Neutral Citation: [2022] UKFTT 147 (TC)

Case Number: TC08478

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal reference: TC/2018/01480

VAT – appeal withdrawn – subsequent claim made for recovery of VAT, including periods included in withdrawn appeal – HMRC refused claim and Appellant appealed to Tribunal – HMRC conceded substantive issue, but applied to strike out the appeal in relation to VAT periods which had formed part of the withdrawn appeal – whether HMRC estopped from making strike out application because of delay – whether cause of action estoppel, issue estoppel and/or abuse of process barred the Appellant from recovering VAT for the overlap periods – strike out application allowed

Heard on: 7 to 9 December 2021
Judgment date: 03 MAY 2022

Before

TRIBUNAL JUDGE ANNE REDSTON

Between

TELENT TECHNOLOGY SERVICES LIMITED **Appellant**

and

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS
Respondents

Representation:

For the Appellant: Mr Michael Jones QC, instructed by PricewaterhouseCoopers LLP

For the Respondents: Mr Ben Elliott of Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs

DECISION

1. The Appellant had appealed against HMRC's refusal to repay VAT of £1,312,309. On 14 October 2021, HMRC conceded the substantive issue in dispute, but applied to strike out part of the appeal on the basis that the Appellant was estopped from recovering VAT of £855,754. The Appellant disagreed, and counter-argued that HMRC were themselves estopped from making the strike out application.

2. This decision therefore concerns cause of action estoppel, issue estoppel, abuse of process and estoppel by convention/representation. For the reasons summarised below, which I have set out in more detail in the main body of this decision, I allowed HMRC's strike out application. As a result, the Appellant is unable to recover VAT of £855,754.

Summary

3. The telent group provides network, transport, telecommunications and infrastructure services. In 2006, it placed a sum in escrow ("the Escrow Account") to provide comfort to the Pensions Regulator as to the future funding of its occupational pension scheme. In 2014, telent Ltd informed HMRC that it had been recovering input tax on fees paid to investment advisers for the Escrow Account. At that time, telent Ltd was the representative member of the telent group.

4. On 17 November 2014, HMRC issued telent Ltd with an assessment to recover VAT for the periods 11/10 through to 05/14, a sum of £1,146,598.93 ("the Assessment"). On 10 September 2015, following a statutory review, telent Ltd appealed the assessment to the Tribunal ("the Assessment Appeal"). In March 2016, the Assessment Appeal was withdrawn.

5. Later that year, telent Ltd changed its professional advisers to PriceWaterhouseCoopers LLP ("PwC"). On 30 September 2016, PwC made a claim in the name of telent Ltd to recover VAT on the investment management services relating to the Escrow Account of £1,312,309 for periods 08/12 to 08/16 ("the Claim"). The Claim thus included eight VAT periods ("the Overlap Period") which had also come within the Assessment Appeal; the related VAT totalled £855,754.

6. HMRC refused the Claim by writing to Telent Technology Service Ltd ("TTSL"), the new representative member of the telent VAT group. TTSL appealed that refusal to the Tribunal. In their Statement of Case, HMRC made no reference to the Assessment Appeal or to estoppel.

7. In July 2021, HMRC informed PwC that they were minded to concede the substantive issue, but also said "Telent is procedurally barred" from recovering the VAT for the Overlap Period, and inviting settlement on that basis. The parties failed to agree, and HMRC applied for the Tribunal to strike out of the part of the appeal relating to the Overlap Period; they conceded the remaining part of the appeal.

8. HMRC's strike out application rested on Value Added Taxes Act 1994 ("VATA"), s 85(1) and (4), which state that where a person has withdrawn its appeal, the parties are deemed to have agreed that "the decision under appeal should be upheld without variation" and the Tribunal is deemed to have determined accordingly. In Mr Elliott's submission, the effect of those subsections was that, when telent Ltd withdrew the Assessment Appeal, the parties were deemed to have come to an agreement with HMRC that input tax on the investment

management services for periods 08/12 to 05/14 was not allowable, and the Tribunal was deemed to have determined that this was the case. As a result, there had been a judicial determination that the VAT was irrecoverable, and the principles of cause of action estoppel, issue estoppel and/or abuse of process prevented relitigation.

9. The parties raised the following issues:

(1) Mr Jones submitted that HMRC's strike out application should be refused, because Mr Elliott's skeleton argument had been headed "telent Ltd", when the appellant in this appeal was TTSL. I decided that there was no unfairness in admitting Mr Elliott's written and oral submissions, see Issue One.

(2) Mr Jones also submitted that HMRC were estopped from refusing to repay the VAT relating to the Overlap Period, because of its delay in raising the point. I decided that HMRC were not so estopped, see Issue Two.

(3) The parties put forward different statutory interpretations of VATA s 85(1) and (4). I agreed with Mr Elliott as to the effect of those subsections, see Issue Three.

(4) In interpreting VATA s 85(1) and (4), Mr Jones relied in particular on *Matalan Retail Ltd v HMRC* [2009] EWHC 2046 (Ch) ("*Matalan*"), a decision of Clarke J. Mr Elliott placed particular reliance on *Littlewoods Retail Ltd and others v HMRC* [2014] EWHC 868 (Ch) ("*Littlewoods*"), a decision of Henderson J (as he then was). I considered both parties' submissions carefully, but found neither case of assistance in construing the subsections, for the reasons explained under Issue Four.

(5) Mr Elliott's primary submission was that cause of action estoppel applied to block the VAT repayment for the Overlap Period. Cause of action is defined as "the fact or combination of facts which gives rise to a right of action". An estoppel operates where a party brings a new appeal with an identical cause of action involving the same subject matter as has been determined in an earlier appeal. It was common ground that the subject matter of the Assessment Appeal was in all respects identical to that in the Overlap Period of the Claim. I agreed with Mr Elliott that cause of action estoppel applied, see Issue Five.

(6) In the alternative, Mr Elliott submitted that repayment was blocked by issue estoppel. This operates where "a particular issue forming a necessary ingredient in a cause of action has been litigated and decided". I again agreed with Mr Elliott, see Issue Six.

(7) Finally, Mr Elliott submitted that repayment was barred by abuse of process. This applies where a party "is misusing or abusing the process of the court" by making a claim in relation to the same subject matter as has previously been decided. Where cause of action estoppel applies, there is also abuse of process unless there is a relevant exception. There was no basis for such an exception, and I therefore decided Issue Seven in favour of HMRC.

(8) I add for completeness that Mr Jones, rightly, did not seek to argue that I should refuse the strike out because HMRC had conceded the substantive issue. As Lord Hoffman said in *Watt v Ahsan* [2007] UKHL 51 at [33] "the whole point of an issue estoppel on a question of law is that the parties remain bound by an erroneous decision", and this must also be true of cause of action estoppel. Thus, even though HMRC now

accepted the VAT was recoverable, that relating to the Overlap Period could not be repaid.

10. For the reasons summarised above, I therefore allowed HMRC's application, and struck out the part of the Claim relating to the Overlap Period.

The Appellant

11. As is clear from the summary of Issue One above, and as set out in more detail in the main body of the decision, there was a change of VAT representative member during the relevant period, from telent Ltd to TTSL. The appellant in this appeal is TTSL, but the appellant in the Assessment Appeal was telent Ltd. Where the identity of the appellant makes no difference to the particular point being discussed, I have simply referred to "the Appellant" and where I have done so, that term should be taken to refer to the appellant in the particular proceedings.

The evidence

12. I was provided with a Bundle prepared by PwC which included the following documents:

(1) the Notice of Appeal, Statement of Case and Notice of Withdrawal in relation to the Assessment Appeal;

(2) the Notice of Appeal in relation to the Claim;

(3) HMRC's application to strike out the part of the Claim relating to the Overlap Period, and a related Statement of Case;

(4) correspondence between the parties, including two letters marked "without prejudice save as to costs". The Appellant initially objected to their inclusion, but withdrew that objection on the first day of the hearing; and

(5) correspondence between the parties and the Tribunal about the Assessment, the Claim, and the proceedings before this Tribunal.

13. I was also provided with three supplementary bundles, which from the indices contain witness statements on behalf of the Appellant and related exbibits prepared for the substantive hearing. Neither party referred to these bundles during the hearing and I understood it to be common ground that the witness evidence was relevant to the substantive issue only. Neither party relied on witness evidence during the hearing.

Legislation and case law

14. In this decision, all legislation and case law is cited so far as relevant to the issues before the Tribunal.

THE FACTS

15. These findings of fact are made on the basis of the evidence before the Tribunal.

The companies and the pension scheme

16. In 2006, telent Ltd (then named Marconi Corporation plc) transferred around 75% of its business as a going concern to Ericsson AB. As part of the terms of that sale, telent Ltd retained its obligations as the sponsoring employer of a pension scheme named the "GEC 1972 Plan", an occupational pension scheme for the telent group of companies ("the Plan").

17. As a pre-requisite to the Pension Regulator's clearance of the Ericsson Sale, telent Ltd agreed to place money into the Escrow Account to provide comfort to the Pensions Regulator that, if the Plan went into deficit, the assets in that account would be available to cover the deficit. By an agreement dated 18 November 2009, telent Ltd and the Trustee of the Plan agreed that the assets of the Escrow Account should be released into the Plan by instalments until 31 March 2023.

18. The Plan had a charge over the assets of the Escrow Account, but until transferred into the Plan, those assets were legally owned by telent Ltd. They were managed by third party investment managers appointed by telent Ltd. VAT was incurred on the fees charged by the investment managers, and telent Ltd as the representative member recovered that VAT as input tax arising in relation to the group's fully taxable business. In 2014, the group's turnover was £320m.

The Assessment Appeal

19. On 24 July 2014, telent Ltd's then adviser, KPMG LLP ("KPMG") wrote to Mr Boobyer of HMRC's Large Business Service; Mr Boobyer's title was "VAT Tax Specialist". KPMG explained why telent Ltd had claimed input tax relating to the Escrow Account, with the aim of reaching agreement with HMRC as to the VAT position for the past and the future. KPMG's letter was copied to Mr Stephen Vey, director of tax compliance at telent Ltd, as were the subsequent exchanges between KPMG and HMRC.

20. On 7 November 2014, Mr Vey emailed Mr Boobyer a schedule setting out the input VAT claimed by telent Ltd on the investment management services provided in relation to the Escrow Account, in each of the periods 11/10 through to 05/14; this totalled £1,146,598.93.

21. On 17 November 2014, Mr Boobyer issued telent Ltd with the Assessment to recover the VAT set out in the schedule provided by Mr Vey; this had been raised under VATA s 73. A statutory review was requested, and on 12 August 2015 the HMRC Review Officer, Mr Bennett, issued his review decision: he addressed his letter to Mr Vey.

22. On 10 September 2015, KPMG sent the Assessment Appeal to the Tribunal on behalf of telent Ltd. HMRC filed and served their Statement of Case on 1 December 2015. On 9 March 2015, Mr Vey emailed Mr Boobyer and said "I wish to inform you that a decision has in fact been taken to withdraw this appeal". On 14 March 2016, KPMG filed a document with the Tribunal on behalf of telent Ltd headed "Notice of Withdrawal". The wording on the Notice said only "Take notice that the Appellant hereby withdraws this appeal".

The claim

23. At some point before 30 September 2016, telent Ltd changed their professional advisers from KPMG to PwC. On 30 September 2016, PwC sent the Claim to Mr Boobyer on behalf of telent Ltd. The Claim is headed "telent Ltd ('telent')" and it begins:

> "I am writing on behalf of my above named client, telent, to lodge a claim for VAT under recovered in the VAT periods 08/12 to 08/16 in the sum of £1,312,309 plus interest.
>
> The claim relates to VAT incurred on costs incurred by telent, relating to the operation of an escrow fund, which we consider to be a non-economic activity for VAT purposes."

24. It was common ground that the Claim had been made by telent Ltd; that it was for the recovery of input tax incurred on the investment management fees for the Escrow Account, and that it included the Overlap Period, namely the VAT periods 08/12 to 05/14 which had also formed part of the Assessment Appeal. The VAT claimed for the Overlap Period totalled £855,754, and the amounts claimed for each period were identical to the sums assessed for the same periods by the Assessment.

25. PwC's letter referred to the Assessment, but submitted that "the direction of travel" of recent case law meant that "a person who has a fund should be able to recover input VAT on investment management costs in circumstances where the costs are a general overhead of the business". One of the cases relied on was *University of Cambridge v HMRC* [2015] UKUT 305 (TCC) ("*University of Cambridge*"); this had been published on 15 June 2015, and at the time of PwC's letter was under appeal to the Court of Appeal.

26. On 3 November 2016, Mr Boobyer responded to PwC, copying his letter to Mr Vey. His letter is headed "Telent Technology Services Ltd ('telent')", because telent Ltd had been replaced as the representative member of the VAT group by TTSL. I return to the question as to when this change took place at §56.

27. Mr Boobyer first made some comments on the technical arguments put forward by PwC, and then added:

> "I would draw your attention to the fact that your client accepted in a previous appeal relating to this same subject (TC/2015/05402) that telent's escrow activity was a business or 'economic' activity (this view was confirmed in a letter that was dated 28 May 2015). The appeal progressed on that basis until it was withdrawn prior to being heard…
>
> There is one further point I should make about the claim: it includes periods 08/12 to 05/14 inclusive, the various amounts claimed for those periods totalling £855,754. These amounts are identical to the amounts previously assessed by HMRC, forming part of the tax in dispute in the previous appeal, from which, as I have mentioned, your client withdrew. In these circumstances, I can confirm now that, if any repayment were made in advance of the Court of Appeal's decision in the University of Cambridge case, it would exclude the amount of £855,754. Moreover, in the event that he final decision were in telent's favour, repayment of the £855,754 would be a matter for HMRC's discretion, given that the tax in question had been subject to an appeal process from which your client had formally withdrawn."

28. On 11 November 2016, Mr Boobyer met with Mr Vey and Ms Middleton of KPMG to discuss the Claim. On 5 December 2016, PwC replied to Mr Boobyer's letter. That reply is headed "telent Technology Services Ltd ('telent')". It refers to "telent withdrawing its appeal"; states that "telent" operates the Escrow Account and is obliged to hold the investments, and explains why in PwC's view, there is no restriction on "telent" including the Overlap Period within the Claim. In making those submissions, PwC relied in particular on their understanding of the High Court's judgment in *Matalan.*

29. On 12 April 2017, Mr Boobyer wrote to Mr Vey. His letter is headed "Telent Technology Services Ltd ('telent')". He said HMRC had decided not to repay the Claim, and his letter included this paragraph:

> "In my letter of 3 November I suggested that any repayment HMRC may eventually be required to make in connection with this matter should be restricted to £456,556, the amount that had not been part of the tax at stake in the previous appeal. I have since considered the relevance of the High Court's judgment in *Matalan* (as per PwC's letter of 5 December) and now accept that, if it is ultimately determined that a repayment should be made, that repayment should be of the full claim in the sum of £1,312,309."

30. On 27 April 2017, Mr Burn of PwC emailed Mr Boobyer. The subject line of the email is "telent" and the text says "telent and I wanted a very quick chat with you ahead of writing to request an extension to the 30 day time limit". On 28 April 2017, Mr Burn emailed again, with the same subject line, asking Mr Boobyer to agree to "an extension of time within which telent can request a review of your decision".

31. On 23 May 2017, PwC wrote to Mr Boobyer. This letter, like the previous one, was headed "telent Technology Services Ltd ('telent')". It begins by saying that Mr Boobyer had "rejected telent's claim for VAT under-recovered", and adds that "telent is required to make contributions to the pension scheme and the liabilities of the pension scheme are legal liabilities of the current and continuing business activities of the company".

32. On 31 October 2017, PwC requested a statutory review of Mr Boobyer's decision not to pay the Claim. That letter too was headed "telent Technology Services Ltd ('telent'); under the heading "Background" it says:

> "telent submitted a claim in the sum of £1,312,309…Following submission of the Claim, telent and HMRC entered into correspondence regarding the basis of the Claim."

33. On 18 January 2019, Mr Bennett issued a statutory review of Mr Boobyer's decision to refuse the Claim; this was the same Mr Bennett who had previously carried out the statutory review of the Assessment. Under the heading "Previous assessment action", he said:

> "On 17 November 2014, an assessment was raised in respect of the input tax related to the escrow funds in question for VAT periods 11/10 to 05/14. You queried this assessment, but the decision was upheld on review. I understand that telent submitted but subsequently withdrew an appeal to the Tribunal. The issue for this period is therefore considered by HMRC to be closed.
>
> A review was offered at the time under VAT Act 1994 Section 83A, and this review was performed as requested. There is no allowance in law for a second review of a matter, and indeed VATA Section 83A (3) specifically states that the offer of a review does not apply to the notifications of the conclusions of a review. Furthermore, Section 83C(4) states that HMRC shall not review a decision if the matter has been appealed to the Tribunal.
>
> I therefore regret that I am unable to review the part of the claim relating to VAT periods 08/12 to 05/14, on the grounds that these periods have already been subject to review. I agree that there is no impediment to you discussing the issue further with HMRC. However, if you wish to reinstate the claim for these earlier periods then, in the absence of the withdrawal of the assessment, your only option is to apply to the Tribunal for a reinstatement of the appeal submitted in 2015. Reinstating an appeal is at the discretion of the Tribunal, and HMRC will be asked whether there is any objection to such action. This issue is outside of the scope of my review.

> Although your claim dated 30 September 2016 covers all VAT periods from 08/12 to 08/16, I am, for the reasons given above, only able to review the claim as it relates to VAT periods 08/14 to 08/16."

The appeal to the Tribunal and HMRC's change of position

34. On 15 February 2018, PwC filed an appeal against HMRC's refusal of the Claim. The Appellant was named on the headnote of the Grounds of Appeal as "Telent Technology Services Ltd" and the first paragraph reads:

> TAKE NOTICE that the Appellant, telent Technology Services Limited, of Point 3 Haywood Road, Warwick, CV34 5AH which is the representative member of the Value Added Tax ('VAT') group registered under registration number 239 1370 65 APPEALS AGAINST the decision of the Respondents contained in a letter dated 18 January 2018 in which the Respondents rejected the Appellant's claim for under-recovered input tax in periods 08/12 to 08/16 in the sum of £1,312,309 plus interest."

35. The Grounds also referred to the correspondence about the Overlap Period, including Mr Boobyer's change of position.

36. On 25 May 2018, in response to the appeal, HMRC filed a Statement of Case headed "telent Technology Services Limited". The Statement of Case did not contain any submission that the Assessment Appeal prevented the Appellant from claiming the VAT for the Overlap Period; it was instead entirely silent on that issue.

37. Arrangements for the appeal to be heard before the Tribunal proceeded in the normal way. In January 2021, the parties agreed a hearing window. On 8 June 2021, the Tribunal informed the parties that a face-to-face hearing had been listed from 7-9 December 2021. The Tribunal's letter advising the parties of the hearing was headed "Telent Limited".

Intra-parties correspondence

38. On 15 July 2021, HMRC wrote to PwC saying that having carried out a further review, they wished to "revisit" a "jurisdictional issue" and also to put forward "a possible basis upon which this matter could be resolved without the need for a First tier Tribunal hearing".

39. HMRC went on to explain that the "jurisdictional issue" was whether "Telent" could make a claim for the Overlap Period. HMRC set out the background, and stated that although Mr Boobyer had previously agreed in reliance on *Matalan* that a claim could be made for the Overlap period, HMRC were no longer of that view. This part of the letter ended by saying that HMRC "now take the view that Telent is procedurally barred from revisiting the previous assessment periods as part of the Claim", but they were "minded not to proceed with the substantive point". HMRC offered to settle the dispute on the basis that the Appellant conceded the part of the Claim which fell within the Overlap Period.

40. On 8 September 2021, PwC replied. Their detailed letter runs to 33 numbered paragraphs, and was signed by David Anderson, a PwC partner and the Head of the Indirect Tax Disputes group. It is headed "telent Technology Services Limited", but the text uses the name "telent" to refer both to telent Ltd and to TTSL. For example, in the sentence "HMRC relies on section 85 VATA to support its view that telent is unable to challenge its rejection of telent's input tax claim for the Disputed Periods", it was common ground that the first reference

to "telent" was to TTSL, as the current representative member, and that the second referred to telent Ltd, the company which had made the Claim.

41. The substance of Mr Anderson's letter was that PwC disagreed with HMRC's view as to the Overlap Period and refused to concede that issue. On 14 October 2021, HMRC wrote to PwC, withdrawing their case on the substantive issue, but attaching a strike out application in relation to the Overlap Period, together with an application to amend their Statement of Case. On the same day, HMRC filed that application with the Tribunal, together with an application for the listed hearing to be cancelled and relisted for 2022. On 19 October 2021, PwC informed HMRC that they would oppose the strike out, and that they did not agree the hearing should be vacated and relisted.

The period before the hearing

42. On 26 October 2021, PwC wrote to the Tribunal objecting to the strike out, but stating that they did not object to HMRC's application to amend their Statement of Case.

43. On 3 November 2021, having considered the principles set out by Carr J in *Quah International v Goldman Sachs* [2015] EWHC 759 (Comm), I directed that:

> (1) the strike out application and related submissions about the Overlap Period were to be heard and decided during the three day period previously listed for the hearing of the substantive appeal; and
>
> (2) in advance of that hearing date, HMRC were to file and serve their amended Statement of Case with related submissions, and the Appellant to respond.

44. Soon after receipt of these directions, HMRC made a late change of counsel, as the barrister they had originally instructed was unable to attend the listed hearing.

45. On 10 November 2021, HMRC filed and served their submissions on the strike out application. The heading of that document has the name "TELENT LIMITED" as the appellant. I return to this at §62. On 24 November 2021, the Appellant filed and served its response, and the hearing took place as listed.

ISSUE ONE: THE REPRESENTATIVE MEMBER

46. There were two sub-issues under this heading. The first is the date on which TTSL replaced telent Ltd as the representative member, and the consequences of that change. The second concerns the submissions made for this hearing. I begin by setting out the legislation and case law on representative members.

The legislation and the case law

47. EC Council Directive 2006/112/EC, also the Principal VAT Directive ("PVD") provides:

> "After consulting the advisory committee on value added tax…each Member State may regard as a single taxable person any persons established in the territory of that Member State who, while legally independent, are closely bound to one another by financial, economic and organisational links."

48. This provision was described by Lord Hodge, giving the only judgment with which the other members of the Court agreed, in *Taylor Clark Leisure v HMRC* [2014] UKSC 35 ("*Taylor Clark*") at [19] as being "permissive" and "not prescriptive". Lord Hodge added that "it does

not lay down a template as to how a member state will treat a group of persons as a single taxable person", and noted that it shared all those characteristics with its predecessor, Article 4(4) of the Sixth Council Directive (77/388/EEC).

49. Under UK law, the current implementing provision is at VATA s 43, which provides:

> "Where under sections 43A to 43D any bodies corporate are treated as members of a group, any business carried on by a member of the group shall be treated as carried on by the representative member, and—
>
> (a) any supply of goods or services by a member of the group to another member of the group shall be disregarded; and
>
> (b) any supply which is a supply to which paragraph (a) above does not apply and is a supply of goods or services by or to a member of the group shall be treated as a supply by or to the representative member; …
>
> and all members of the group shall be liable jointly and severally for any VAT due from the representative member."

50. Lord Hodge said that at [21] of *Taylor Clark* that:

> "It is clear from the statutory words in s 43(1) of VATA that the UK chose to achieve the end which the Directive authorised not by deeming the group to be a quasi-person but by treating the representative member as the person which supplied or received the supply of goods or services."

51. At [27] he endorsed the following description from *HMRC v MG Rover; Standard Chartered v HMRC*[2016] UKUT 434 (TCC) ("*MG Rover*"), a decision of Warren J and Judge Hellier:

> "The representative member of s 43 must, in our view, be understood as a continuing entity (perhaps akin to a corporation sole whose role is fulfilled by whoever holds the relevant office at any time). Thus actions, liabilities and rights of an old representative member must be ascribed to the new representative member on a change of representative member."

52. VATA s 80 provides:

> "(1) Where a person—
>
> (a) has accounted to the Commissioners for VAT for a prescribed accounting period (whenever ended), and
>
> (b) in doing so, has brought into account as output tax an amount that was not output tax due,
>
> the Commissioners shall be liable to credit the person with that amount
>
> (1A) Where the Commissioners
>
> (a) have assessed a person to VAT for a prescribed accounting period (whenever ended), and
>
> (b) in doing so, have brought into account as output tax an amount that was not output tax due,
>
> they shall be liable to credit the person with that amount.
>
> (1B) …

(2) The Commissioners shall only be liable to credit or repay an amount under this section on a claim being made for the purpose.

(3)-(3C) …

(4) The Commissioners shall not be liable on a claim under this section—

(a) to credit an amount to a person under subsection (1) or (1A) above, or

(b) to repay an amount under subsection (1B) above,

if the claim is made more than four years after the relevant date."

53. Essentially the same provisions were considered in *Taylor Clark,* other than that the time limit in s 80(4) was three years[1]. Lord Hodge said at [29]:

> "It is clear from the words of s 80(1) that HMRC's liability to credit or repay the overpaid output tax is owed to the person who accounted to them for VAT in the relevant accounting period or periods…Subsection (4), which imposes a time limit on claims, also is drafted on the basis that the claim will result in the giving of a credit or repayment to the person who accounted for or paid the VAT in the first place. It therefore follows from the operation of s 43 of VATA that where there have been overpayments of VAT by the representative member of a VAT group, the person entitled to submit a claim during the currency of a VAT group, unless the claim has been assigned, is either the current representative member of the VAT group or a person acting as agent of that representative member."

54. At [30] Lord Hodge agreed with the Court of Session that "it is only the representative member who has any interest in making the claim", and at [32] added:

> "Mr Scorey on behalf of [Taylor Clark] submits that the only taxable person is the VAT group, which alone has fiscal personality, and that any company within the VAT group can claim repayment of unduly levied VAT on behalf of the group. For the reasons set out above, I do not accept that submission. Nor do I see any basis for the assertion by the Extra Division (para [27]) that a claim by an individual member of a VAT group must normally be construed as a claim made on behalf of the representative member, as otherwise the claim would have no meaning. An assignee of the representative member may make a valid claim in its own right (as Carlton purported to do in this case). Alternatively, a party may make a claim to which it is not entitled."

55. Lord Hodge then applied that analysis of the law to the facts. In *Taylor Clark* the claim had been made by Carlton Clubs Ltd ("Carlton"), after it had left the Taylor Clark VAT group. As a result, the claim had plainly not been made by the representative member. Lord Hodge also held at [38] that Carlton had not acted as the agent of the representative member, because of findings of fact made by the FTT, namely:

> "The FTT held (para [55]) that TCL 'neither instructed nor authorised' Carlton to submit any of the claims and (para [57]) that TCL was unaware that it had a potential claim under s 80 of VATA and that HMRC's payment of £667,069 to it on 27 April 2009 'came out of the blue'. Similarly, there is no basis for an

[1] That subsection was referred to, but not cited, by the Supreme Court but is set out in the UT judgment under reference [2014] UKUT 396 (TCC at [12]

> argument that TCL ratified Carlton's claims which had been made on its behalf, thereby conferring retrospective authority. First, Carlton's letters to HMRC did not purport to be written as agent of TCL. On the contrary, they were claims which Carlton pursued for its own benefit. That is fatal to the claim of ratification…Secondly, there are no findings of fact that TCL ratified Carlton's actions as its agent."

The date of change

56. It was common ground that (a) the Claim was made by telent Ltd on 30 September 2017, see §24, and (b) that Mr Boobyer's reply dated 3 November 2016 had been headed "Telent Technology Services 'telent' because the representative member had changed from telent Ltd to TTSL before he sent that letter.

57. Mr Elliott said in submissions that this change had taken place between the making of the Claim and Mr Boobyer's letter in reply. Mr Jones did not correct him on this point, and I am confident he would have done so had he known it to be factually incorrect.

58. However, after the hearing I re-read the Notice of Appeal to the Tribunal, which stated that TTSL had become the representative member on 14 April 2016, over five months before telent Ltd made the Claim. It is clear from *Taylor Clark* that claims can only be made by the representative member, its agent or its assignee. If the Notice of Appeal was correct, the Claim had therefore not been made by the representative member

59. Neither party raised this issue during the hearing, and I considered whether I should ask for clarification as to the date of change, and for further submissions. However, I decided not to do so, because:

(1) the Claim was received on HMRC's behalf by Mr Boobyer. He was the "VAT tax specialist" responsible for the telent group of companies. He clearly knew there had been a change of representative member, because he addressed his reply to TTSL. On the balance of probabilities, I find that he understood the role of representative members as set out earlier in this Decision, and that he also knew when that change occurred;

(2) had Mr Boobyer considered the Claim was not properly made, it is inconceivable that he would not have raised that issue in his reply;

(3) HMRC have not sought at any time to argue that the Claim was not properly made because it had not been submitted by the representative member; and

(4) it follows from the above that either:

(a) the date given in the Notice of Appeal is incorrect, or

(b) at the time the Claim was made it was accepted by both parties that telent Ltd was acting as agent for TTSL.

60. The factual position in *Taylor Clark* was entirely different. In that case, the claim had been made by a company which had left the VAT group, without the knowledge of the representative member; the related VAT payment by HMRC came "out of the blue", as Lord Hodge put it. In this case telent Ltd and TTSL have remained part of the same group; the same individual – Mr Vey – was responsible for both companies' VAT affairs before and after the Claim, and the companies worked closely together throughout, as is clear from the correspondence summarised above.

61. For the above reasons, in the rest of this decision I have accepted that the Claim was properly made by telent Ltd either because it was at the time still the representative member, or because it was acting as agent for TTSL.

The heading on HMRC's skeleton argument

62. As noted at §45, the heading to Mr Elliott's skeleton argument setting out HMRC's reasons why the strike out application should succeed named the Appellant as "Telent Limited". Mr Elliott freely admitted that this was a mistake, and the heading should have been "TTSL", because that company had appealed to the Tribunal in its role as representative member, and was therefore the Appellant.

Mr Jones's submissions

63. Mr Jones pointed out that HMRC's submissions were not only headed incorrectly, but also referred throughout to "the Appellant", a term which had been wrongly defined as telent Ltd. In his submission, this error vitiated the whole the submissions. He said that:

(1) HMRC had failed to provide any submissions in relation to their strike out application;

(2) had also failed to comply with the Tribunal's directions;

(3) the fact that HMRC had misdirected their submissions was an important point because the substance of the continuing dispute between the parties concerned estoppel, and the identity of the parties is key when considering questions of estoppel, because an estoppel does not bind a different party unless the two parties are "privies"; and

(4) it was too late for Mr Elliott to make good that failure by directing his oral submissions at the correct company, as this would be a "fundamental change" which was "beyond the pale".

64. By way of conclusion, he said that the Tribunal should not admit any of Mr Elliott's arguments on the reasons why the strike out should be granted, but instead summarily dismiss the application.

The privity issue

65. The privity issue raised by Mr Jones at §63(3) was resolved in the course of the hearing. Mr Elliott took the Tribunal to the discussion of privies in *Littlewoods* at [214] to [228], which included the following points:

(1) there must be "a sufficient degree of identity between the successful defendant and the third party…having due regard to the subject-matter of the dispute, there must be a sufficient degree of identification between the two to make it just to hold that the decision to which one was party should be binding in proceedings to which the other is party", see *Gleeson v Wippell* [1977] 1 WLR 510 at 515 ("*Gleeson*") per Megarry V-C;

(2) where one company in a group brings a claim or conducts proceedings "for the benefit of others in the group", the test in *Gleeson* "might well be met", see *Special Effects Ltd v L'Oréal SA* [2007] EWCA Civ 1;

(3) In *Littlewoods*, the claimants accepted, and Henderson J agreed, that six of the claimant companies were privies of Littlewoods Retail Ltd, as they were all wholly owned indirect subsidiaries of that company; their VAT affairs in general, and the claims

in particular were centrally managed by the same person, Mr Mitchell; and they were all members of the Littlewoods VAT group and so had a concrete interest in the outcome of the appeal.

66. Mr Elliott submitted that telent Ltd and TTSL were clearly "privies" as they were members of the same corporate and VAT group; they both had an interest in the outcome of the proceedings, and Mr Vey (like Mr Marshall in *Littlewoods*) had centrally managed the group's VAT affairs generally and the Assessment Appeal and the Claim in particular.

67. Having considered this issue overnight and taken instructions, Mr Jones accepted that telent Ltd and TTSL were "privies" and this point therefore fell away.

Mr Elliott's response on the procedural issue

68. Mr Elliott apologised for the procedural mistake, but submitted that it would not be in the interests of justice for HMRC to be prevented from putting their case at the hearing. He made the following points.

(1) He had taken on the case shortly before the hearing, and it had not been obvious to him from the paperwork that telent Ltd and TTSL were two different companies.

(2) Both the Assessment Appeal and the Claim were made by telent Ltd.

(3) The parties repeatedly used the term "telent" to refer to both companies. For example:

(a) Mr Boobyer's letter of 3 November 2016 is headed "Telent Technology Services Ltd ('telent')" but in the main body he refers to "telent's escrow activity", when that activity was carried on by telent Ltd, not by TTSL.

(b) PwC's reply of 5 December 2016 is similarly headed "telent Technology Services Ltd ('telent')", but in the main body 'telent' means telent Ltd: it refers to "telent withdrawing its appeal"; says that "telent" operates the Escrow Account; telent is obliged to hold the investments; and explains why in PwC's view, there is no restriction on "telent" including the Overlap Period within the Claim.

(c) PwC's letter of 23 May 2017 similarly defines "telent" as TTSL, but continues by saying that "telent is required to make contributions to the pension scheme and the liabilities of the pension scheme are legal liabilities of the current and continuing business activities of the company", when it is telent Ltd (and not TTSL) which has to make those contributions and has those liabilities.

(4) HMRC's application to strike out the appeal, and their amended Statement of Case, were both correctly headed "TTSL". Those were the key documents for the purposes of the strike out application.

(5) Mr Jones and those instructing him on behalf of the Appellant were not in any doubt that the submissions were directed at the Appellant and were not therefore put at any disadvantage.

(6) Viewed through the prism of *Denton v TH White* [2014] EWCA Civ 906 ("*Denton*") and *Martland v HMRC* [2018] UKUT 0178 (TCC) ("*Martland*"), Mr Elliott accepted that there had been a failure to follow the Tribunal's Directions because the skeleton argument had misidentified the Appellant, but that failure was neither serious nor significant for the reasons set out at above. HMRC should therefore not suffer the

sanction of being unable to redirect the arguments in the skeleton and make supplementary oral submissions at the hearing. Instead, it was in the interests of justice for HMRC's application to be decided on the basis of the substantive points made by both parties.

(7) Mr Elliott referred to *Denton* at [41] where Dyson MR and Vos LJ said "We think we should make it plain that it is wholly inappropriate for litigants or their lawyers to take advantage of mistakes made by opposing parties in the hope that relief from sanctions will be denied and that they will obtain a windfall strike out or other litigation advantage". In Mr Elliott's submission, that was the position here.

The Tribunal's view

69. Having heard the parties' submissions, I considered whether to adjourn and decide Issue One as a preliminary Issue, or to continue and hear both parties submissions on all Issues. I considered the guidance given by the UT in *Wrottesley v HMRC* [2015] UKUT 0637 (TCC) at [28], the UT (Judges Herrington and Falk). Although Issue One might prove to be "a succinct knockout point", this would only be the case if the Appellant succeeded not only before me but also on appeal. If HMRC succeeded either before me or on appeal, dealing with Issue One as a preliminary issue would cause delay and increase costs. I decided that it was in the interests of justice to hear both parties' arguments on all Issues.

70. In relation to Issue One, it is a matter of case management whether to (a) read Mr Elliott's skeleton as relating to the Appellant despite the heading, and/or (b) allow him to make submissions at the hearing. The Tribunal's case management discretion must be exercised in accordance with the overriding objective.

71. In my judgment, it is not in the interests of justice to refuse to admit Mr Elliott's skeleton argument, or to refuse to consider his oral submissions. I come to that conclusion for the reasons set out by Mr Elliott, and for the following further reasons:

(1) HMRC's pleadings are the strike out application together with the amended Statement of Case. Both of these pleadings had the correct name on the heading and throughout the text, and they set out why in HMRC's view the application should succeed.

(2) A skeleton argument is supplementary to those pleadings: CPR 52.5(1) says (my emphasis) that "the purpose of a skeleton argument is <u>to assist the court</u> by setting out as concisely as practicable the arguments upon which a party intends to rely". Mr Jones rightly did not seek to argue that the use of "Telent Limited" in the headnote had prevented the Tribunal from understanding HMRC's submissions for this hearing.

(3) A skeleton is of course also helpful to the other party in the proceedings, but Mr Jones did not seek to argue that there was any failure to understand HMRC's case. I agree with Mr Elliott that Mr Jones and those instructing him knew all they needed to know about HMRC's case, other than on the "privies" point, which had arisen only arose because of the Appellant's stance on the headnote, and it was quickly conceded in HMRC's favour.

(4) The use of the name "telent" as an abbreviation for both telent Ltd and TTSL, often incorrectly, is part of the relevant background. I add, although this was not drawn to my attention at the hearing by either party and I do not rely on it in coming to this part of my

decision, that it was not just the parties who used the names interchangeably. The Tribunal's own letter advising the parties of this hearing was headed "Telent Limited" when the Appellant is in fact TTSL.

ISSUE TWO: WHETHER HMRC WERE ESTOPPED

72. The next issue was whether, as Mr Jones submitted, HMRC were estopped from putting forward their submissions on the Overlap Period, because they had long ago acquiesced in the Appellant bringing the Claim for the full amount. This issue was set out at the very end of Mr Jones's skeleton argument in four brief paragraphs, but it is logically prior to the other estoppel-related issues, and I deal with it next.

Mr Jones's submissions on behalf of the Appellant

73. Mr Jones relied on the following facts, none of which were in dispute:

(1) Although on 3 November 2016 Mr Boobyer had said that the withdrawal of the Assessment meant the Appellant had no right to claim back the VAT for the Overlap Period, Mr Boobyer then changed his mind, and on 12 April 2017 had written to Mr Vey (see §29) saying:

> "I have since considered the relevance of the High Court's judgment in Matalan (as per PwC's letter of 5 December) and now accept that, if it is ultimately determined that a repayment should be made, that repayment should be of the full claim in the sum of £1,312,309."

(2) The Appellant referred to this change of position in its Grounds of Appeal to the Tribunal**,** and it was therefore clear from the outset of the Tribunal proceedings that the appeal was proceeding on the basis that that HMRC's original objection was no longer in play.

(3) The Statement of Case was issued on 25 May 2018. It did not include any submission that the Appellant's withdrawal of the Assessment blocked the part of the Claim relating to the Overlap Period.

(4) HMRC did not revive their submission about the Overlap Period until 15 July 2021, when they wrote to PwC saying they wished to revisit that "jurisdictional issue". There was thus a delay of over three years between their abandonment of the point and its revival.

74. Mr Jones submitted that HMRC were estopped from reviving this issue because they had previously agreed the Appellant's claim could proceed in full. He relied in particular on the House of Lords' judgment in *Johnson v Gore Wood & Co* [2002] 2 AC 1 ("*Gore Wood*").

Gore Wood

75. The parties to this appeal were (a) Mr Johnson, a businessman who carried out his business in part through a company called Westway Homes Ltd ("WWH") and (b) Gore Wood & Co ("GW") a firm of solicitors. WWH had previously sued GW for negligence, but that claim had been settled. Before the settlement, GW had been notified that Mr Jones also had a personal claim against GW. At the time of the settlement it was the parties' common understanding that Mr Johnson would separately pursue his personal claim, and he subsequently did so. Lord Millett describes what happened next (see page 57 of *Gore Wood*):

> "For the next 4½ years the proceedings brought by Mr Johnson followed the normal course. The parties served and amended their pleadings and exchanged witness statements. Mr Johnson served expert evidence. The firm made a payment into court. A trial date was obtained. But then came a sudden change of tack. The firm instructed fresh leading counsel. In December 1997 the firm's solicitors indicated, for the first time, that it intended to apply *inter alia* for an order to strike the action out as an abuse of the process of the court."

76. The basis of GW's strike out application was that Mr Johnson should have brought his personal claim at the same time as that made by WWH, and his failure to do so had exposed GW "to the harassment of further proceedings canvassing many of the same issues as had been canvassed in the earlier action, with consequential waste of time and money and detriment to other court users". At the High Court, Pumfrey J found that GW were estopped by convention from contending that Mr Johnson's action was an abuse. The Court of Appeal overturned that judgment, and Mr Johnson appealed to the House of Lords.

77. Lord Bingham, giving the leading judgment with which Lords Cooke and Hutton agreed, held at page 31 that there was no abuse of process and that Mr Johnson succeeded for that reason. He then moved on to consider the parties' submissions on estoppel by convention. He noted at page 33 that both parties had accepted the correctness in principle of Lord Denning MR's statement in *Amalgamated Investment v Texas Commerce International Bank Ltd* [1982] QB 84 ("*Amalgamated Investment*") at page 122, where he had said:

> "When the parties to a transaction proceed on the basis of an underlying assumption—either of fact or of law—whether due to misrepresentation or mistake makes no difference—on which they have conducted the dealings between them—neither of them will be allowed to go back on that assumption when it would be unfair or unjust to allow him to do so. If one of them does seek to go back on it, the courts will give the other such remedy as the equity of the case demands."

78. Lord Bingham applied those principles to the facts of Mr Johnson's case, and held that GW were estopped by convention, stating at page 34 that:

> "The terms of the settlement agreement and the exchanges which preceded it in my view point strongly towards acceptance by both parties that it was open to Mr Johnson to issue proceedings to enforce a personal claim, which could then be tried or settled on its merits, and I consider that it would be unjust to permit GW to resile from that assumption."

79. He went on to say:

> "If, contrary to my view, GW is not estopped by convention from seeking to strike out Mr Johnson's action, its failure to take action to strike out over a long period of time is potent evidence not only that the action was not seen as abusive at the time but also that, on the facts, it was not abusive."

80. Lord Goff came to a similar conclusion at pages 39-41. although he disagreed with Lord Bingham's classification of the issue as one of "estoppel by convention", saying:

> "It could, however, be appropriate subject matter for an estoppel by representation, whether in the form of promissory estoppel or of acquiescence, on account of which the firm is, by reason of its prior conduct, precluded from enforcing its strict legal rights against Mr Johnson (to claim that his personal

> proceedings against the firm constituted an abuse of the process of the court). Such an estoppel is not, as I understand it, based on a common underlying assumption so much as on a representation by the representor that he does not intend to rely upon his strict legal rights against the representee which is so acted on by the representee that it is inequitable for the representor thereafter to enforce those rights against him."

81. Lord Millett held (at page 60) that "it would be unconscionable for the firm to raise the issue after the way in which it handled the negotiations for the settlement of the company's action", but like Lord Goff, did not agree that it was estoppel by convention. He added:

> "If necessary, however, I should have regarded the delay [by GW in raising the issue] as fatal. Indeed, I should have regarded it as more than delay; I think it amounted to acquiescence…the premise [put by GW] in the present case is that Mr Johnson has a good cause of action which he should have brought earlier if at all. I do not consider that a defendant should be permitted to raise such an objection as late as this."

Mr Jones's submissions in reliance on Gore Wood

82. Mr Jones submitted that the position in the Appellant's case was essentially the same, and that as the result of the representation in Mr Boobyer's letter of 3 November 2016 and the absence of any reference to estoppel or abuse of process in the Statement of Case, HMRC should be taken to have acquiesced in, if not expressly consented to, the Appellant bringing its appeal against HMRC's refusal of the Claim, and that it was "now too late for them to object to that appeal on the grounds of cause of action/issue estoppel or abuse of process". In his submission, it was unconscionable and unfair of HMRC to have allowed the Appellant "to have proceeded on the footing that there would be no such objection, and then to raise it at the last minute".

83. Mr Jones also referred to *Amalgamated Investment* as cited in *Gore Wood,* and said the parties in that case were mutually mistaken as to the effect of a contractual provision, adding:

> "If an estoppel can operate in circumstances where a party can realise that they've been under a mistake and point to the truth of the matter, then you would have thought it would *a fortiori* apply where a party thinks one thing about the law then decides that they'd like to think something else."

Mr Elliott's submissions on behalf of HMRC.

84. Mr Elliott pointed out that the Appellant had agreed on 26 October 2021 (see §42) that HMRC could amend their Statement of Case to reintroduce the jurisdictional issue arising from the Overlap Period; if the Appellant considered HMRC were estopped from doing so, it should have objected to the amendment of the Statement of Case, but had not done so. It was thus too late for the Appellant to raise this issue by the inclusion of four paragraphs at the end of Mr Jones's skeleton argument. Mr Elliott went on to say that he was nevertheless able to deal with this Issue and would do so. He set out his submissions under two headings: those related to the Supreme Court's recent judgment in *Tinkler v HMRC* [2021] UKSC 39 ("*Tinkler*"), and what I have called the "case management" ground.

Tinkler

85. The key facts in *Tinkler* were that:

(1) HMRC had failed to serve a notice under Taxes Management Act 1970 ("TMA") s 9A enquiring into Mr Tinkler's self-assessment tax return, but had instead sent that notice to an incorrect address;

(2) Mr Tinkler's agent, BDO Stoy Hayward ("BDO") received a copy of that notice;

(3) BDO and HMRC proceeded on the basis that a valid enquiry had been opened;

(4) it was not until two months before the FTT hearing that Mr Tinkler amended his grounds of appeal to include a submission that the enquiry had not been validly opened because of the failure to serve the notice; and

(5) HMRC were by that date out of time to reissue the notice.

86. The issue before the Supreme Court was whether Mr Tinkler was estopped from relying on the fact that a notice of enquiry had not been served, because the parties had proceeded on the basis that there had been a valid enquiry. Lord Burrows gave the majority judgment, with which Lord Hodge, Lady Rose and Lady Arden all agreed. The fifth member of the Court was Lord Briggs, who issued a concurring judgment.

87. Lord Burrows cited at [45] the "very important statement of principle" established in *Benchdollar v HMRC* [2009] EWHC 1310 (Ch) ("*Benchdollar*") by Lord Briggs when sitting as a judge of that court some twelve years earlier. The principles in *Benchdollar* had subsequently been approved by the Court of Appeal in *Blindley Heath Investments Ltd v Bass* [2015] EWCA Civ 1023 ("*Blindley Heath*"), subject to one qualification which was not relevant to the Appellant's case. Lord Briggs added some further points to his earlier judgment in *Benchdollar*, and then confirmed at [92] that "the principles for the application of estoppel by convention as set out in *Benchdollar* and amended in *Blindley Heath*…accurately summarise the relevant law".

88. The *Benchdollar* statement of principles contains five points, all of which must be satisfied for estoppel by convention to operate. The first four points relate to reliance, and the fifth reads:

> "Some detriment must thereby have been suffered by the person alleging the estoppel, or benefit thereby have been conferred upon the person alleged to be estopped, sufficient to make it unjust or unconscionable for the latter to assert the true legal (or factual) position."

89. Lord Burrows explained at [63] that this test was satisfied on the facts of Mr Tinkler's case, because HMRC's reliance on the "affirmed common assumption that a valid enquiry had been opened" caused a significant detriment to HMRC because (a) they were out of time to send another enquiry notice within the statutory time limit, and (b) would therefore now be unable to enforce and collect the £635,000 which would otherwise be payable by Mr Tinkler.

90. At [64], Lord Burrows considered the reference to "unconscionable" at the end of the citation set out above, and said this was unlikely to add anything where (as in *Tinkler*) there has been detrimental reliance, but that there might be rare or exceptional cases "where unconscionability may have a useful additional role to play".

91. Mr Elliott submitted that the Appellant could not show the detrimental reliance necessary for estoppel by convention to operate, because the Appellant would still have pursued the Claim

for the whole of the period even had HMRC raised the Overlap Issue in their original Statement of Case.

92. Mr Jones replied to that submission by saying that:

(1) the Appellant was relying on estoppel by representation and not on estoppel by convention, so the principles in *Tinkler* did not apply; and

(2) even if this were wrong, it was both a detriment to the Appellant and also unconscionable for HMRC to move the goalposts at such a late stage: the Appellant had appealed to the Tribunal on the basis that it would recover £1.3m if it won the case, and it might have acted differently had it considered it might only get back the VAT for the later periods of £456,555.

93. In response to the first of those points, Mr Elliott said that the Appellant's case on this Issue relied on *Gore Wood,* which concerned estoppel by convention, as was clear not only from Lord Bingham's judgment in *Gore Wood,* but had also been confirmed in *Tinkler*, where Lord Burrows had said at [40] (Mr Elliott's emphasis):

> "it is noteworthy that, in *Johnson v Gore Wood & Co* [2002] 2 AC 1, **estoppel by convention was applied by the House of Lords**, albeit as *obiter dicta*, by Lord Bingham (with whom Lord Cooke and Lord Hutton expressed agreement on this aspect of the case)."

94. In Mr Elliott's submission, it was thus not possible for Mr Jones (a) to rely on *Gore Wood* and (b) also argue that the Appellant was not relying on estoppel by convention.

95. In relation to the second of Mr Jones's points, Mr Elliott said:

(1) there was no evidence to support the assertion that the Appellant might have acted differently had HMRC stated throughout the course of the appeal that the Overlap Period VAT was not recoverable;

(2) there was no evidence as to the costs incurred; and

(3) had the Appellant decided not to pursue its appeal, it would have recovered nothing. Instead, far from suffering a detriment, HMRC had already agreed that the Appellant would receive £456,555, namely the amount of the Claim less that VAT for the Overlap Period.

Case management

96. Mr Elliott also submitted that estoppel by convention does not in any event apply to legal arguments put forward by either party. Instead, parties may change their legal arguments subject to proper case management. He said that there are many case law examples where the parties "raise arguments in their pleadings that haven't been raised before even when they've been expressly agreed in the enquiry", and drew attention to closure notice cases by way of exemplars.

The Tribunal's view

97. I find that HMRC are not estopped from raising the jurisdiction issue, for the three reasons set out below.

Gore Wood is factually very different

98. There is a significant difference between the facts of *Gore Wood* and this case. In *Gore Wood,* the respondent had come to an agreement before the proceedings commenced that the appellant would bring his appeal. In this case, HMRC changed their view of the law. Mr Jones did not cite any authority in which a court had decided that a party was estopped from changing its legal arguments.

A matter of case management

99. In my judgment, a party can change its view of the law at any time subject to the other party having a fair opportunity to respond. In other words, as Mr Elliott said, it is a matter of case management. In *Tower M'Cashback v HMRC* [2011] SC19 ("*Tower*") at [15], Lord Hope endorsed the following passage from Henderson J's judgment when that case was decided by the High Court:

> 'There is a venerable principle of tax law to the general effect that there is a public interest in taxpayers paying the correct amount of tax, and it is one of the duties of the commissioners in exercise of their statutory functions to have regard to that public interest…For present purposes, however, it is enough to say that the principle still has at least some residual vitality in the context of s 50, and if the commissioners are to fulfil their statutory duty under that section they must in my judgment be free in principle to entertain legal arguments which played no part in reaching the conclusions set out in the closure notice. Subject always to the requirements of fairness and proper case management, such fresh arguments may be advanced by either side, or may be introduced by the commissioners on their own initiative."

100. Although the subject matter of *Tower* was closure notices and the context was the Tribunal's jurisdiction to decide appeals under TMA s 50, it is clear that there is a wider application for the principle that a party may introduce new legal arguments subject to the requirements of proper case management. For example, in *Ritchie v HMRC* [2019] UKUT 71 (TCC) at [36] the UT (Nugee J and Judge Hellier) considered the citation above from *Tower* together with the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ("the Tribunal Rules"), and then said:

> "These sources make clear that in determining what arguments the tribunal may permit to affect its decision the guiding principle must be fairness in the circumstances of the case. Fairness does not require formality, and Rule 2(2)(b) expressly requires formality to be avoided. Fairness does not require, for example, that to advance an argument not present in its statement of case or the notice of appeal a party must always formally apply to amend its earlier pleading. On the other hand it does require that the other party is given adequate opportunity in the circumstances to meet the point, whether by argument or with evidence.
>
> 38. If a new argument is a pure point of law it might be addressed, as the case may be, after: a few minutes' thought; an evening's consideration; or one or more days' research. Provided that the other party has an appropriate opportunity to meet the point, it would generally not be unfair for the tribunal to take that argument into account.
>
> 39. When the argument gives rise to the possibility that it may be rebutted by further evidence, the other party must have a fair opportunity to bring that evidence to the tribunal…We do not wish to be thought to be laying down any

> particular rules, as what fairness requires will depend on all the circumstances of the case, and cases in the FTT vary enormously from informal appeals that take a very short time to elaborately argued cases that last for many days.
>
> 40. On the other hand, there will be circumstances where it is simply too late for a point to be raised. Where it is not reasonably possible in the circumstances of the case – having regard in particular to the resources of the parties and the need to avoid delay – for the other party to have a fair opportunity to rebut a new point, that is likely to mean that it would be unfair for a new point to be taken."

101. Paragraph [38] of *Ritchie* confirms that whether or not to allow a party to change its legal submissions is a case management decision. Mr Jones did not submit that there was any case management related reason why HMRC should not be allowed to change their legal arguments, and in my judgment he was right not to do so, for the following reasons:

(1) The Appellant had been aware since 15 July 2021 that HMRC had revised their position in relation to the jurisdiction issue. This was almost five months before the hearing was listed to begin.

(2) PwC took some seven weeks to reply to HMRC's letter of 15 July 2021; their response of 8 September 2021 runs to 33 numbered paragraphs and was signed by the Head of the Indirect Tax Disputes group. It is clear that PwC carefully considered the implications of HMRC's letter before they replied.

(3) On 26 October 2021, PwC wrote to the Tribunal in response to HMRC's Application. They disagreed with HMRC that the listed hearing be postponed, saying that the Appellant "considers that the jurisdictional issue should be heard in full. This will prevent the allocated hearing dates from being wasted". They then said:

> "The Appellant submits that the parties have sufficient time between now and 6 December to prepare for a hearing on the 'jurisdictional issue', which turns on a discrete point of law. The Appellant has started preparing for a hearing on the 'jurisdictional issue' and has served a draft hearing bundle index on the Respondents per the extant case management directions. It does not consider that the late service of an amended statement of case by the Respondents justifies vacating the hearing..."

No detriment

102. In relation to the parties' submissions about detriment, I begin by rejecting Mr Jones's argument that the Appellant was not relying on estoppel by convention, but instead on estoppel by representation. As Mr Elliott said, the Appellant's case on Issue Two rested on *Gore Wood,* in which the leading judgment was given by Lord Bingham. As set out later in this decision, see §226, Lord Bingham held that estoppel by convention applied, and in *Tinkler*, the Supreme Court referred only to Lord Bingham's judgment. Mr Jones relied on *dicta* from the minority judgments of Lord Goff and Lord Millett, which are plainly of less authority.

103. As a result, to succeed on Issue Two, the Appellant has to meet all the requirements in *Benchdollar,* including that:

> "Some detriment must thereby have been suffered by the person alleging the estoppel, or benefit thereby have been conferred upon the person alleged to be estopped, sufficient to make it unjust or unconscionable for the latter to assert the true legal (or factual) position."

104. In considering whether there had been detriment, I asked myself what would have happened if HMRC had always maintained that the VAT for the Overlap Period was not recoverable. It seemed to me that there were the following possible outcomes:

(1) the Appellant would have made the same appeal, on the same basis, because they had been advised they would succeed;

(2) the Appellant would have reduced the Claim so as to exclude the Overlap Period; or

(3) the Appellant would not have made the Claim at all, because the cost to risk ratio made it unattractive.

105. Of these three options:

(1) The most probable is the first: the Appellant would have continued with the appeal on the same basis. I come to this conclusion because of PwC's clear view that HMRC was wrong to think that the Claim could not include the Overlap Period: see their letter of 5 December 2016 which relied on *Matalan,* and their repetition of this reliance in their Grounds of Appeal to the Tribunal.

(2) However, even if the Appellant had instead taken the second option, its legal costs were unlikely to have been any less: the dispute was unrelated to quantum or to the number of VAT periods; moreover there was also no related evidence to support such a submission.

(3) Had Appellant not have appealed at all, as Mr Elliott said, it would have lost the £456,555 it will now receive for the later periods.

106. It follows from the above that the Appellant has not shown it has suffered detriment by way of costs or otherwise. I also considered Mr Jones's submission that HMRC had acted unconscionably. However, as Lord Burrows said in *Tinkler*, this is the position only in "rare or exceptional cases", and Mr Jones did not explain why this was such a case, and I could think of no basis on which it satisfied those requirements.

Conclusion on Issue Two

107. For the reasons set out above, I decide Issue Two in favour or HMRC, who are therefore not estopped from raising the jurisdiction issue at this hearing.

ISSUE THREE: STATUTORY INTERPRETATION

108. The central issue in this case was the statutory interpretation of VATA s 85(4) read with subsection (1). HMRC's position was that, as a result of those provisions, the Tribunal had made a prior judicial determination that the VAT for the Overlap Period was not recoverable. The Appellant's position was that VATA s 85 did not have that effect. As the existence (or otherwise) of a prior judicial determination formed a key ingredient of the parties' submissions on estoppel, it was necessary first to decide the meaning and effect of VATA s 85(1) and (4) in the context of the Appellant's withdrawal.

VATA s 85

109. VATA s 85 is headed "Settling appeals by agreement" and reads:

> "(1) Subject to the provisions of this section, where a person gives notice of appeal under section 83 and, before the appeal is determined by a tribunal, HMRC and the appellant come to an agreement (whether in writing or otherwise) under the terms of which the decision under appeal is to be treated
>
> (a) as upheld without variation, or
>
> (b) as varied in a particular manner, or
>
> (c) as discharged or cancelled,
>
> the like consequences shall ensue for all purposes as would have ensued if, at the time when the agreement was come to, a tribunal had determined the appeal in accordance with the terms of the agreement.
>
> (2)-(3) …
>
> (4) Where
>
> (a) a person who has given a notice of appeal notifies HMRC, whether orally or in writing, that he desires not to proceed with the appeal; and
>
> (b) 30 days have elapsed since the giving of the notification without HMRC giving to the appellant notice in writing indicating that they are unwilling that the appeal should be treated as withdrawn,
>
> the preceding provisions of this section shall have effect as if, at the date of the appellant's notification, the appellant and HMRC had come to an agreement, orally or in writing, as the case may be, that the decision under appeal should be upheld without variation..".

110. Section 85(4) and (1) thus both include deeming provisions. When an appeal is withdrawn, the parties are deemed to have "come to an agreement…that the decision under appeal should be upheld without variation", and a tribunal is then deemed to have "determined the appeal in accordance with the terms of the agreement".

111. In *Fowler v HMRC* [2020] UKSC 22 ("*Fowler*"), Lord Briggs, giving the only judgment with which the other members of the Court agreed, said at [27] that:

> "There are useful but not conclusive *dicta* in reported authorities about the way in which, in general, statutory deeming provisions ought to be interpreted and applied. They are not conclusive because they may fairly be said to point in different directions, even if not actually contradictory…They include the following guidance, which has remained consistent over many years:
>
> (1) The extent of the fiction created by a deeming provision is primarily a matter of construction of the statute in which it appears.
>
> (2) For that purpose the court should ascertain, if it can, the purposes for which and the persons between whom the statutory fiction is to be resorted to, and then apply the deeming provision that far, but not where it would produce effects clearly outside those purposes.
>
> (3) But those purposes may be difficult to ascertain, and Parliament may not find it easy to prescribe with precision the intended limits of the artificial assumption which the deeming provision requires to be made.
>
> (4) A deeming provision should not be applied so far as to produce unjust, absurd or anomalous results, unless the court is compelled to do so by clear language.

> (5) But the court should not shrink from applying the fiction created by the deeming provision to the consequences which would inevitably flow from the fiction being real. As Lord Asquith memorably put it in *East End Dwellings Co Ltd v Finsbury Borough Council* [1952] AC 109, at 133:
>
> > 'The statute says that you must imagine a certain state of affairs; it does not say that having done so, you must cause or permit your imagination to boggle when it comes to the inevitable corollaries of that state of affairs'."

112. I did not understand either party to take issue with this well-established approach to the construction of deeming provisions.

The issue

113. The following points were common ground:

(1) VATA s 83(1)(p) gives appellants the right to appeal the assessment to the Tribunal and the Appellant had done so; it had not appealed HMRC's review decision, so the content of that decision was not relevant to Issue Three.

(2) The Appellant had therefore appealed against HMRC's assessment dated 17 November 2014 refusing to repay the input VAT claimed by telent Ltd on the investment management services provided in relation to the Escrow Account for periods 11/10 through to 05/14; of £1,146,598.93.

(3) By Mr Vey's email to Mr Boobyer on 9 March 2015 stating "I wish to inform you that a decision has in fact been taken to withdraw this appeal", the Appellant had notified HMRC that it desired not to proceed with the Assessment Appeal, and had therefore made a withdrawal within the meaning of VATA s 85(4).

(4) The effect of that notification was that the parties were deemed to have agreed that:

(a) "the decision under appeal should be upheld without variation"; and

(b) "the like consequences shall ensue for all purposes as would have ensued if, at the time when the [deemed] agreement was come to, a tribunal had determined the appeal in accordance with the terms of the agreement".

(5) In non-withdrawal cases, where the parties come to an agreement, VATA s 85(1) provides that the terms of that agreement form part of the deemed Tribunal determination.

114. In this case, the Appellant had simply notified HMRC that the appeal was withdrawn and had not come to an agreement. The parties disagreed on (a) the content of the deemed agreement and (b) the content of the Tribunal's deemed determination. In other words, what had the parties agreed, and what had the Tribunal decided.

(1) In Mr Elliott's submission, when the Assessment Appeal was withdrawn:

(a) the Appellant was deemed to have come to an agreement with HMRC that input tax on investment management services provided in relation to the Escrow Account for the periods 11/10 through to 05/14 was not allowable;

(b) the Tribunal was deemed to have determined this was the case;

(c) there had thus been a (deemed) prior judicial determination that the input tax for the Overlap Period was not recoverable.

(2) In Mr Jones's submission, the effect of the deeming provisions was that *the particular assessment* which had been appealed was upheld without variation, but that was all. There had been no prior judicial determination that the input tax for the Overlap Period was not recoverable, and it was therefore possible for the Appellant to make a claim to recover the same input VAT for the same periods of account, for the same reason.

115. In support of their submissions the parties considered the statutory context of s 85 together with its purpose. Mr Elliott relied on *Littlewoods* and Mr Jones relied on *Matalan.* However, in *Littlewoods* there had been no withdrawal of an appeal, and in *Matalan* the appeal was withdrawn only after HMRC had withdrawn the decision which was under appeal. I therefore did not find it helpful or necessary to consider those two judgments in order to decide the statutory interpretation of the provisions in issue. In this part of my Decision, I therefore consider and decide the meaning of VATA s 85(4) read with subsection (1) in the light of their statutory context and purpose, without reference to either *Littlewoods* or *Matalan.* Nevertheless, given the weight placed by both parties on those two judgments, I have set out their positions and my analysis as Issue Four.

Section 73(1) or (2)?

116. The Assessment was made under VATA s 73. This section is headed "Failure to make returns etc", and subsections (1) and (2) read as follows (emphases added):

> "(1) Where a person has failed to make any returns required under this Act (or under any provision repealed by this Act) or to keep any documents and afford the facilities necessary to verify such returns or where it appears to the Commissioners that such returns are incomplete or incorrect, they may assess the amount of VAT due from him **to the best of their judgment** and notify it to him.
>
> (2) In any case where, for any prescribed accounting period, there has been paid or credited to any person
>
> (a) as being a repayment or refund of VAT, or
>
> (b) as being due to him as a VAT credit,
>
> **an amount which ought not to have been so paid or credited**, or which would not have been so paid or credited had the facts been known or been as they later turn out to be, the Commissioners may assess that amount as being VAT due from him for that period and notify it to him accordingly."

The parties' submissions

117. Mr Elliott submitted that:

(1) the Assessment had been issued under VATA s 73(1), and must therefore have been made in accordance with HMRC's best judgement;

(2) HMRC's "best judgement" was that tax on investment management services provided in relation to the Escrow Account for the periods 11/10 through to 05/14 was not allowable;

(3) when the Appellant withdrew the Assessment Appeal, the parties were deemed by s 85(1) to have agreed that "the decision under appeal" had been "upheld without variation"; and

(4) therefore the parties must also have agreed that the decision had been made to best judgement, and thus to have accepted that the input tax for those periods was not allowable.

118. Mr Jones challenged this submission in two ways. First, he said that his understanding was that the Assessment had not been made under s 73(1) but under s 73(2), and there was no "best judgement" element in s 73(2). Secondly, he submitted that it would be "unprincipled" to import the best judgement element into the deemed agreement between the parties, for the reasons explained below. I consider each of those submission in turn.

Assessment under s 73(1) or (2)?

119. Although Mr Elliott and Mr Jones disagreed as to whether the Assessment had been made under s 73(1) or s 73(2), neither referred me to any evidence in the Bundle or to any authorities. I identified after the hearing that the Assessment had simply been headed "Assessment made under section 73 of the Value Added Taxes Act 1994". I reviewed the related correspondence and could find no further information.

120. However, my understanding of the two subsections is that:

(1) s 73(1) applies where a fully taxable business has overclaimed input tax in a VAT period or periods; and

(2) s 73(2) only applies where a person's input tax has exceeded its output tax, in other words, where HMRC have paid VAT to that person, and subsequently seek to recover it.

121. That understanding is consistent with the commentary in the De Voil Indirect Tax Service, at Chapter V5.132B and the guidance in HMRC's VAT Assessments and Error Correction Manual at VAEC2940. I also considered the case law and identified a small number of cases which related to assessments under VATA s 73(2), namely *C&E Commrs v Laura Ashley* [2003] EWHC 2832(Ch); *Milton Keynes Hospitals v HMRC* [2020] UKUT 231 (TCC); and *LSE v HMRC* [2015] UKFTT 291(TC) ("*LSE*"). In all of those judgments, the assessments had been made following a repayment of VAT to the trader. In *LSE* Judge Mosedale said at [46] that VATA s 73(2) applies where "HMRC seek to recoup by assessment a repayment made to a taxpayer which they consider should not have been made". I agree.

122. The telent group was a fully taxable business, with a turnover of £320m in 2014 (see §18). The VAT at issue in the Assessment Appeal totalled £1,146,590, spread over the 15 quarters to May 2014, and so was far below the threshold for triggering a repayment. I therefore find as a fact that the Assessment was raised under VATA s 73(1), and as such, it was a necessary condition of its validity that it was made to HMRC's best judgement.

Unprincipled?

123. Mr Jones submitted that it would be "an unprincipled distinction" if the Tribunal's deemed determination following the withdrawal of an assessment under s 73(1) included the reasons for HMRC's decision because of the reference in that subsection to "best judgement", given that there was no similar consequence for withdrawals of s 73(2) assessments. This was in terms a submission that it would be unjust to construe the deeming provision by reference to the "best judgement" element of VATA s 73(1), see *Fowler* at [27(4)].

124. However, an assessment is only validly made under s 73(2) if "an amount which **ought not** to have been so paid or credited, or which would not have been so paid or credited had the facts been known or been as they later turn out to be". If HMRC issue an assessment under s 73(2), they must first have decided that the repayment "ought not" to have been made, and the decision will state their reasons. When a trader appeals against that decision, and then withdraws his appeal, the parties are thus deemed to have agreed that the "decision under appeal" is upheld without variation, and must therefore have agreed that HMRC were right to decide that the repayment should not have been made. The Tribunal is then deemed to have determined the appeal on the same terms. In other words, HMRC's rationale for making the decision is an essential part of a s 73(2) assessment, and the Tribunal must have upheld that rationale. To borrow the words of Lord Briggs in *Fowler,* this was one of "the consequences which would inevitably flow from the fiction being real".

125. I therefore do not agree that there is any relevant distinction between the application of the deeming provisions where an assessment made under s 73(1) is withdrawn, and their application where an assessment made under s 73(2) is withdrawn. It follows that there is nothing unjust in construing the deeming provision by reference to the subsection under which HMRC's decision was made.

Section 73(9)?

126. Mr Jones also relied on s 73(9, which reads (his emphases):

> "**Where an amount has been assessed** and notified to any person under subsection (1), (2)…above it shall, subject to the provisions of this Act as to appeals, **be deemed to be an amount of VAT due from him** and may be recovered accordingly, unless, or except to the extent that, the assessment has subsequently been withdrawn or reduced."

127. Mr Jones summarised this subsection as saying that all that is determined by an assessment is that that the VAT shown is "an amount of VAT due" which "may be recovered accordingly", and that the subsection says nothing about the reasons which lie behind the assessment. HMRC may have had more than one reason for making an assessment, and issued reasons in the alternative, but s 73(9) is silent as to the reasons: it simply provides that the quantum, and only the quantum, stands good.

128. He submitted that the position is the same when a person withdraws an appeal: by s 85(4), the parties are deemed to have agreed that the Assessment was payable, and by s 85(1) that the Tribunal had upheld the parties' agreement as to quantum, but that was all. There had been no agreement and no Tribunal determination that the input tax on the investment management services for periods 08/12 to 05/14 was irrecoverable; only that the sum was payable..

129. Mr Elliott responded by saying that s 73(9) was expressly "subject to the provisions of this Act as to appeals", and it was therefore not correct to rely on it where, as here, an assessment has been appealed to the Tribunal. That is plainly correct, and I next consider the relevant appeal provisions.

The appeal provisions

130. In Mr Elliott's submission, the relevant appeal provision was s 84(4). I consider that subsection below (see §144), but I instead find that the key provision is s 83(1)(p), which reads:

> "(1) … an appeal shall lie to the tribunal with respect to any of the following matters…
>
> (p) an assessment
>
> (i) under section 73(1) or (2) in respect of a period for which the appellant has made a return under this Act;…
>
> or the amount of such an assessment…"

131. An assessment under s 73(1) or (2) can therefore be appealed on either or both of two bases. One is that the "amount" is wrong, which relates to matters of quantum; the other is that HMRC have wrongly assessed something which is not subject to VAT.

132. Where a trader appeals only the amount of the assessment, and then withdraws the appeal, the decision under appeal must have related only to quantum. Section 85(4) provides that on a withdrawal, the parties are deemed to have agreed that the decision under appeal should be upheld without variation, in other words, that the quantum of that assessment was correct. By s 85(1), the Tribunal is therefore deemed to have determined that the quantum was correct.

133. However, where a person has appealed only against something other than quantum, the appeal is not about "the amount of such an assessment", but about the reasons for making the assessment. When such an appeal is withdrawn, the decision upheld without variation is HMRC's decision to assess the trader to VAT, and that must import the reasons for that decision.

134. In this case the Assessment was made on the basis of figures provided to Mr Boobyer by Mr Vey, see §21, so its quantum was not in dispute. The Appellant instead appealed against HMRC's decision that input tax on the investment management services for the periods 08/12 to 05/14 was not allowable. When the appeal was withdrawn, it was *that decision* which was deemed to have been agreed without variation and was then deemed to have been determined by the Tribunal.

135. I therefore find that the wording of s 83(1)(p) read together with s 85 supports HMRC's reading of the legislation, and that the Appellant's view (that the decision which has been determined relates only to quantum) is incorrect. My conclusion is consistent with the purpose of the deeming provisions, to which I now turn.

The purpose of the deeming provisions

136. There are two deeming provisions in s 85. Subsection (1) applies where the parties **settle** an appeal before the Tribunal had determined the dispute; the position is deemed to be the same as if the Tribunal had actually determined the dispute in accordance with the terms in the agreement. The parties agreed that the purpose of that provision was to prevent relitigation of the same issues.

137. Subsection (4) then provides that where a person has **withdrawn** its appeal, the parties are treated as having come to an agreement that the decision under appeal has been upheld without variation; the deeming provision in subsection (1) then applies, so that the Tribunal is treated as having decided the appeal on that basis.

The parties' submissions

138. Mr Jones submitted that the purpose of subsection (4) is to determine the particular appeal in favour of HMRC, but that the deeming does not extend any further, to deem HMRC to have been right as to the reasons for the decision which is under appeal. Thus, in the Appellant's case, the Assessment was upheld without variation, but there was no deemed determination by the Tribunal that this was because the VAT was not recoverable.

139. Mr Elliott submitted that where a trader had withdrawn an appeal, the statutory purpose was the same as it was in cases where the parties had come to an agreement on the issue in dispute, in other words, to prevent relitigation. He submitted that if Mr Jones was right, an appellant could withdraw his appeal if he looked likely to lose, and then "go round again", making a new claim on the self-same basis, even during or after the hearing, provided the withdrawal took place before the Tribunal made its decision.

140. Mr Jones countered by saying that if a party sought to "game the system" in the way described by Mr Elliott, relitigation could be prevented by (a) HMRC objecting to the withdrawal, or (b) the Tribunal striking out the new case as an abuse of process.

The Tribunal's view

141. I agree with Mr Elliott. There is no good reason why Parliament would have intended to prevent relitigation where the parties have come to an agreement on a matter which is under appeal, but opened the gates to relitigation where the appellant had simply withdrawn the appeal without reasons.

142. In coming to that conclusion, I have not overlooked Mr Jones's submissions that relitigation could be prevented by other means. I find as follows:

(1) An HMRC objection to the withdrawal is unlikely to be of any practical use, because HMRC would not know, at the time of the withdrawal, that the appellant would make a new claim, so would have no reason for objecting within the 30 day period allowed by the s 85(4)(b).

(2) Although HMRC could apply for the new appeal to be struck out for abuse of process, strike out applications require time and resources. In my judgment the existence of this further route for preventing relitigation does not assist in construing the purpose of s 85.

Section 84?

143. In the context of construing the meaning of s 85 deeming provisions, the parties also made submissions on VATA s 84. This is headed "further provisions about appeals" and includes the following subsections:

> "(1) References in this section to an appeal are references to an appeal under section 83.
>
> (2)-(3)…
>
> (4) … where
>
> (a) there is an appeal against a decision of HMRC with respect to, or to so much of any assessment as concerns, the amount of input tax that may

be credited to any person or the proportion of input tax allowable under section 26, and

(b) that appeal relates, in whole or in part, to any determination by HMRC

(i) as to the purposes for which any goods or services were or were to be used by any person, or

(ii) as to whether or to what extent the matters to which any input tax was attributable were or included matters other than the making of supplies within section 26(2), and

(c) … ,

the tribunal shall not allow the appeal or, as the case may be, so much of it as relates to that determination unless it considers that the determination is one which it was unreasonable to make or which it would have been unreasonable to make if information brought to the attention of the tribunal that could not have been brought to the attention of HMRC had been available to be taken into account when the determination was made.

(5) Where, on an appeal against a decision with respect to any of the matters mentioned in section 83(1)(p)…

(a) it is found that the amount specified in the assessment is less than it ought to have been, and

(b) the tribunal gives a direction specifying the correct amount,

the assessment shall have effect as an assessment of the amount specified in the direction, and that amount shall be deemed to have been notified to the appellant."

144. Section 84(4) therefore provides that the Tribunal shall uphold HMRC's disallowance of input tax unless the decision was unreasonable, or would have been unreasonable if "information brought to the attention of the tribunal that could not have been brought to the attention of HMRC had been available to be taken into account when the determination was made". In other words, the Tribunal has the duty:

(1) to vary the decision in the appellant's favour if information subsequently provided shows that the decision was unreasonable; and

(2) to vary the decision in HMRC's favour if the appellant was under-assessed by the decision.

145. Carnwath LJ summarised that duty the context of best judgement assessments in *Pegasus Birds v C&E Commrs* [2004] EWCA Civ 1015 as follows:

> "The tribunal should remember that its primary task is to find the correct amount of tax, so far as possible on the material properly available to it, the burden resting on the taxpayer."

146. Mr Elliott submitted that when the Tribunal was deemed to determine an appeal under s 85(1), it must also be deemed to have carried out the duties set out in s 84 and thus to have determined that the assessment was correct. He relied on *Albert House v HMRC* [2020] UKUT 373 ("*Albert House*"), an SDLT case in which HMRC had objected to the appellants' withdrawal. The statutory provisions at issue in that case essentially mirror those for VAT,

with FA 2003, Sch 10 para 37 being the equivalent of VATA s 85 and para 42 being the equivalent of s 84. Mr Elliott relied in particular on the underlined part of the following passage at [112] of the UT's judgment.

> "Viewing the statutory scheme as a whole, it is clear to us that paragraph 37 is an express exception to the general duty imposed by paragraph 42. There is no need for the FTT to determine an assessment where the parties have reached an agreement. In any event, where paragraph 37 does apply to an agreement between the parties (i.e. there is an agreement between the parties to settle an appeal) the agreement is deemed by statute to have all the practical consequences of being a determination by the FTT. The FTT was well aware that *the duty under paragraph 42 only arose in circumstances where paragraph 37 did not ap*ply (i.e. where no in-time objection had been made by HMRC).."

147. Mr Jones countered by emphasising the phrase highlighted in italics, and said that in *Albert House,* the UT had concluded that the SDLT equivalent of s 84 did not apply at all where (as here) the appeal had been withdrawn, and thus *Albert House* provided no support for HMRC's submissions on s 84.

148. I agree with Mr Jones that s 84 is of no relevance to the issue before the Tribunal. That section requires the Tribunal, when hearing an appeal, to take into account the information provided, to *vary* HMRC's decision so that it is correct. Where, as here, an appeal has been withdrawn before the hearing, HMRC's decision is deemed to have been upheld "without variation". As the UT said in *Albert House,* the provisions relating to the consequences of withdrawal are an express statutory exception to the Tribunal's general duty to consider whether the assessment is too high or too low. It is, instead, the decision itself which is deemed to have been agreed as between the parties.

My conclusions

149. For the reasons set out above, I find that:

(1) the Assessment was issued under s 73(1) and in accordance with HMRC's best judgement, it was made on the basis that input tax on the investment management services for the periods 11/10 to 05/14 was not allowable.

(2) the Appellant appealed against the Assessment under s 83(1)(p) on the grounds that the input tax was allowable, there was no dispute about quantum;

(3) the Appellant withdrew the appeal under s 85, the purpose of which is to prevent relitigation; and

(4) the Appellant was deemed by s 85 to have come to an agreement with HMRC that input tax on the investment management services for the periods 11/10 to 05/14 was not allowable and the Tribunal was deemed to have determined that this was the case.

150. Although I have decided this key issue without reference to the case law authorities on which the parties relied, I set out their positions and my analysis as Issue Four.

ISSUE FOUR: CASE LAW GUIDANCE ON VATA s 85

151. The parties disagreed as to the meaning and effect of the two judgments on which they focused their submissions, namely *Matalan* and *Littlewoods*. Both have something to say about VATA s 85, but neither are binding authorities in relation to the issue I have to decide.

Matalan

152. The issue in *Matalan* concerned customs classification, and the underlying legislation was therefore not identical to that which applies to the Appellant. Customs duties were levied in accordance with the Convention on the Harmonized Commodity Description and Coding System ("the Customs Code", the "HS Code" or simply the "HS"). Changes to the HS were agreed by the Nomenclature Committee of the European Union. Rates of duty were set by the TARIC (the TARif Intégré Communautaire or Integrated Tariff of the European Union). Traders could ask HMRC to provide a Binding Tariff Information ("BTI") ruling as to the correct duty rate.

153. If a trader had applied a duty rate which HMRC considered to be wrong, HMRC could issue a decision; the trader could ask for a review of that decision, and the trader had a right of appeal against that review decision (not against the original decision, in contrast to the position of the Appellant, see §114(1)). If the trader appealed the review decision and subsequently withdrew its appeal, VATA s 85 applied.

Matalan: the facts and the s 85 submissions

154. On 23 August 2004, Matalan sent HMRC a claim for repayment of duty in relation to certain items of swimwear which included rubber thread. Matalan considered the swimwear was classified under code 6112 41 1000 of the TARIC ("Code 10").

155. On 17 September 2004, Matalan sent HMRC an application for a BTI that Code 10 was correct, and attached a single example of a ladies black swimsuit with pink trim. HMRC issued a BTI dated 20 September 2004, classifying that swimsuit under Code 6112 41 9000 ("Code 90"). Matalan applied for a review decision, and the HMRC review officer upheld the original decision.

156. Matalan appealed to the Tribunal against the review decision. On 26 May 2005, HMRC lodged their Statement of Case with the Tribunal; their submissions relied on the following two points:

(1) the rubber was not contained in the fibres of the garment; and

(2) the rubber strip was not "thread" as defined in the relevant part of the TARIC.

157. On 26 April 2006, six days before the hearing was due to start, HMRC wrote to Matalan saying:

> "The Commissioners hereby withdraw the disputed decision. The Appellant is hereby invited to withdraw its appeal and is reminded in that regard that such withdrawal would not prevent its making application to the tribunal in respect of costs (rule 16 of the tribunal Rules)."

158. On 21 April 2006, PwC gave notice on behalf of Matalan that it withdrew its appeal, and HMRC paid Matalan's costs. On 5 July 2006, Matalan made further claims totalling

£522,537.43 for swimwear which in Matalan's view was similar to the sample attached to the BTI request. HMRC delayed repayment because the question as to the classification of swimwear including rubber was under consideration by the Nomenclature Committee.

159. On 8 September 2006, HMRC wrote to Matalan agreeing to repay the duty on the single costume which had been sent by Matalan, but stating that the claims for other swimwear were being treated as "protected claims" pending the outcome of the Committee meeting.

160. On 3 October 2006, PwC requested a statutory review of HMRC's decision, and this was issued on 12 October 2006. In summary, it stated that Matalan was required to establish its claim on a garment-by-garment basis and had not yet done so to HMRC's satisfaction.

161. Matalan appealed the review decision to the Tribunal, on a number of grounds, one of which was explained by Matalan's counsel Ms Whipple as follows, see [37] of the FTT judgment under reference C200262, [2008] Lexis citation 5216:

> "The letter of 20 April 2006 by which the Commissioners informed Matalan that the original BTI was rescinded and invited it to withdraw the appeal (and seek its costs), Matalan's acceptance of that proposal and the Commissioners' making good of the rescission of the original BTI by the issue of a replacement amounted, she said, to an agreement within section 85 of the Value Added Tax Act 1994, which relates to appeals to this tribunal, and which provides that such agreements have the same consequences as a determination of the tribunal. It was not open to the Commissioners to litigate the same issue again in these appeals since there was a deemed decision by the tribunal that classification within 10 was correct, and the matter was *res judicata*…."

162. The Tribunal (Colin Bishopp) decided that there was no "agreement within section 85" because there had been no meeting of minds; instead, HMRC had unconditionally withdrawn the BTI and Matalan had subsequently withdrawn the appeal (see [40] of the FTT judgment).

163. When the case went to the High Court, Clarke J agreed, saying at [94]:

> "The withdrawal of the decision by the commissioners was not conditional on the withdrawal of the appeal by Matalan and had occurred before Matalan did so. The withdrawal of the appeal followed the withdrawal of the decision but was not made as the price of that withdrawal."

164. He added at [97]:

> "Matalan contends that, in the light of the withdrawal by HMRC of the review decision it is estopped from disputing that all of Matalan's imported swimwear throughout the period 2001–07 should attract the '10' classification; or, alternatively that it would be an abuse of process for it to be allowed to do so."

165. That passage is followed by citations from case law, and then by these two paragraphs:

> "[100] The withdrawal of the first appeal did not constitute a determination (explicit or implicit) of any issue between Matalan and HMRC. The tribunal made no order and the parties made no compromise. At the same time the only basis upon which HMRC can have withdrawn its decision, Matalan withdrawn its appeal and HMRC issued the second BTI was that swimwear with no rubber in the synthetic fibre content but with rubber amounting to 5% or more of the garment as a whole ('the qualifying swimwear') was properly to be given

> a '10' and not a '90' classification. Unless that proposition ('the essential proposition') was correct there could be no basis for withdrawing either the review decision (or the original decision) or for issuing the second BTI with a '10' classification.
>
> [101] If the essential proposition was correct it would follow that Matalan was entitled to have the duty on all its qualifying swimwear treated as having a '10' classification for tariff purposes. This would not be because of any BTI but because that result would be a necessary consequence of the essential proposition. Matalan could then recover the duty that it had overpaid subject to the relevant time limits. Matalan would only be out of time in relation to imports which were made prior to three years before 23 August 2004."

166. These passages were relied on by Mr Jones as forming part of Clarke J's judgment, but Mr Elliott disagreed, saying that they were instead Matalan's submissions. I agree with Mr Elliott: it is clear from the context and from what follows that [100] and [101] are part of the case being put by Matalan, namely that:

(1) although there had been no deemed judicial determination of the first appeal under VATA s 85;

(2) HMRC had withdrawn the BTI because it had accepted Matalan was correct as to the classification of the product – this "the essential proposition"; and

(3) Matalan was therefore entitled to have the duty repaid.

167. Clarke J's judgment is instead set out at [121]. He first said under (a) that "there had been no judicial determination of the validity or otherwise of the essential proposition", a point which had already been accepted by Matalan. He went on to dismiss Matalan's submission that HMRC had nevertheless accepted that Matalan were correct on classification, saying at (b):

> "whatever Matalan's expectations were, there was no agreement that the outcome of the first appeal would determine the classification for tariff purposes of Matalan's qualifying swimwear."

168. Clarke J went on to find that as a result, HMRC were not estopped from refusing to pay Matalan the customs duty it had claimed.

Mr Jones's submissions

169. Mr Jones relied on the following facts from *Matalan*:

(1) the first appeal concerned the same two issues as the second appeal;

(2) Matalan had withdrawn its first appeal before the hearing;

(3) the withdrawal did not create a deemed agreement between the parties under s 85, and neither was their any deemed judicial determination;

(4) HMRC were not estopped by what happened in relation to the first appeal, and could therefore refuse to pay Matalan's claim.

170. In his submission, it must follow that the Appellant's withdrawal of the Assessment Appeal had not brought about a deemed judicial determination of the "essential proposition",

namely the underlying issue which was in dispute, and the Appellant was not estopped from making the Claim for the Overlap Period.

171. Mr Jones's main submission therefore relied on [100]-[101] set out above, and in particular the passage which read "The withdrawal of the first appeal did not constitute a determination (explicit or implicit) of any issue between Matalan and HMRC. The tribunal made no order and the parties made no compromise".

172. However, Mr Jones said in closing that even were he to be wrong in that reliance, because those passages did not form part of Clarke J's judgment, the Appellant's position was unaffected. He submitted that the key point was that in *Matalan* there had been a withdrawal, but that withdrawal had not brought the deeming provisions into effect; it therefore followed that a withdrawal (in contrast to an agreement on terms) did not deem the parties to have come to any agreement that the reasons for the original decision had been upheld. In consequence, there was no estoppel.

Mr Elliott's submissions

173. Mr Elliott emphasised that the issue in *Matalan* was whether the parties had come to an **agreement** under which HMRC withdrew the BTI and Matalan withdrew its appeal. Had there been such an agreement, there would have been a binding judicial determination by virtue of VATA s 85(1). However, on the facts found by the Tribunal there was no agreement, and in consequence s 85(1) did not operate.

174. Neither the Tribunal nor the High Court had considered whether Matalan's **withdrawal** from the appeal meant that there was a deemed agreement under VATA s 85(4) and in consequence a binding judicial determination under VATA s 85(1). In his submission *Matalan* was not an authority for anything relating to s 85(4), as that subsection was simply not considered.

The Tribunal's view

175. It is clear that the FTT in *Matalan* had decided s 85(1) did not apply, because the parties had not come to an agreement under which HMRC would withdraw the BTI and Matalan would withdraw its appeal. Instead, HMRC withdrew the BTI unconditionally, and this withdrawal was followed by Matalan's withdrawal of the appeal. That finding of was confirmed by Clarke J. As Mr Elliott said, neither the Tribunal nor the High Court considered s 85(4), and I therefore agree with him that *Matalan* is not an authority as to the meaning or effect of that provision.

176. However, it is instructive to consider why s 85(4) was not considered by either party, by the FTT, or by the High Court, given that (a) s 85(1) was plainly in issue and (b) Matalan had withdrawn its appeal. My view is as follows:

(1) Section 85(4) provides that, on a withdrawal, the parties are deemed to have come to an agreement that "that the decision under appeal should be upheld without variation".

(2) It is a necessary element of that deeming provision that *at the time of the withdrawal* there is a "decision under appeal".

(3) Matalan did not withdraw its appeal until *after* HMRC had "withdrawn the disputed decision". There was thus no "decision under appeal" on which the deeming provision could operate.

(4) Thus, although Matalan withdrew its appeal, s 85(4) could not operate to deem the parties to have come to an agreement confirming a decision which was no longer extant. Such an outcome would, to borrow the language of Lord Briggs in *Fowler,* be an unjust, absurd and anomalous result.

Littlewoods

177. The complicated background to the High Court judgment of Henderson J in *Littlewoods* was helpfully summarised in HMRC's skeleton. With minor textual amendments, it was as follows:

(1) Littlewoods had been assessed in relation to the VAT on commission paid for certain supplies for certain periods, and the Court of Appeal had determined those appeals in Littlewoods's favour in *HMRC v Littlewoods* [2001] EWCA Civ 1542 ("*Littlewoods CA*")

(2) Littlewoods had also made a claim under VATA s 80 in relation to VAT on different commission, and had appealed the refusal of the claim ("the 10% Commission Appeal"). The appeal was settled by an agreement in 2004 under VATA s 85 ("the 2004 s 85 Agreement");

(3) Littlewoods made a further claim covering different periods (1973-1998); this was settled in 2008 under s 85 ("the 2008 s 85 Agreement");

(4) Littlewoods made a restitution claim seeking compound interest in relation to periods between 1973 and 2004: this was the subject of the proceedings before Henderson J; and

(a) by way of defence in those proceedings, HMRC submitted that the earlier VAT payments they had made to Littlewoods had not been due; and

(b) Littlewoods responded by submitting that HMRC were estopped from raising that argument, and/or that it was an abuse of process for HMRC to do so.

178. In relation to this Issue, I consider only what *Littlewoods* has to say about s 85. I consider other aspects of the case later in this Decision.

The Agreements

179. The 2004 s 85 Agreement was set out "so far as material" to the issues in that case at [52] of the judgment as follows:

> "WHEREAS [HMRC] have rejected the Appellant's claim, pursuant to section 80 of the VAT Act 1994, for the recovery of output tax overpaid in the sum of £4,443,162.12, contained in a letter dated 5 February 2002 ("the Claim")
>
> NOW in consideration of the terms set out herein IT IS HEREBY AGREED between the parties as follows:
>
> 1. [HMRC] will repay the Appellant's Claim, subject to the receipt of satisfactory evidence to support the quantum and method of calculation of the Claim.
> 2. …"

180. The 2008 s 85 Agreement was referred to at [56]:

> "Following representations on behalf of Littlewoods, on 27 June 2008 HMRC accepted that the logic of their argument did not cover cases in which commission was taken in goods. They therefore agreed to repay the amounts of VAT attributable to commission so taken, and this agreement was recorded in a further s 85 agreement dated 23 September 2008."

181. The judgment records at [155] that the parties agreed that:

> "the determinations by the Tribunal and the FTT respectively which are deemed to exist by virtue of the 2004 and 2008 s 85 Agreements have the necessary qualities of finality and jurisdictional competence."

182. Thus, in *Littlewoods*, both parties agreed they had "come to an agreement" within the meaning of VATA s 85(1), and had also agreed that a "a tribunal had determined the appeal in accordance with the terms of the agreement", as provided by that subsection. However, the judgment does not set out the whole of the 2004 s 85 Agreement, and also does not include any part of 2008 s 85 Agreement, but instead only notes that HMRC accepted they had been wrong.

The submissions and my view

183. Both parties made submissions as to the guidance given by *Littlewoods* in relation to their dispute. However, in my judgment the case provides no real assistance. That is because the two s 85 agreements in *Littlewoods* both came into existence by virtue of VATA s 85(1), namely that:

> "before the appeal is determined by a tribunal, HMRC and the appellant come to an agreement…the like consequences shall ensue for all purposes as would have ensued if, at the time when the agreement was come to, a tribunal had determined the appeal in accordance with the terms of the agreement".

184. The parties to *this* appeal had already agreed that in non-withdrawal cases, where the parties had come to an agreement, the terms of that agreement formed part of the deemed Tribunal determination by virtue of VATA s 85(1), see §114(5). The dispute was instead about what happened when a party withdrew its appeal under s 85(4), and *Littlewoods* provides no assistance on that point.

Overall conclusion on Issue Four

185. For the reasons set out above, I find that neither *Matalan* nor *Littlewoods* is of assistance in deciding the meaning or effect of a deemed agreement under s 85(4). I move on to considering whether cause of action estoppel operates to prevent the Appellant from bringing the Claim for the Overlap Period.

ISSUE FIVE: CAUSE OF ACTION ESTOPPEL

The principle

186. Osborn's Concise Law Dictionary (12 ed) defines "cause of action" as "the fact or combination of facts which gives rise to a right of action". In *Arnold v National Westminster Bank plc* [1991] 2 AC 93 at 104 ("*Arnold*"), Lord Keith explained cause of action estoppel as follows (emphasis added):

> "Cause of action estoppel arises where **the cause of action in the latter proceedings is identical to that in the earlier proceedings, the latter having been between the same parties or their privies and having involved**

> **the same subject matter. In such a case the bar is absolute in relation to all points decided** unless fraud or collusion is alleged, such as to justify setting aside the earlier judgment. The discovery of new factual matter which could not have been found out by reasonable diligence for use in the earlier proceedings does not, according to the law of England, permit the latter to be reopened…The principles upon which cause of action estoppel is based are expressed in the maxims. *nemo debet bis vexari pro una et eadem causa* and *interest rei publicae ut finis sit litium*. Cause of action estoppel extends also to points which might have been but were not raised and decided in the earlier proceedings for the purpose of establishing or negativing the existence of a cause of action."

187. Those principles were considered and reaffirmed in *Virgin Atlantic v Zodiac* UKSC [2013] UKSC 46 ("*Virgin*"), in which Lord Sumption gave the only judgment. After a discussion of the principles, he confirmed that cause of action estoppel operated as an absolute bar to new proceedings, saying at [26]:

> "Where the existence or non-existence of a cause of action has been decided in earlier proceedings, to allow a direct challenge to the outcome, even in changed circumstances and with material not available before, offends the core policy against the re-litigation of identical claims."

The parties' submissions

188. Mr Elliott submitted that, following the Appellant's withdrawal of the Assessment Appeal:

(1) there had been a deemed agreement between the parties that the VAT on the investment management fees was not deductible;

(2) the Tribunal was deemed to have issued a judicial determination to that effect;

(3) the subject matter of the Assessment Appeal was in all respects identical to that in the Overlap Period of the Claim; and

(4) as a result cause of action estoppel operated.

189. Mr Jones relied on *Durwin Banks v C&E Commrs* [2008] VAT Decision 20695, Lexis Citation 674 ("*Durwin Banks 2*"), a decision of Commissioner Wallace to which I return at §213. In the course of his judgment, Commissioner Wallace said:

> "Clearly a decision giving rise to a right of appeal is analogous to a cause of action. A further decision gives rise to a further right of appeal."

190. Mr Jones submitted that the cause of action in the Assessment Appeal was the right to appeal against the Assessment, and the cause of Action in the Claim appeal was the right to appeal against HMRC's refusal of the Claim; these were two different decisions and so gave rise to two different causes of action.

The Tribunal's view

191. The Assessment Appeal and the Overlap part of the Claim Appeal have identical subject matter and are between identical parties or their privies. Those are the conditions set out in *Arnold* for cause of action estoppel to apply.

192. I reject Mr Jones's submission that there are two different causes of action because there were two HMRC decisions: the *dicta* on which he relied from the Tribunal judgment in *Durwin Banks 2* cannot displace the authoritative and binding judgment in *Arnold* which was reaffirmed in *Virgin.*

193. I thus find that cause of action estoppel applies and operates as an absolute bar to the Overlap Part of the Claim. That is sufficient to allow HMRC's strike out application, but in case there is an onward appeal, and because it was fully argued, I have also considered whether the Appellant is also blocked by issue estoppel and/or by abuse of process.

ISSUE SIX: ISSUE ESTOPPEL

The principle

194. In *Arnold* at p 105, Lord Keith defined issue estoppel as follows:

> "Issue estoppel may arise where a particular issue forming a necessary ingredient in a cause of action has been litigated and decided and in subsequent proceedings between the same parties involving a different cause of action to which the same issue is relevant one of the parties seeks to reopen that issue."

195. He also formulated the following exception (at p 109):

> "In my opinion your Lordships should affirm it to be the law that there may be an exception to issue estoppel in the special circumstance that there has become available to a party further material relevant to the correct determination of a point involved in the earlier proceedings, whether or not that point was specifically raised and decided, being material which could not by reasonable diligence have been adduced in those proceedings. One of the purposes of estoppel being to work justice between the parties, it is open to courts to recognise that in special circumstances inflexible application of it may have the opposite result."

196. in *Virgin* at [22(3)], Lord Sumption formulated that exception as follows:

> "Except in special circumstances where this would cause injustice, issue estoppel bars the raising in subsequent proceedings of points which (i) were not raised in the earlier proceedings or (ii) were raised but unsuccessfully. If the relevant point was not raised, the bar will usually be absolute if it could with reasonable diligence and should in all the circumstances have been raised."

197. In *Watt v Ahsan* [2007] UKHL 51 at [33], in a speech with which the other four members of the House of Lords agreed, Lord Hoffman said:

> "The whole point of an issue estoppel on a question of law is that the parties remain bound by an erroneous decision."

198. In *Littlewoods,* Henderson J said at [152]:

> "Issue estoppel is a well-established part of the law of *res judicata*. It is common ground that, in order for an issue estoppel to arise, three conditions need to be satisfied:
>
> (i) the same question must previously have been decided;

(ii) the judicial decision which is said to create the estoppel must have been a final decision of a court of competent jurisdiction; and

(iii) the parties to the prior judicial decision (or their privies) must have been the same persons as the parties to the subsequent proceedings in which the estoppel is raised (or their privies)."

199. In tax there is a more limited role for issue estoppel, following the Privy Council judgment in *Caffoor v Income Tax Commissioner* [1961] AC 584 ("*Caffoor*"). In the words of the headnote:

> "A question of liability to tax for one year was always to be treated as inherently a different issue from that of liability for another year…even though there might appear to be similarity or identity in the questions of law on which they respectively depended, and the principle of *res judicata* did not apply."

200. In *Littlewoods,* having first considered the case law, Henderson J concluded at [175] that there was :

> "no doubt that the *Caffoor* principle remains good law in England and Wales, at least in relation to income tax, corporation tax, capital gains tax and other annually assessed (or, nowadays, self-assessed) taxes, where the basic question for determination is the correct amount of tax payable for the relevant year or period of assessment."

201. At [190] he said:

> "I can see no good reason why the *Caffoor* principle, with suitable modifications, should not apply to [VAT] in a similar way, at least where the dispute relates to the amount of VAT chargeable on supplies of goods or services in one or more (usually quarterly) periods, or to assessments (whether of VAT, interest, penalties or surcharges) made for particular periods, or to claims for the repayment of VAT originally paid in respect of particular periods".

202. Henderson J also considered whether issue estoppel was compatible with the EU principle of effectiveness, and referred at [192] to *Amministrazione dell'Economia e delle Finanze v Fallimento Olimpiclub Srl* (Case C-2/08) [2009] ECR I-7501 ("*Olimpiclub*") at [22]-[23], where the CJEU had confirmed that *res judicata* applies to final decisions. Those paragraphs read:

> "22. …attention should be drawn to the importance, both for the Community legal order and for the national legal systems, of the principle of *res judicata*. In order to ensure stability of the law and legal relations, as well as the sound administration of justice, it is important that judicial decisions which have become definitive after all rights of appeal have been exhausted or after expiry of the time-limits provided for in that regard can no longer be called into question (Case C-224/01 *Köbler* [2003] ECR I-10239, paragraph 38, and Case C-234/04 *Kapferer* [2006] ECR I-2585, paragraph 20).
>
> 23. Accordingly, Community law does not require a national court to disapply domestic rules of procedure conferring finality on a decision, even if to do so would make it possible to remedy an infringement of Community law on the part of the decision in question (see *Kapferer*, paragraph 21)."

203. The CJEU in *Olimpiclub* also stated that a principle similar to *Caffoor* applies, at least where this would make it possible to remedy an abusive practice, saying at [32] (emphasis added):

> "Community law precludes the application, in circumstances such as those of the case before the referring court, of a provision of national law, such as Article 2909 of the Italian Civil Code, in a dispute concerning value added tax and **relating to a tax year for which no final judicial decision has yet been delivered,** to the extent that it would prevent the national court seized of that dispute from taking into consideration the rules of Community law concerning abusive practice in the field of value added tax."

204. In *Littlewoods* at [207] Henderson J applied his analysis of issue estoppel to Littlewoods's claim. He found that there was no issue estoppel, because the issue in dispute was different: Littlewoods's current claim related to interest, whereas the parties' earlier agreements had concerned the underlying VAT.

205. However, he went on to say that were he to be wrong in that conclusion, HMRC would have been estopped "in relation to the specific quarterly periods and the specific companies covered by the earlier determinations and s 85 agreements", but not in relation to other periods, because the *Caffoor* principle would have applied. Mr Jones and Mr Elliott both accepted that this alternative finding was *obiter*. However, as Sir James Mundy said in *An NHS Trust v X* [2021] EWHC 65 at [59], "there are *obiter dicta* and *obiter dicta"*, adding that "a great judge", namely Megarry J in *Brunner v Greenslade* [1971] Ch ("*Brunner*") had said at pp 1002-3:

> "A mere passing remark or a statement or assumption on a matter that has not been argued is one thing, a considered judgment on a point fully argued is another, especially where, had the facts been otherwise, it would have formed part of the ratio. Such judicial *dicta*, standing in authority somewhere between a *ratio decidendi* and an *obiter dictum*, seem to me to have a weight nearer to the former than the latter."

Mr Elliott's submissions

206. HMRC's primary case rested on cause of action estoppel. Mr Elliott submitted in the alternative that issue estoppel applied, for the following reasons:

(1) All elements of Lord Keith's definition were present: the Claim had made on the basis that the input VAT on the investment management services provided for the Escrow Account in periods including 8/12 through to 05/14 was recoverable, and this was the self-same issue for the self-same periods as had been the subject of the deemed judicial determination of the Assessment Appeal. The recoverability of that VAT was plainly "a necessary ingredient" in the cause of action.

(2) All three of the conditions set out by Henderson J were satisfied:

(a) the issue in dispute was whether investment management services provided in relation to the Escrow Account in each of the periods 8/12 through to 05/14 was recoverable and the issue in the Assessment Appeal had been identical, so the same question had previously been decided;

(b) by virtue of VATA s 85(4) a final judicial decision had been made by a court of competent jurisdiction; and

(c) the parties or their privies were identical.

(3) In *Littlewoods*, Henderson J had said that issue estoppel would have applied had the issue under appeal before him been identical to that previously decided by *Littlewoods CA* and by the 2004 and 2008 s 85 Agreements. Although that conclusion was *obiter,* it was persuasive.

(4) In relation to the Appellant, HMRC had not sought to argue that the whole of the Claim should be struck out, because they accepted the later VAT periods were covered by the *Caffoor* principle. However, that principle did not apply to the Overlap Period because those VAT periods were also within the Assessment Appeal.

Mr Jones's submissions

207. The Appellant's case on issue estoppel relied to a significant extent on Mr Jones's submission that where a party had withdrawn from an appeal without giving reasons, the final judicial determination brought into being by VATA s 85 decided only the quantum of the assessment and not the reasons for its issuance. I have already decided this point against the Appellant, see Issue Three.

208. Mr Jones also relied on *Matalan,* where the High Court had found there was no issue estoppel. However, in that case there was no agreement between the parties under VATA s 85 (see §163-164), and the position was entirely different from that in this appeal, as explained in Issue Four.

209. Finally, Mr Jones relied on the VAT Tribunal decision of *Durwin Banks 2,* adding that Henderson J at [191] had approved that Tribunal's conclusions.

210. The background to *Durwin Banks 2* was as follows:

(1) Mr Banks had previously appealed a Customs ruling dated 27 May 2004 that the linseed oil he produced was standard rated rather than zero rated.

(2) The appeal was heard on 12 November 2004, and Mr Banks lost; the decision is reported as *Durwin Banks v C&E Commrs* [2005] VAT Decision 18904[2], Lexis Citation 504 ("*Durwin Banks 1*").

(3) Mr Banks asked for a second ruling on the basis of further information, and Customs provided that ruling on 27 June 2006, which also concluded the linseed oil was standard rated. Mr Banks appealed that ruling to the VAT Tribunal.

(4) The VAT Tribunal allowed his appeal, holding at [48] and [52]:

(a) "another trader not fettered by *res judicata* would succeed on the material before us in establishing that similar bottled linseed oil is food, a decision against this Appellant based on *res judicata* would conflict with the principle of fiscal neutrality"; and

(b) Société Internationale de Télécommunications Aéronautiques SC [2003] V&DR 131 ("*SITA*") at [70], which had correctly stated that "issue estoppel has no

[2] in *Durwin Banks 2*, this decision is incorrectly referred to as Decision 18905 and also as Decision 16905.

> place in a VAT litigation of this nature"; adding that the reference to "this nature" was to "the tax chargeable on the supply of any goods or services".

211. Given Lord Hoffman's *dictum* in *Watt v Ahsan* that "the whole point of an issue estoppel on a question of law is that the parties remain bound by an erroneous decision", Mr Jones rightly did not seek to argue that issue estoppel should not apply to the Appellant, simply because HMRC had conceded the substantive issue on the merits.

The Tribunal's view

212. I have already considered and rejected Mr Jones's submissions on the statutory interpretation of VATA s 85 under Issue Three, and his submissions on *Matalan* under Issue Four, so only those on *Durwin Banks 2* remain to be considered.

213. The first of the passages on which Mr Jones relied was this one (my emphasis):

> "another trader not fettered by *res judicata* would succeed on the material before us in establishing that similar bottled linseed oil is food, a decision **against this Appellant** based on *res judicata* would conflict with the principle of fiscal neutrality";

214. However, that passage was preceded by detailed consideration of the *Caffoor* principle, see [43]-[45]. The cited passage therefore concluded that a decision "against this Appellant" would conflict with the principle of fiscal neutrality, because the *Caffoor* principle applied. The passage was cited with approval by Henderson J in *Littlewoods* **because** the Tribunal had stated that the *Caffoor* principle applies to tax, and this was also Henderson J's conclusion. In this case the Appellant is not relying on the *Caffoor* principle and so it is not assisted by the passage. In contrast to the position in *Durwin Banks 2,* the Claim for the Overlap Period relates to exactly same VAT periods and exactly the same technical point as the Assessment Appeal.

215. The second of the passages on which Mr Jones relied contains the reference to *SITA.* As is clear from [60] of the judgment in that case, the appellant in *SITA* had previously appealed against an HMRC decision made in 1973, the year VAT was introduced, that:

> "the activities of SITA relating to the provision of telecommunications facilities within the UK is therefore taxable at the standard rate, and you should account for output tax on those services."

216. That decision was thus a ruling as to the status of future supplies. SITA appealed that ruling, and on 6 July 1973 the VAT Tribunal decided the supplies were zero-rated. On 18 November 2007, HMRC issued a new ruling that the supplies should be treated as standard rated, and SITA appealed. One of its submissions was that issue estoppel applied because of the 1973 Tribunal decision. At [68] of their judgement, the Tribunal in *SITA* said:

> "…The public policy behind the general application of issue estoppel is to ensure the finality of litigation. In taxation and rating cases, however, that aspect of public policy has been override[n] by a different element of public policy. Recovering[3] business transactions, which fall to be assessed period by period, as is the case of supplies of a VAT registered trader, are involved here. Administrative flexibility is needed to enable the even-handed management of the revenue. To impose on a trader the unalterable privilege or disadvantage

[3] Probably a typographical error for "recurring"

> of a particular tax treatment of his supplies its the result of a decision of a tribunal or court [sic] might lead to inequity as between him and other traders making similar supplies the liability of which had been determined at a later date. The principle of public policy that applies in that situation, and in particular through the taxation of business transactions, is that of ensuring that the tax operates uniformly…"

217. The VAT Tribunal continued at [69]:

> "Here SITA and its services are unique. Nonetheless there can, we think, be no real public policy in securing finality in litigation on the strength of a decision reached with the consent of both parties some 30 years ago. Moreover, to regard the 1973 Decision as ensuring zero-rating in perpetuity for SITA while the supply of other telecommunications outlets are either exempt or standard rated could lead to inequality of treatment. This is all the more so when it is recalled that the 1973 Decision was a tribunal decision produced without pleading, without argument, and without any reasoning."

218. Thus, the VAT Tribunal decided in terms that the *Caffoor* principle applied to prevent the earlier decision operating as an issue estoppel.

219. The following paragraph of the *SITA* judgment ends with the sentence cited in *Durwin Banks 2* and relied on by Mr Jones. However, it is important to consider that sentence in context. The whole paragraph reads:

> "A different, but reduced, feature of VAT cases is that the jurisdiction of this tribunal is limited to determining the taxability of past supplies. See *Odhams Leisure v Customs and Excise Commissioners* [1992] STC 332. That is the effect of section 83(b) of VAT Act 1994 which limits the tribunal's jurisdiction to "the tax chargeable on the supply of any [goods][4] or services". That provision reflects the rule that issue estoppel has no place in a VAT litigation of this nature."

220. In this passage, the judgment concludes that the VAT Tribunal sitting in 1973 had no jurisdiction to rule on the liability of **future** supplies, as was clear from the subsequent case of *Odhams Leisure,* and that as a result, there could be no issue estoppel. It is not correct to treat paragraph [70] as an authority for a general proposition that issue estoppel "has no place in VAT litigation" at all.

221. It is thus clear that, when considered in context, neither of the passages on which Mr Jones relied were of assistance to the Appellant. In addition, as Mr Elliott pointed out, Henderson J decided that issue estoppel would have applied in *Littlewoods* had the facts been different, see §205, so he clearly did not consider that issue estoppel never had a place in VAT litigation. Although Henderson J's finding was *obiter,* as Megarry J said in *Brunner,* it was not a mere passing remark, but "a considered judgment on a point fully argued...where, had the facts been otherwise,…would have formed part of the ratio". I thus agree with Mr Elliott that it is to be treated as persuasive.

[4] The text has "foods and services" and this is plainly a typographical error

Conclusion on issue estoppel

222. In conclusion, even were I to be wrong on cause of action estoppel, the Appellant would be barred by issue estoppel from bringing the Claim for the Overlap Period.

The "Arnold exception"

223. I record for completeness that Mr Jones did not refer to the exception set out at §196 and §197, namely that issue estoppel does not apply "in the special circumstance that further material relevant to the correct determination of a point involved in the earlier proceedings, whether or not that point was specifically raised and decided". In particular, he did not seek to argue that the new arguments included in the Claim (see §25) based on the UT judgment in *University of Cambridge* constituted "special circumstances" for the purposes of issue estoppel.

224. The *Arnold* exception only operates, of course, where the newly adduced material "could not by reasonable diligence have been adduced in those proceedings". The UT's judgment in *University of Cambridge* was issued in June 2015, so before the Assessment was appealed to the FTT, and thus *prima facie* could have been adduced in those proceedings.

ISSUE SEVEN: ABUSE OF PROCESS

The principle

225. The principle of abuse of process was first crystallised in *Henderson v Henderson* (1843) 3 Hare 100, and was restated by Lord Bingham in *Gore Wood* at page 31 as follows:

> "But *Henderson v Henderson* abuse of process, as now understood, although separate and distinct from cause of action estoppel and issue estoppel, has much in common with them. The underlying public interest is the same: that there should be finality in litigation and that a party should not be twice vexed in the same matter. This public interest is reinforced by the current emphasis on efficiency and economy in the conduct of litigation, in the interests of the parties and the public as a whole. The bringing of a claim or the raising of a defence in later proceedings may, without more, amount to abuse if the court is satisfied (the onus being on the party alleging abuse) that the claim or defence should have been raised in the earlier proceedings if it was to be raised at all. I would not accept that it is necessary, before abuse may be found, to identify any additional element such as a collateral attack on a previous decision or some dishonesty, but where those elements are present the later proceedings will be much more obviously abusive, and there will rarely be a finding of abuse unless the later proceeding involves what the court regards as unjust harassment of a party. It is, however, wrong to hold that because a matter could have been raised in earlier proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive. That is to adopt too dogmatic an approach to what should in my opinion be a broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before. As one cannot comprehensively list all possible forms of abuse, so one cannot formulate any hard and fast rule to determine whether, on given facts, abuse is to be found or not…."

226. Lord Bingham continued at p 34 by rejecting a subsidiary argument made on behalf of GW that the rule in *Henderson v Henderson* did not apply, because the first action had ended in a compromise and not a judgment. He said:

> "An important purpose of the rule is to protect a defendant against the harassment necessarily involved in repeated actions concerning the same subject matter. A second action is not the less harassing because the defendant has been driven or thought it prudent to settle the first; often, indeed, that outcome would make a second action the more harassing."

227. Lord Millett concurred, saying at p 59:

> "I agree that [abuse of process] is capable of applying even where the first action concluded in a settlement. Here it is necessary to protect the integrity of the settlement and to prevent the defendant from being misled into believing that he was achieving a complete settlement of the matter in dispute when an unsuspected part remained outstanding."

228. In *Virgin*, Lord Sumption said:

> "[25] *Res judicata* is a rule of substantive law, while abuse of process is a concept which informs the exercise of the court's procedural powers. In my view, they are distinct although overlapping legal principles with the common underlying purpose of limiting abusive and duplicative litigation. That purpose makes it necessary to qualify the absolute character of both cause of action estoppel and issue estoppel where the conduct is not abusive. As Lord Keith put it in *Arnold v National Westminster Bank plc* [1991] 2 AC 93, 110G 'estoppel *per rem judicatam*, whether cause of action estoppel or issue estoppel, is essentially concerned with preventing abuse of process'.
>
> [26] It may be said that if this is the principle it should apply equally to the one area hitherto regarded as absolute, namely cases of cause of action estoppel where it is sought to reargue a point which was raised and rejected on the earlier occasion. But this point was addressed in *Arnold,* and to my mind the distinction made by Lord Keith remains a compelling one. Where the existence or non-existence of a cause of action has been decided in earlier proceedings, to allow a direct challenge to the outcome, even in changed circumstances and with material not available before, offends the core policy against the re-litigation of identical claims."

229. In *Koza Ltd v Koza Altin* [2020] EWCA Civ 1018 ("*Koza*"), not cited before me, the Court of Appeal held at [42] that that *Gore Wood* had decided that:

> "it is not sufficient to establish that a point *could* have been taken on an earlier occasion, but a recognition that where it *should* have been taken then, a significant change [of circumstances or new facts will be required if raising it on a subsequent application is not to be abusive."

230. In *Allsop v Banner Jones* [2021] EWCA 7 ("*Allsop*"), also not cited, Marcus Smith J, giving the only judgment with which Lewison and Arnold LJJ both agreed, said at [6]:

> "It was clear from the contentions of the parties – and, indeed, self-evident from the very existence of the jurisdiction – that a claim can be struck out as an abuse of process under CPR 3.4(2)(b) even though there are reasonable

> grounds for bringing the claim and the claim has a real prospect of succeeding…"

The parties' submissions

231. Mr Elliott emphasised that the abuse of purpose doctrine was to ensure that there was "finality in litigation", which was "a matter of public interest", as had been clearly established in *Gore Wood.* He submitted that HMRC are being "twice vexed in the same matter", namely as to whether or not the VAT on the investment management fees was recoverable, and that in the period between the withdrawal of the Assessment Appeal and the making of the Claim there had been no change to the law or to the facts.

232. Mr Jones relied on his submission that there had been no judicial determination of anything other than the quantum of the Assessment, and thus there had been no decision that the VAT on the investment management fees was irrecoverable. I have considered and rejected those arguments as part of Issue Three.

233. Mr Jones also submitted that Mr Elliott had failed to show that including the Overlap Period in the Claim had constituted "unjust harassment" of HMRC. He did not seek to argue that the merits of the substantive claim or the fact that it had been conceded by HMRC meant there was no abuse of process; this was clearly correct, see *Allsop* cited above.

The Tribunal's view

234. I have already found that:

(1) the purpose of VATA s 85(4) read with subsection (1) is to prevent relitigation, and the Tribunal's deemed determination of the Assessment Appeal was a decision that the VAT on the investment management fees was irrecoverable, see Issue Three; and

(2) by including the Overlap Period in the Claim, the Appellant was relitigating the same cause of action, see Issue Five.

235. It is clear from *Virgin* at [26] that where cause of action estoppel applies because an identical point has previously been decided, this creates an absolute bar to allowing the new case to proceed.

236. Even if that were not the position, so that there was no absolute bar, it is only possible to exercise the "broad, merits-based judgment" referred to by Lord Bingham in *Gore Wood* where a party is raising a new point. Even that will be abusive if the new point is one which should have been put forward in the earlier proceedings, see *Gore Wood* and *Kaza*.

237. In this case, as with the "*Arnold* exception" to issue estoppel, Mr Jones did not argue that the Claim was based on any new or different points from those set out in the Grounds of Appeal against the Assessment. As noted at §223-224, although PwC referred in the Claim to the UT judgment in *University of Cambridge*, this was issued in June 2015, before the Assessment was appealed to the FTT, and *prima facie* should therefore have been raised in those earlier proceedings. I was unable to identify any other arguably new points from the correspondence, and none were referred to in submissions.

Conclusion on abuse of process

238. The Appellant is barred by cause of action estoppel from proceeding with the part of the Claim which relates to the Overlap Period. As a result, it is unable to argue that there was no abuse of process. Even were I to be wrong on cause of action estoppel, so that a more flexible approach were to be possible, the absence of any factual or legal new point means that relitigation would be an abuse of process.

OVERALL CONCLUSION AND APPEAL RIGHTS

239. For the reasons set out above, I find as follows:

(1) the erroneous heading to HMRC's skeleton argument did not operate to bar HMRC from relying on Mr Elliott's skeleton argument, and Mr Elliott was not barred from making oral submissions at the hearing;

(2) HMRC were not estopped from putting forward their submissions in relation to the Overlap Period;

(3) cause of action estoppel operates to bar the Appellant from making the Claim in relation to the Overlap Period;

(4) if I were to be wrong on cause of action estoppel, the Appellant would have been barred by issue estoppel and by abuse of process

240. As a result, I allow HMRC's application to strike out the remaining part of the Appellant's appeal, namely that relating to the Overlap Period.

241. My thanks to Mr Elliott and Ms Jones for their detailed written and oral submissions, which have been of considerable assistance in deciding this application.

Appeal rights

242. 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 Rules. 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.

ANNE REDSTON
TRIBUNAL JUDGE

Release date: 03 MAY 2022