53] of *Enel Maritsa* as follows:

> "51. Regarding such legislation under which the requirement on the part of the tax authorities to pay interest is contingent upon the completion of a tax investigation, it has been consistently held by the Court that calculation of the interest payable by the Treasury which does not take as its starting point the date on which the excess VAT

> would have had to be repaid in the normal course of events in accordance with the VAT Directive would be contrary, in principle, to the requirements of Article 183 of that directive.
>
> …
>
> 53. It follows that the period for refunding excess VAT may, as a general rule, be extended in order to carry out a tax investigation without there being any need for such an extended period to be regarded as unreasonable provided that the extension does not go beyond what is necessary for the successful completion of the investigation …. However, in so far as the taxable person is deprived on a temporary basis of funds corresponding to the excess VAT, he is at an economic disadvantage which can be compensated for by payment of interest, thus ensuring compliance with the principle of fiscal neutrality."

73. In *Rafinaria Steaua*, the taxable person had claimed interest on amounts of input tax withheld on the basis of a set-off later held to have been unlawful. Following its earlier decision in *Enel Maritsa*, the CJEU held at [23] and [24]:

> "23. … when the refund to the taxable person of the excess VAT is not made within a reasonable period, the principle of fiscal neutrality of the VAT system requires that the financial losses incurred by the taxable person owing to the unavailability of the sums of money at issue are compensated through the payment of default interest.
>
> 24. In that respect, it follows from the case-law of the Court that the calculation of the interest payable by the Treasury which does not take as its starting point the date on which the excess VAT would have had to be repaid in the normal course of events in accordance with the VAT Directive would be contrary, in principle, to the requirements of Article 183 of that directive."

74. Mr Lasok submitted that *Enel Maritsa* and *Rafinaria Steaua* showed that when Global made the claim for repayment of input tax, it became entitled to interest if payment of the amount properly claimed were delayed beyond the date on which it would have been repaid in the normal course of events. Emblaze's expert witness, James Gilbey, took the normal date for repayment to be 28 April 2006 on the basis that the VAT return was made on 13 April and HMRC try to make payment within ten working days which meant that HMRC should have paid the claimed input tax to Global on 28 April.

75. The position of HMRC on this point was that interest runs from the time that HMRC notify the taxpayer of the decision to disallow the credit, as long as HMRC's enquiries have not taken an unreasonably long time. Mr Moser relied on *R (oao UK Tradecorp Ltd) v HMRC* [2004] EWHC 2515 (Admin) in which Lightman J held at [42]:

> "In my judgment Community law does not oblige Member States to pay interest on repayments of input tax from the date of the making of the claim to repayment.

76. Mr Moser also referred to the comment of Collins LJ in *HMRC v Royal Society for the Prevention of Cruelty To Animals and another; HMRC v ToTel Limited* [2007] EWHC 422 (Ch), [2008] STC 885 ("*RSPCA*") that:

> "The starting date is a matter within the discretion of the Tribunal, and I accept that it can take into account the policy in Notice 700/58. But it can also take account of a reasonable period for Customs to make enquiries."

77. I note that the comments of Lightman J in *Tradecorp* and Collins LJ in *RSPCA* quoted above were made before the CJEU's rulings in *Enel Maritsa* and *Rafinaria Steaua*. It is clear from the CJEU's comments in *Enel Maritsa* and *Rafinaria Steaua* that a repayment of VAT may be withheld for a reasonable period in order to carry out a tax investigation. I consider that it is also clear from those cases that, where the investigation concludes that the repayment is due, interest must be calculated from the date on which the excess VAT would have had to be repaid in the normal course of events. Applying, as I must in a case such as this, the approach required by EU law, I consider that any interest should be calculated from the date on which the VAT would have been repaid to Global in the normal course of events. HMRC did not provide any evidence to contradict Mr Gilbey's view that, in the normal course of events, HMRC would have repaid the disputed VAT to Global on 28 April 2006. I conclude that interest is payable from 28 April 2006 until 21 July 2011 in respect of £6,911,434 and from 28 April 2006 until 9 May 2012 in respect of £1,533,217.

Is interest simple or compound?

78. As I have already noted when discussing whether a repayment supplement constituted an adequate indemnity for Emblaze, Mr Moser accepted that Henderson J had rejected HMRC's submissions on the meaning of adequate indemnity in *Littlewoods CJEU*. In *Littlewoods HC*, Henderson J concluded that compound interest was required to provide the taxpayer in that case with adequate compensation for the lost use value of money. In HMRC's further submissions following the release of the judgment in *Littlewoods HC*, Mr Moser contended that, even if EU law required the use of compound interest, the FTT, unlike the High Court, did not have any statutory power to award compound interest.

79. Mr Moser contended that, if interest were payable under section 84(8) VATA, the pre-2009 principles, as set out in *RSPCA* must be applied. In *RSPCA*, Lawrence Collins LJ held, at [139] that:

> "I am satisfied that section 84(8) should not be judicially interpreted to include the power to award compound interest. If the matter were entirely at large, there would be no difficulty in construing the expression to include compound interest. But the section must be construed against the background of (a) other provisions of VATA; (b) other legislation; and (c) the approach at common law and equity. Against that background I do not consider it would be possible or legitimate to construe the word 'interest' to include compound interest."

80. At [141], Collins LJ stated:

> "If the Tribunal has no power to award compound interest directly, it seems to me to have been an error of principle in the RSPCA Decision to adjust the rate to take account of compounding, although I accept that in practice a realistic rate of interest is bound to reflect some element of compounding."

81. Relying on the comments of Collins LJ, Mr Moser submitted that the FTT simply did not have any statutory power to award compound interest. Mr Moser also relied, by analogy, on the conclusions of the Upper Tribunal in *John Wilkins (Motor Engineers) Ltd v HMRC and other appeals* [2009] STC 2485 ("*John Wilkins*"). In that case, the Upper Tribunal held that it was not possible to interpret section 78 VATA as providing that HMRC should be required to pay compound interest.

82. *RSPCA* and *John Wilkins* were decided before *Enel Maritsa*, *Rafinaria Steaua* and *Littlewoods CJEU*, which are discussed above. In the light of those cases, I do not consider that *RSPCA* and *John Wilkins* require me to conclude that the FTT cannot award compound interest in any circumstances. In *RSPCA*, Collins LJ observed, in [139], that there would be no difficulty in construing interest to include compound interest if the matter were entirely at large. At [163], the learned judge held that Community law did not require the award of compound interest in the circumstances of that case. I consider that, following *Enel Maritsa*, *Rafinaria Steaua* and *Littlewoods CJEU*, section 84(8) VATA must be construed to include compound interest where that is required in order to provide an adequate indemnity.

83. In *John Wilkins*, the Upper Tribunal set out the reasons why it did not feel able to read section 78 VATA as providing authority for awarding compound interest at [120]:

> "… the payment of compound interest goes against the grain of this legislation. The statutory scheme is one of simplicity and is straightforward administratively. There can be no argument about the rate or rates of interest payable; they are laid down in the relevant subordinate legislation. And there is no question of identifying the relevant rests. To hold that s 78 allows for compound interest would be to give to this tribunal a further function and jurisdiction which it was not envisaged that it would have, namely to determine, in case of dispute, the amount of interest payable. This would require the tribunal to embark upon an enquiry which goes beyond that which was contemplated. Although s 83(1)(s) gives the tribunal jurisdiction in respect of the commissioners' liability to pay interest 'or the amount of interest so payable', there are no tools provided for the assessment of interest, the determination of rests or any other matters which would be relevant to the ascertainment of what amount of compound interest would represent the full remedy which Community law requires. Rather, it seems to us that the draftsman had in mind simply the period over which interest should be paid and the arithmetic to be carried out in reaching the amount of (simple) interest due."

84. Section 78 did not provide, as section 84(8) did, for the rate of interest to be determined by the tribunal. It is implicit that the tribunal can also determine the period for which interest is payable and both parties in this appeal asked me to do so on the basis that different rates should apply to different periods. It seems to me to be a small step from saying that the FTT can determine the interest rates to be applied to different periods to accepting that the FTT can also determine the rests for the purposes of compounding.

85. In the context of section 84(8) VATA and this case, however, I do not think that EU law requires interest to be compounded. The CJEU in *Littlewoods CJEU* did not say that EU law required the use of compound interest. As I have already discussed at [45] - [47] above, EU law requires that national rules relating to the calculation of interest do not deprive the taxpayer of an adequate indemnity. If the FTT does not have the power to award compound interest then it can still provide an adequate remedy under section 84(8) by making an award of simple interest at a higher rate than would have been used if the interest had been compounded. As Collins LJ observed in *RSPCA* at [141], a realistic rate of simple interest is bound to reflect some element of compounding. It seems to me that I should determine an appropriate rate or rates of simple interest and then consider whether an award of interest on that basis would deprive Emblaze of an adequate indemnity. Such an approach appears to me to offer the simplicity of calculation and administration that was identified by the Upper Tribunal in *John Wilkins* as one of the merits of the statutory scheme under section 78 and which, in my view, should also characterise the scheme under section 84(8) while also providing an adequate remedy.

What rate or rates of simple interest should apply?

86. Both parties accepted that, if section 84(8) VATA applies, the tribunal has a broad discretion to determine the appropriate rate of interest to be awarded under the section. The judgment of Lawrence Collins LJ in *RSPCA* contains useful guidance on the way in which the tribunal should approach the exercise of the discretion. Collins LJ set out his conclusions succinctly at [113] – [117] as follows (references to authorities omitted):

> "[113] In my judgment it would be wrong for me to attempt to fetter the discretion by attempting to lay down guidelines as a gloss on the legislation. But I will say that it would not be easy to criticise a tribunal if it applied principles commonly applied in cases involving commercial entities, even if the relationship between the trader and the commissioners is not a commercial one. In civil cases, the overriding principle is that interest should be awarded to the claimant not as compensation for the damage done but for being kept out of money which ought to have been paid to him.
>
> [114] Conventional practice in commercial cases (under s 35A of the Supreme Court Act 1981) is to award simple interest at base rate plus 1%.
>
> [115] I do not consider that there is any overriding reason of principle why a higher rate should not be adopted by the tribunal in the

> circumstances of a particular case, either because that rate is reasonably considered too low, or because on the facts the taxpayer has had to borrow at a higher rate. The former case would no doubt be rare. In the latter case, there must be some evidence on which the tribunal can act.
>
> [116] In commercial cases, although a rate higher than the conventional rate may be justified, any such claim is normally dependent on evidence that a claimant has in fact borrowed funds at a higher rate. …
>
> [117] The rate will normally reflect the cost of borrowing rather than the return on lending …"

87. Collins LJ's comments on the significance of a repayment supplement are also relevant to this case. At [136] - [137], he held:

> "[136] … I do not consider that as a matter of principle the section 84(8) interest should be adjusted in order to take account of a section 79 repayment supplement. Again, it is section 84(8) which applies, and not section 79.
>
> [137] But that does not mean that there may not be circumstances in which the tribunal can take account of, or have regard to, the fact that repayment supplement has been made. It would not normally be a reason for departing from a conventional rate if the tribunal considered that a conventional rate was appropriate. But if on the basis of evidence the trader claimed that it was entitled to a rate higher than a conventional rate, it may be unrealistic and unjust not to have regard to the receipt of the repayment supplement. I therefore consider that the tribunal may have regard to the fact that there has been a section 79 repayment supplement, especially where the trader claims on the basis of evidence that interest should be higher than a conventional rate."

88. Both parties agreed that the conventional rate of base rate plus 1% was the starting point. Mr Lasok submitted that the Emblaze was one of the cases identified by Collins LJ in [115] of *RSPCA* where the tribunal would be justified in exercising its discretion to determine that a higher rate than the conventional rate should apply. Mr Lasok also submitted that the conventional rate was not necessarily base rate plus 1% and that it was appropriate to look at the class of borrowers and determine the conventional rate for that class.

89. Mr Moser said that HMRC's case was that base rate plus 1% was the appropriate rate in this case. Mr Moser accepted that the tribunal may award interest at a rate above the conventional rate where the evidence showed that a taxpayer had borrowed at a higher rate. He submitted that *RSPCA* showed that the tribunal is only concerned with the cost of borrowing incurred by the taxpayer, ie Global, and should disregard the rates at which an assignee, such as Emblaze, borrowed. He also submitted that a taxpayer is not entitled to use evidence of actual borrowing costs to obtain an award of interest above the conventional rate and, at the same time, rely on the conventional rate approach where actual borrowing costs were lower. If a taxpayer sought to rely on evidence to establish an entitlement to interest at a higher rate than the conventional rate, Mr Moser submitted that the tribunal should award

interest at a lower rate than the conventional rate where that evidence showed that the taxpayer suffered borrowing costs of less than base rate plus 1%. Where the taxpayer did not borrow, HMRC's position was that the tribunal should make no award of interest. Mr Moser also submitted, relying on the comments of Collins LJ at [137] of *RSPCA*, that it could be "unrealistic and unjust" not to have regard to the receipt of the repayment supplement in determining the rate of interest where a taxpayer was claiming a rate of interest that was higher than the conventional rate.

90. It is clear from the guidance given by Collins LJ in *RSPCA*, that the tribunal may award interest at a rate above the conventional rate where the evidence shows that a taxpayer had borrowed at a higher rate. I find no support in Collins LJ's comments in *RSPCA* for Mr Moser's submission that, if the taxpayer is awarded interest above the conventional rate because its cost of borrowing was higher, the tribunal should award interest at less than the conventional rate for periods where the cost of borrowing was lower or make no award at all for periods where the taxpayer did not borrow. Mr Moser had accepted Collins LJ's statement, in [113], that the overriding principle in civil cases was that interest should be awarded to the claimant not as compensation for the damage done but for being kept out of money. In the context of section 84(8) VATA, the award of interest was intended as compensation for the taxpayer being denied the repayment of VAT. If Mr Moser's submission were correct, a taxpayer who did not borrow or borrowed at advantageous rates would receive less compensation than a taxpayer who had borrowed at higher rates. In my view, that cannot be right. I consider that a taxpayer is entitled to compensation in the form of interest throughout the period when it was kept out of its money.

91. I accept Mr Moser's submissions that the tribunal is only concerned with the cost of borrowing incurred by the taxpayer, ie Global, and that it would not be correct to use the rates of borrowing of persons other than Global in determining the interest rate to be applied in this case. Mr Lasok submitted that, following the assignment in January 2008, Emblaze became entitled to the repayment and therefore its losses, ie its cost of borrowing, should be taken into account. Mr Lasok said that there was no evidence that the assignment was a contrivance designed to put HMRC in a worse position than would otherwise have been the case.

92. I was not referred to any authority on the point. I note that, in *Rafinaria Steaua*, the CJEU referred to "the financial losses incurred by the taxable person" when discussing the requirement to pay interest in [23]. In *Rafinaria Steaua*, there was no assignee and the CJEU's comment may simply reflect the facts of that case. I take the view that I should not have regard to the cost of borrowing of an assignee, such as Emblaze, because such cost is too remote from the original claim, which arose from the refusal to pay Global. I consider that the compensation represented by the interest must relate to the financial losses suffered by Global as the taxable person entitled to the repayment. Where, as here, the taxable person assigns its claim, the assignee obtains not only the right to the repayment but also the right to interest that goes with it. Even where interest continues to accrue, the right to interest is based on the taxable person's claim and the assignee only has such right to interest as the assignor had or would have. If an assignee's borrowing costs were relevant then the original claimant could increase the amount of compensation payable merely by assigning the claim to

a person with higher borrowing costs. In my view, it would not be fair or just to require HMRC to pay a higher rate of interest because the claimant had assigned the claim to another person who is a higher credit risk than the assignor. I also consider that HMRC should not pay a lower rate of interest where the claim has been assigned to a person who has low rates of borrowing or does not need to borrow.

93. I accept Mr Moser's submissions that, adopting the approach discussed by Collins LJ in *RSPCA* at [137], I should take account of the fact that repayment supplement has been paid to Emblaze if I decide to award a rate of interest higher than the conventional rate. That may be done most simply by directing that the amount of the repayment supplement is deducted from the amount of interest that is determined to be payable by HMRC to Emblaze. That is what I propose to direct even though I acknowledge that a simple deduction does not take account of the fact that Emblaze has had the use of the repayment supplement since July 2011.

94. Both parties put forward expert and other witnesses in relation to the rates of interest that should be applied. The expert witness for Emblaze was James Gilbey, a chartered accountant and a partner in the Forensic and Investigation Services team at Mazars LLP. Mr Gilbey made three witness statements. He also gave oral evidence and was cross-examined by Mr Moser. Mr Gilbey determined what, in his opinion, were the appropriate interest rates by calculating the amount that would be required to put Emblaze back in the position it would have been in but for HMRC's failure to pay the input tax repayment claimed in April 2006. In doing so, Mr Gilbey took account of the borrowing costs incurred by Global prior to the assignment of its claim to Emblaze and the borrowing costs of Emblaze, or the interest that Emblaze would have earned, after the assignment. His alternative approach was to look at the debt positions of Emblaze and its ultimate parent company, Emblaze Limited, throughout the period. Mr Gilbey used those rates to calculate, on both a simple basis and a compound basis, the amount of interest payable to Emblaze by HMRC.

95. The expert witness for HMRC was Elizabeth Reeves, a chartered accountant and an employee of HMRC, working in the Finance Professionals Unit of the Specialist Investigations directorate of HMRC. Ms Reeves made two witness statements. She also gave oral evidence and was cross-examined by Mr Lasok. Ms Reeves did not express any opinion on what the appropriate rate of interest to be applied should be. In her first witness statement, Ms Reeves commented on Mr Gilbey's first witness statement. She stated that, on the basis of his stated assumptions and logic, Mr Gilbey's calculations and figures appeared to be correct. She also made certain comments that were critical of Mr Gilbey's approach in general and about some specific figures.

96. Mr Gilbey made a second witness statement in response to Ms Reeves's first witness statement. He also responded to a witness statement from Roderick Stone OBE. That statement contained information in relation to Emblaze's parent company and its directors which sought to counter any attempt to calculate interest by reference to what might have happened to Global if it had been repaid the VAT amount and continued to trade. Mr Gilbey said that he had not attempted to calculate the interest on the basis of a "but for" hypothesis. When he was cross-examined by Mr Lasok,

Mr Stone acknowledged that he did not know what Global might have done. To counter Mr Stone's evidence, Emblaze had also produced witness statements from Mr Drinkwater, the former managing director of Global, and Naftali Shani, a director of Emblaze. Both men gave oral evidence and were cross-examined by Mr Moser. As Emblaze's case was not based on what would have happened if it had been repaid £8,444,651 in April 2006, the evidence was largely, if not wholly, irrelevant to the issue of what rates of interest should be applied and I do not say any more about it.

97. In her second statement, Ms Reeves calculated interest, on both a simple and compound basis, using six alternative methods. In making her calculations, Ms Reeves was instructed by HMRC to assume that the start date for calculating interest was 29 November 2006 and, where the debt of the company in question was lower than the amount of the VAT repayment, that a rate of 0% should be applied to the balance. Mr Gilbey prepared a third witness statement in response to Ms Reeves' second witness statement.

98. During the hearing and at my request, Mr Gilbey and Ms Reeves prepared a joint statement setting out their respective positions in relation to the issues arising from their witness statements. Both agreed that, as at 31 December 2006, Global owed £3,000,000 to EMSL and the debt carried an interest rate of LIBOR plus 2.55%. The experts also agreed that Global had a £500,000 overdraft facility with HSBC at an interest rate of HSBC's base rate plus 1.75%. The experts agreed that the amount of the repayment that was withheld in 2006 was £8,444,651 and the end dates for calculating interest (see [70] above). The remainder of the joint statement dealt with the debt position of Emblaze and its (and Global's) ultimate parent company, Emblaze Limited. Neither expert took the repayment supplement into account in their calculations.

99. Mr Gilbey's evidence was that HSBC's base rate ranged between 4.5% (August 2005 to August 2006) and 5.75% (July 2007 to December 2007) during the period April 2006 to December 2007 and the average LIBOR rate in 2006 was 4.89% and in in 2007 it was 5.86%. During the same period, the Bank of England base rate also ranged between 4.5% (August 2005 to August 2006) and 5.75% (July 2007 to December 2007). Although I did not receive any specific evidence on the point, I assume that the HSBC base rate was the same as the Bank of England base rate. It follows that Global's cost of borrowing at the time that HMRC refused to pay the VAT repayment to Global and prior to it going into administration was between base rate plus 1.75% and LIBOR plus 2.55%.

100. When determining what would be an appropriate rate of interest, I only take account of the actual costs of borrowing incurred by Global before the assignment of the right to the repayment and the hypothetical costs that Global would have incurred after that time. I do not accept Mr Lasok's submission that I should determine a rate of interest according to a class of borrowers and determine the conventional rate for that class. Even if I considered that I should determine a rate for a class of borrowers, I was not provided with any evidence to enable me to do so. I consider that I must determine an appropriate rate of interest for Global in the circumstances of this case.

An appropriate rate of interest is one that provides an adequate remedy for the financial losses incurred by Global based on its cost of borrowing.

101. It seems to me that the appropriate rate of interest in this case must lie between base rate plus 1% and LIBOR plus 2.55%. I consider that base rate plus 1% is too low to be an appropriate rate of interest for Global in the circumstances of this case. It is much lower than the lowest rate at which Global was able to borrow commercially, namely base rate plus 1.75%, and does not reflect the fact that the interest charged to Global would be calculated on a compound basis. Having decided that I am only concerned with Global's costs of borrowing, I do not consider that there is any reason to award interest at a rate higher than LIBOR plus 2.55%. That was the highest rate at which Global borrowed money during the period before it went into administration. In my opinion, a rate of LIBOR plus 2.55% would be excessive for the following reasons. First, it is much higher than the commercial rate of interest charged by HSBC in relation to Global's borrowing by way of overdraft. Secondly, the amount borrowed by Global at LIBOR plus 2.55% was much less than the repayment withheld so applying that rate to the whole repayment would result in Emblaze receiving an amount far greater than the financial losses that were and would have been incurred by Global. However, the fact that Global borrowed less than the repayment withheld does not mean that Global is not entitled to any compensation for being kept out of that money by HMRC.

102. In the circumstances of this case, I consider that interest at the Bank of England base rate plus 1.75%, calculated on a simple basis, for the periods from 28 April 2006 until 21 July 2011 in respect of £6,911,434 and from 28 April 2006 until 9 May 2012 in respect of £1,533,217 is an appropriate rate of interest. I consider that it is a realistic rate of interest in that it is a commercial rate set by a third party that was actually applied to Global. It also, conveniently, falls between the inadequate compensation produced by applying base rate plus 1% and the over generous award produced by using LIBOR plus 2.55%. The fact that it exceeds the conventional rate might be seen to reflect some element of compounding as Collins LJ recognised in *RSPCA*.

Decision on calculation and rate of interest

103. In summary, I have concluded that interest is payable from 28 April 2006 until 21 July 2011 in respect of £6,911,434 and from 28 April 2006 until 9 May 2012 in respect of £1,533,217. Although I consider that the FTT can and must direct that interest under section 84(8) should be calculated on a compound basis where that is required in order to provide an adequate indemnity, I concluded that simple interest at an appropriate rate would provide an adequate indemnity in this case. In my opinion, interest at the Bank of England base rate plus 1.75%, calculated on a simple basis, is broadly commensurate with the loss suffered by Global, which was assigned to Emblaze, and provides an adequate indemnity under EU law.

Decision

104. For the reasons set out above, I grant Emblaze's application for interest under section 84(8) VATA and determine that it shall be payable at the Bank of England base rate plus 1.75%. The interest shall be calculated on a simple basis for the periods from 28 April 2006 until 21 July 2011 in respect of £6,911,434 and from 28 April 2006 until 9 May 2012 in respect of £1,533,217. HMRC shall pay Emblaze the amount so calculated less a deduction of £422,282.52 being the repayment supplement paid to Emblaze in July 2011. If the parties are unable to agree the amount payable in accordance with this decision then either party may apply to the Tribunal for further determination or directions. Any such application must be made within 28 days of the date of release of this decision.

Costs

105. Any application for costs must be made within 28 days after the date of release of this decision. As any direction as to costs will be for detailed assessment, it will not be necessary for the application to be accompanied by a schedule of costs.

Right to apply for permission to appeal

106. 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.

GREG SINFIELD
TRIBUNAL JUDGE

RELEASE DATE: 14th July 2014