



[2022] UKFTT 92 (TC)

TC 08423

Interest payments – customs duty – Article 241 Community Customs Code – money market rates

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

Appeal number: TC/2014/02414

BETWEEN

XEROX LIMITED

Appellant

-and-

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

Respondents

TRIBUNAL: JUDGE RACHEL SHORT

The Tribunal determined the appeal on 11 and 12 January 2022 without a hearing under the provisions of Rule 26 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (“the Tribunal Rules”) having first read the Notice of Appeal dated 30 March 2014 with enclosures), the Appellant’s amended grounds of appeal dated 25 February 2019 and HMRC’s Statement of Case (with enclosures) dated 12 March 2020

DECISION

INTRODUCTION

1. This case concerns a claim by the Appellant, Xerox Limited (“Xerox”) for additional interest on repayment of customs duties at a level above the UK’s statutory interest rate in reliance on Article 241 of the Customs Code which Xerox says applies to override UK domestic legislation

PRELIMINARY MATTERS

Lead case

2. By an application dated 14 September 2018 it was agreed between the parties that this case should be treated as a lead case under Rule 18 of the Tribunal Rules with four cases stood behind it:

- (1) Kingston Communications PLC
- (2) Dimension Data Networks Services LTD
- (3) N.E.T Europe Limited
- (4) British Telecommunications PLC
- (5) Kubota (U.K) LTD

3. The Kingston Communications PLC case has subsequently been withdrawn.

Littlewoods case

4. This case was stood behind the *HMRC v Littlewoods* case ([2017] STC 2413 UKSC) a decision which was released by the UK Supreme Court on 1 November 2017.

Amended grounds of appeal

5. In response to the release of the *Littlewoods* decision in the Supreme Court the Appellant amended its grounds of appeal on 25 February 2019.

First-tier Tribunal decision - 2010

6. The First-tier Tribunal released a decision on 22 October 2010 ([2010] UKFTT 527 (TC)) which determined that HMRC had applied the incorrect code under the Combined Nomenclature of goods in the Customs Tariff of the EC (referred to here as the CN code), on certain products imported by the Appellant. As a result, import duty had been paid at an incorrect level on the imported goods by the Appellant.

7. The goods in dispute were digital copiers and printers which were imported by Xerox into the UK between 1997 and 2000. They were assessed under CN code 9009 and the duty was paid by Xerox. Xerox made a claim for repayment on 7 March 2001 on the basis that the wrong CN code had been applied. The question before the Tribunal was whether the correct CN code had been applied to the goods; the Tribunal agreed with Xerox that the machines had been incorrectly classified by HMRC and should have been classified under heading 8471.

8. As a result of the Tribunal decision, the Appellant reclaimed amounts of import duty which had wrongly been levied on the goods, The total amount of duty reclaimed was £3,520,683.50. This amount is not in dispute.

9. Statutory interest was paid on the £3,520,683.50 amounting to £980,979.42 in accordance with s 127 Finance Act 1999 (“FA 1999”) from the 31st working day after the

making of the repayment claim until the date of repayment. (Referred to here as the “Post Claim Period”)

10. However, Xerox claimed that additional interest should have been paid under Article 241 of the Community Customs Code (“Art 241”), a claim which was rejected by HMRC in their statutory review letter of 31 March 2014.

11. Xerox appealed to this Tribunal by a notice of appeal dated 30 March 2014.

MATTERS IN DISPUTE

12. The matter for decision by this Tribunal is whether Xerox’s claim that additional interest should be payable under Art 241 is correct.

13. This comes down to an interpretation of Art 241 and its interaction with the UK domestic law concerning payments of interest. Xerox argues that Art 241 is applicable to these facts and takes precedence over any UK domestic legislation. HMRC argues that Art 241 is not applicable to these facts and UK domestic law is the only relevant legislation.

14. The amount of interest in dispute is £1,171,587.39.

15. There is no material dispute over the facts in this case.

16. It is agreed between the parties that if any additional interest is payable, it is payable for the same period for which statutory interest has already been paid under s 127 FA 1999.

THE LAW

17. Article 241 of the Community Customs Code – Council Regulation (EEC) No 2913/92) is the main provision on which Xerox relies in making its claim for additional interest:

“Community Customs Code (Council Regulation 2913/92/EEC) Article 241

Repayment by the competent authorities of amounts of import duties or export duties or of credit interest or interest on arrears collected on payment of such duties shall not give rise to the payment of interest by those authorities. However, interest shall be paid:

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where a decision to grant a request for repayment is not implemented within three months of the date of adoption of that decision, - (*referred to in this decision as “the First Exception”*)

where national provisions so stipulate, (*referred to in this decision as “the Second Exception”*)

The amount of such interest shall be calculated in such a way that it is equivalent to the amount which would be charged for this purpose on the national money or financial market”

Xerox relies on the Second Exception being satisfied in its case due to s 127 Finance Act 1999 being in force in the UK.

18. S 127 Finance Act 1999 (“FA 1999”)

127 Interest on repayments.

(1) Subject to the following provisions of this section, where the Commissioners are liable to repay an amount to any person in consequence of—

(a) the payment to them by way of customs duty of an amount that was not due from that person, or

(b) any requirement to repay an amount of customs duty in accordance with the Community Customs Code or [Commission Regulation No. 2454/93],

(2) The amounts that carry interest under subsection (1) above—

(a) include only so much of any amount mentioned in that subsection as is the subject of a claim that the Commissioners are required to satisfy or have satisfied; and

(b) do not include any amount of interest under this section.

[(3) Subject to section 128 below, in relation to any amount that carries interest under subsection (1) above, the applicable period for the purposes of this section is the period which—

(a) begins with the thirty-first working day after the making of the claim for repayment of that amount; and

(b) ends with the date on which the Commissioners issue the repayment of that amount, and in paragraph (a) above “working day” means any day other than a non-business day within the meaning of section 92 of the Bills of Exchange Act 1882.]

(4) The Commissioners shall not be liable to pay interest under this section except on the making of a claim for that purpose.

(5) A claim under this section must be in writing and must be made not more than three years after the end of the applicable period to which it relates.

(6) Any reference in this section to the issue by the Commissioners of any repayment of any amount includes a reference to the discharge by way of set-off of the Commissioners’ liability to repay that amount.

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

(8).....

19. S 197 of the Finance Act 1996 states that:

“(1) The rate of interest applicable for the purposes of an enactment to which this section applies shall be the rate which for the purposes of that enactment is provided for by regulations made by the Treasury under this section.” and goes on to refer to s 127 FA 1999.

20. The Regulations referred to at the relevant time were SI 1998/1461 The Air Passenger and other Indirect Taxes (Interest Rate) Regulations, which set the rate of interest payable 1% below the Bank of England Base Rate with a floor of 0.5% per annum (referred to here as the Statutory Rate).

21. Xerox’s right to appeal against a decision made about the interest payable under s 127 FA 1999 is set out at S 13A(2) and 16(1B) Finance Act 1994 (“FA 1994”) which provide that a “relevant decision”, including at 13A(2) (i):

“(i) any decision as to whether or not—

(i) an amount due in respect of customs duty or agricultural levy, or

(ii) any repayment by HMRC of an amount paid by way of customs duty or agricultural levy,

is to carry interest, or as to the rate at which, or period for which, any such amount is to carry interest;”

can be appealed to this Tribunal under s16(1B) FA 1994.

Case authorities

22. The parties referred to the following cases:

(1) *Littlewoods Retail Limited v HMRC* (Case C-591/10) [2012] STC 1714 (ECJ) (“Littlewoods ECJ”)

(2) *Littlewoods plc v HMRC* [2017] STC 2413 UKSC (“Littlewoods SC”)

(3) *Wortmann KG Internationale Schuhproduktionen v Hauptzollmat Bielefeld* (Case C-365/15) (“Wortmann”)

(4) *Vividas Limited v HMRC* [2009] UKFTT 100 (TC)

(5) *HMRC v Oxfam* [2009] EWHC 3078 Ch

(6) *HMRC v Abdul Noor* [2013] UKUT 071(TC)

(7) *Beadle v R & C Commissioners* [2020] EWCA Civ 562

23. I also referred to the recent decision in *HMRC v Zeman* [2021] UKUT 182 (TCC)

EVIDENCE SEEN

Written evidence

24. Documents referring to the various interest rates applied in the UK and EU capital markets:

(1) Financial Times Guides: Financial Markets

(2) UK Debt Management Office: Public Works Loan Board Lending Facility Report and Accounts 2018-19.

Oral evidence

25. No oral evidence was provided to the Tribunal.

APPELLANT’S ARGUMENTS

26. The Appellant contends that the payment of statutory interest under s 127 FA 1999 on its repayment of customs duty is incompatible with EU legislation and that additional interest is due under Article 241 of the Customs Code. The rate of interest paid to Xerox should reflect the cost of borrowing on the UK money markets and should be compounded.

27. It is not in dispute that the repayment is subject to the pre-1 June 2016 Community Customs Code.

EU law – Art 241

28. Under Art 241 the EU provides two key measures for the payment of interest on overpaid customs duty; it is to be paid when domestic provisions allow and to be calculated so that it is equivalent to an amount charged on the national money or financial market.

29. The UK does have provisions for the payment of interest on overpaid customs duty – s 127 FA 1999. Art 241 provides that interest paid under this provision should be paid at a rate equivalent to the amount which would be charged on the national money or financial markets.

30. The statutory interest rates imposed by s 127 FA 1999 and related provisions do not reflect the cost of borrowing money in the UK financial markets. Art 241 takes precedence meaning that these statutory interest rates should be disregarded.

Interest rates to be applied

31. The Bank of England publishes a report each quarter providing an average measure of bank lending rates on outstanding corporate loans – i.e. amounts which have actually been charged on the national money markets.

32. The *Vividas* Tribunal decision demonstrates that HMRC and the Tribunal accept that default interest represents the amount that would be charged on the UK's money markets:

“The rate determined under the regulations represents a margin of 2.5% over the base rate of the major UK clearing banks and is therefore linked to rates of interest charged in the commercial sphere” [10].

33. The rate of interest applied to the repayment of customs duty to Xerox should be a rate which reflects the cost of borrowing on the UK money market. The Appellant suggests that this should be determined in line with the rates of default interest published by HMRC since these have been accepted to be in line with commercial interest rates.

Period for which interest is due

34. The period for which interest should be treated as accruing is the period from the 31st working day after the repayment claims were submitted until the date when repayment is made. The same period for which the statutory interest has already been paid.

HMRC ARGUMENTS

Scope of Art 241 - Wortmann

35. HMRC's starting point is that the ambit of Art 241 is narrow; it does not apply to all claims for interest arising as a result of overpayments of customs duty. It applies only in specific and limited circumstances, as explained in the *Wortmann* decision:

“Article 241 of the Customs Code relates to a situation in which, after the customs authority has released the merchandise concerned, it becomes apparent that the initial calculation of the import duties should be revised downwards and therefore, that all or a part of the import duties paid by an operator must be repaid to him” [27] and

“The reason for [Art 241's] adoption was that in most cases the customs authorities carry out only an a posteriori review of the customs declarations, with the result that there is a real possibility that such a review will give rise to a reimbursement of import duties already paid” [28].

36. In the *Wortmann* decision the ECJ decided that the reimbursement of anti-dumping duties which were being claimed by *Wortmann* did not fit within Art 241 because “it did not arise from an error in the calculation of those duties that was discovered after the competent custom authority had released the goods to Wortmann” [32]

37. Art 241 does not apply to the imports and repayments made to Xerox; that repayment arose from a misinterpretation by HMRC of the relevant CN code, which was not a *Wortmann* type scenario. As *Wortmann* makes clear, the general exclusion from the obligation to pay

interest under Art 241 does not apply to all overpayments of customs duty and the exception to that exclusion (Art 241 (Second Exception)) is only relevant to the narrow set of circumstances in which Art 241 applies.

General right to interest payments - Littlewoods

38. HMRC accept that under EU law, Xerox has a right to interest on overpaid customs duty. That right is identified in the ECJ *Littlewoods* decision:

“It follows from the case law that the principle of the obligation of the Member States to repay with interest amounts of tax levied in breach of EU law follows from that law” [26]

39. HMRC also accept that the Littlewoods principles give a claimant such as Xerox a right to claim interest from the date of the overpayment of the customs duty to the date of repayment, while noting that in its appeal Xerox is only claiming interest for the Post Claim Period [define] as referred to in s 127 FA 1999. Xerox has in fact already received simple interest for the Post Claim Period under s 127 FA 1999.

EU Principle of Effectiveness

40. Xerox’s amended grounds of appeal no longer refer to the EU principle of effectiveness. For the avoidance of doubt, HMRC do not accept that Xerox has an argument based either on the EU principles of effectiveness or equivalence. HMRC rely on the Supreme Court decision in *Littlewoods* for this conclusion:

“The CJEU’s reliance on the principles of effectiveness and equivalence is wholly consistent with its jurisprudence that the questions of the rate and method of calculation of interest are matters for the internal legal order of a member state” [69]

41. Aside from Art 241, there is no other EU provision which gives Xerox any right to interest other than the interest rate provided by the UK’s domestic legislation, s 127 FA 1999.

Interaction of Art 241 and 127 FA 1999

42. Even if, which HMRC do not accept, Art 241 does apply in Xerox’s case, the scope of Art 241 is limited by the UK’s domestic legislation and the specific provisions of s 127 FA 1999 which limit interest to the applicable Statutory Interest rate. No approach to the interpretation of S 127 (such as relying on the *Marleasing* principles) could impose a higher level of interest since this would be against the grain of the legislation.

43. It is clear from the Supreme Court decision in *Littlewoods* that it is for the national courts to set the level of interest which they consider to be appropriate: “No ruling or comment was made [by the CJEU in *Wortmann*] as to the scope of a member state’s discretion in fixing the rate or the method of calculation of interest” [68]

44. If Xerox cannot rely on s 127 to claim a higher level of interest, then the only basis for its claim would be a claim for restitution at common law or in equity in the ordinary courts, a claim which cannot be considered by this Tribunal. The Tribunal has no general or residual power to award interest to any party and no jurisdiction to entertain a claim for restitution at common law or in equity.

Interest Rate in Art 241

45. In respect of the calculation of interest under Art 241, that rate (a market determined rate) cannot be the same as the Default Interest Rate referred to in the *Vividas* case, which is not a market rate as defined by Art 241. The onus of proof is on Xerox to determine what rate should be charged which is equivalent to a national money market or financial market rate referred to in Art 241.

46. Any appropriate rate under Art 241 cannot be any higher than the Bank of England base rate (referred to in the Air Passenger Duty and Other Indirect Taxes regulations 1998 as “the official bank rate determined by the most recent meeting of the Monetary Policy Committee of the Bank of England”)

FINDINGS OF FACT

47. Customs Duty was paid under the wrong CN code by Xerox at the date of importation of multi-function printers into the UK.

48. The repayment of customs duty to Xerox arose as a result of the application of that incorrect CN code by HMRC arising from HMRC’s misinterpretation of the relevant CN code descriptions.

49. The reason for the misapplication of the CN code was, as set out in the First-tier Tribunal decision of 2010, that the multi-function printers imported by Xerox should have been treated as essentially printing machines and that HMRC had failed to take account of their functions other than as copying machines.

DISCUSSION AND DECISION

The scope of Article 241

50. Counter to HMRC’s arguments and their reliance in particular on the *Wortmann* decision, I do not agree that the scope of Art 241 is limited to the circumstances suggested by HMRC. In my view the *Wortmann* decision merely provides a general description of the type of circumstances in which Art 241 may be in point.

51. Art 241 is a rather strange provision in a number of ways; counter to the general principles of EU law its starting point is that interest should not be paid on late repayments of customs duties. It then provides two exceptions to that restriction (referred to here as the First and Second Exception) and, again counter to the general approach rehearsed in *Littlewoods* which suggests that it is for member states to decide what interest rate to impose, ends by stipulating how any interest which is charged should be calculated.

The First Exception

52. The First Exception stipulates that interest can be paid if a decision to make a repayment of customs duty has been made but no repayment is made within three months of that decision. This First Exception is readily understandable as essentially imposing a default interest provision for a delay in making payment of customs duties which have been accepted as due by the tax authorities. Xerox places no reliance on this First Exception.

53. *Wortmann* describes the reason for the three-month time limit in Art 241; to provide a grace period during which both parties should be able to establish the correct CN code with no penalties being applied to either party.

54. However, Art 241 talks not about the time which it takes to come to a decision about the correct code, but about the time between a decision having been made to grant a request for repayment (i.e. having decided that the wrong CN code has actually been applied) and the implementation of that decision.

1. “If the recalculation of customs duties gives rise to the reimbursement to the operator concerned of part or all of the customs duties previously paid, it follows from Article

241.... that interest is due only after the expiry of the three-month period referred to in that provision, without prejudice to the possibility for the national legislature also to provide for the payment of interest in other circumstances” [31]

The Second Exception

55. The Second Exception merely states that interest can be paid where national provisions stipulate. This is the provision which Xerox relies on, by reference to the UK’s domestic legislation imposing interest under s 127 FA 1999.

56. The parties accepted that the First and Second Exceptions are discrete and not cumulative and this is the approach taken by the ECJ in *Wortmann*. It is only necessary for Xerox to fulfil one of those exceptions to bring itself within the interest charging provisions of Art 24.

“The first favours a linear interpretation of the article, in accordance with which the general rule would prevail..... because neither of the two exceptions laid down there arise” [45] AG opinion

The rate of interest

57. Art 241 then goes on to stipulate precisely how that interest should be calculated, in a process which directs the payer of interest to consider the amount which would be charged “for this purpose” if the interest was calculated “on the national money or financial markets”.

Approach to interpretation

58. A straightforward reading of Art 241 does not suggest that it is limited to any particular set of circumstances above and beyond those actually stipulated.

59. Neither party provided any specific guidance or arguments about the approach to interpreting Art 241. I have taken as my starting point the approach adopted in *Wortmann* and *Littlewoods* on which the parties relied.

Wortmann

60. It is accepted by the parties, and cannot seriously be disputed that it is a fundamental principle of EU law that interest should be payable on duties which EU authorities are required to reimburse because they have been levied contrary to EU law.

61. The prohibition on charging interest in the main part of Art 241 is a notable exception to that general principle. It is that exception which is explained in *Wortmann*

62. It is certainly not the case that Xerox’s customs claim is of the same nature as that made by *Wortmann*, which rather than depending on the application of the CN code, concerned the legality of EU anti-dumping legislation and its interaction with customs charges. *Wortmann* was reimbursed a sum as a result of EU anti-dumping regulations being declared invalid by the ECJ.

63. *Wortmann* was attempting to argue that Art 241, and the exclusion of the right to claim interest on the wrongly charged anti-dumping duties did not apply in its case. Or, if Art 241 was applicable, it should be interpreted to mean that national law should provide for the payment of interest on refunded import duties even when proceedings had not been brought before a national court.

64. The national (German) authorities refused to pay *Wortmann* interest on the wrongly charged anti-dumping duty under Art 241 because (i) there had been no delay of three months in implementing the reimbursement decision and (ii) the German legislation provided for the payment of interest only from the date the claim was lodged with the courts.

65. The actual reference to the ECJ was couched in terms of the principle of effectiveness and asked whether Art 241 should be “interpreted as meaning that the national law.....must, having regard to the general EU-law principle of effectiveness, provide for the payment of interest on reimbursed import duties from the time of the payment of those duties up to the time of their reimbursement”.

66. The Attorney General’s Opinion in the *Wortmann* decision referred to three options for interpreting Art 241:

- (1) A “linear” interpretation – the general rule (the refusal of the payment of interest) would prevail because neither of the two exceptions in Art 241 arose.
- (2) An interpretation taking account of fundamental principles of EU law under which a prohibition on the payment of interest is contrary to EU law and so invalid.
- (3) A nuanced approach, excluding some factual situations such as the *Wortmann* situation, because the reimbursement of the anti-dumping duties was required as a result of the invalidity of the imposing legislation.

67. The AG concluded that the nuanced approach was relevant to the *Wortmann* decision because while “the Customs Code governs ordinary situations in which an assessment notice is cancelled as a result of defects in the detailed specification of the individual components of the Customs debt.....I do not believe it encompasses situations in which the reimbursement of undue payments made by importers is the result of a decision on the invalidity of the regulation imposing the obligation” [46]

68. In considering the application of Art 241 the AG considered the preceding EU legislation and concluded that “It may be inferred that the purpose of the rule was to establish a degree of symmetry between the situation of operators and that of customs authorities with regard to the accrual of interest, where an initial assessment has to be amended, in one sense or the other as a result of errors which may have occurred on account of the speed of the clearance system” [48]..... “neither the customs authority nor the person liable for the customs debt is required, as a general rule, to pay interest during the (brief) intervening period” [49]

69. The ECJ decision in *Wortmann*, following the AG’s opinion, decided that Art 241 did not apply to *Wortmann* because its claim did not fall within the specific circumstances of Art 241 but fell instead with the general principle (set out in *Littlewoods* and other cases) that interest should be paid on taxes wrongly paid to EU authorities from the date on which those sums were paid.

Applying *Wortmann* to these facts

70. HMRC argued that Art 241 should be applied only to a specific set of circumstances, but failed to stipulate in any detail what the parameters for determining those specific circumstances should be or why they considered that Xerox did not have an Art 241 type claim

71. In contrast to the facts in *Wortmann*, Xerox’s reclaim does arise as a direct result of a retrospective decision about the correct CN code to apply to the goods imported by Xerox: HMRC originally charged customs duties under CN Code 9009. The First-tier Tribunal ultimately decided that the correct CN Code was 8471.

72. To that extent, Xerox’s claim is an “ordinary situation” in which an assessment notice has been cancelled as a result of “defects in the original detailed specification of the individual components of the customs debt”. This is not a situation in which a “nuanced” approach suggested by the AG needs to be brought into play.

73. I do not agree with HMRC that Xerox’s claim does not fall within Art 241 “type circumstances” because it arises from “a requirement to pay import duty based on misinterpretation by HMRC of a various CN code descriptions in the CN”. I can see no significant difference between what has occurred in Xerox’s circumstances and the “ordinary situation” referred to in *Wortmann*. As the First-tier Tribunal decision of 2010 makes clear, the reason for the misapplication of the CN code by HMRC was as a result of a failure to properly classify the specific components of the printing and copying machines which were being imported.

74. That means that the starting point for Xerox is that Art 241 is in point; no interest is chargeable unless the exceptions in Art 241 are fulfilled. There is no dispute that the Second Exception is fulfilled: S 127 FA 1999 provides for interest to be paid at the statutory rate on overpaid customs duties.

75. I have assumed for these purposes (as the parties assume and as the ECJ and AG assume in the *Wortmann* decision) that the two exceptions in Art 241 are discrete not cumulative. The AG’s decision refers to this approach as the “linear” approach which relies on either of the two exceptions being fulfilled in order for interest to be payable (AG Opinion [45]).

76. Xerox states that the First Exception is not relevant and is not considered as part of its claim. It relies only on the Second Exception and points to s 127 FA 1999 as fulfilling that exclusion.

77. HMRC does not suggest that in order to rely on Art 241 Xerox has to fulfil both of the exceptions.

78. On this “linear” approach to Art 241, the only question is whether the specific interest rate provisions in the final paragraph of Art 241 should override the rates stipulated by the UK’s domestic legislation.

79. The wording of Art 241 is clear; if interest payments are triggered by Art 241, they should be calculated “in such a way as is equivalent to the amount which would be charged for this purpose on the national money or financial markets”.

Rate of interest under Art 241 – Second Exception

80. The parties accept that the statutory interest so far paid by HMRC to Xerox under s 127 FA 1999 does not fulfil this definition. The definition at Art 241 is difficult to apply in practice since “the purpose” of this interest charge (compensation for wrongful payment of tax to a government authority) is not something which is generally priced on the national money or financial markets. However, it is clear that the intention is to import a recognised market rate of interest to payments made under Art 241.

81. Interest rates are decided by reference to commercial factors, including the length of time within which re-payment is to be made, the perceived risk of the lending and the credit rating of the respective parties. On that premise, it is possible to argue that the “market rate” which should be paid under the First Exception of Art 241 should not necessarily be the same as the rate paid under the Second Exception, since the First Exception applies where a revenue authority has failed to repay duty which has been determined to be due within three months, so that any interest payable would be equivalent to a default or late payment rate of interest (likely to be more punitive) whereas payments falling under the Second Exception are merely compensation for time value of money.

82. Xerox has suggested that the default rate applied in the Air Passenger Duty and Other Indirect Taxes (Interest Rate) (Amendment) Regulations 2020 should be used as a proxy for the calculation of this rate, particularly by reference to the statements of the First-tier Tribunal in the *Vividas* case.

83. The interest rates stipulated by these regulations are default rates of interest; they apply in circumstances where taxpayers have failed to make returns and/or make payments of tax.

84. In my view applying what is a default or late payment rate to interest payments falling within the Second Exception of Art 241 is not appropriate and does not reflect how interest arising “for this purpose” would be “calculated on the national money or financial markets”. More relevant in a non-default type situation is the Bank of England’s overnight money rate, (the Bank of England base rate) referred to by HMRC as “the official bank rate determined by the most recent meeting of the Monetary Policy Committee of the Bank of England” and the rate used as the starting point for commercial lending in the UK.

85. Art 241 does not give any specific guidance about the period for which interest should be paid, particularly in respect of payment triggered by the Second Exception. However, the parties have accepted that any additional interest under Art 241 should be paid for the same period as that already claimed as statutory interest.

Are the exceptions cumulative?

86. Although not a point raised by the parties and so not considered in this decision, I would find the two exclusions in Art 241 more readily understandable if they are read as cumulative rather than discrete conditions, particularly given the relatively punitive rate of interest which is applied and the override of domestic legislation about interest rates.

87. In my view this also explains why the interest rate then applied is a commercial market rate, since it is being applied for a period of delayed payment, rather than for a period of delayed decision making.

Remit of this Tribunal

Claims in restitution or equity

88. As a final point, HMRC set out brief arguments concerning the remit of this Tribunal’s jurisdiction. HMRC argue that even if Xerox can substantiate a claim under Art 241, that is not a claim which can be considered by this Tribunal. S 127 cannot be interpreted so that it is in accordance with Art 241 on *Marleasing* principles since to do so would ignore the specific provisions setting a statutory interest rate.

89. Therefore, Xerox’s claim is a claim which is being made outside the UK’s statutory code for paying interest on customs debts (s 127 FA 1999) so is a claim in restitution or equity which can only be considered by the commercial courts.

90. I have agreed with the Appellant that it has a claim under Art 241. Art 241 imposes a specific interest rate which is a rate which is higher than the statutory rate paid by HMRC. HMRC’s suggestion that the rate of interest imposed on Xerox must be left to the national taxing authorities is not consistent with the clear wording of Art 241.

91. I do not agree that it is not possible to amend the UK’s statutory code so that it is in accordance with EU legislation in this case. Changing the level of interest which is treated as the statutory rate does not “go against the grain” of the core of the legislation as HMRC suggest.

92. On the contrary by referring to the specific purpose for which interest is to be charged, Art 241 provides a more flexible rather than an opposing approach to the UK’s statutory scheme. This is also supported by the fact that taxpayers are given a specific right to appeal against the level of interest applied by HMRC through s 13A(2) FA 1994.

93. Finally, HMRC suggest that since Xerox cannot rely on s 127 FA 1999 for its interest rate claim, its only claim is in equity or restitution, both of which are outside the remit of this

Tribunal. The scope of this Tribunal's jurisdiction, when a claim relating to a tax appeal overlaps with a non-statutory remedy has been reviewed very recently by the Upper Tribunal in its extensive obiter comments in the 2021 *Zeman* decision. The relevant principles which I take from *Zeman* are;

(1) The extent of the Tribunal's jurisdiction is in the first instance a question of statutory construction "We have no doubt that the nature of the FTT's jurisdiction depends on the proper construction, in the context of the statutory provision to which it relates, of the statutory provision by which it is given" [27].

(2) There is a distinction between cases in which the non-statutory legal principle concerns the amount of tax due (when non-statutory principles can be applied) and cases where the non-statutory legal principle is being used to argue about something other than whether a specific amount of tax was payable by a particular taxpayer. [46] and "s 83(1)(t) ... conferred an appeal jurisdiction only where the challenge was that an amount of VAT was not in fact due. It did not confer jurisdiction in a case where the relevant VAT amount was due, but was said to be repayable for an extraneous reason" [48]

(3) The FTT does not have a general supervisory jurisdiction; the question is whether the statutory scheme expressly or by implication excludes the ability to raise a public law defence. [70]. By reference to the VAT legislation under consideration in *Zeman*, this comes down to considering the scope of the Tribunal's jurisdiction "not by reference to any particular legal regime or type of law, but instead by reference to the subject matter of the subsection".

94. Taking these principles, the starting point must be the relevant provision under which Xerox makes its appeal; that is Xerox's appeal rights against a relevant decision under s 127 FA 1999 set out in s 13A(2) FA 1994 and s 16(1B) FA 1994. That includes a decision about the amount of any interest charged.

95. On the face of it, that gives Xerox a clear right of appeal against the level of interest paid to it. The subject matter of the relevant subsection is the amount of interest which is being paid to Xerox and any dispute about that is within the remit of the Tribunal.

96. For these reasons I do not accept that Xerox's claim for additional interest under Art 241 is outside the scope of this Tribunal, both because it is legitimate to read the interest rate provisions of Art 241 into HMRC's obligations under s 127 FA 1999 and because, even if Xerox's claim is properly seen as a claim in restitution or equity, that claim is a component of its original appeal against the customs duty levied by HMRC subject to appeal under s 127 FA 1999 and the level of interest paid under s 13A(2) FA 1994, which is within the remit of this Tribunal.

DECISION

97. Xerox's appeal under Art 241 is allowed.

98. Xerox has a right to additional interest, taking account of the statutory interest already paid, at the relevant bank of England base rate from the date when Xerox made its claim to the date when HMRC repaid the overpaid customs duty.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

99. 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.

RACHEL SHORT
TRIBUNAL JUDGE

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