

Commissioners for His Majesty's Revenue and Customs (Appellants) v NHS Lothian Health Board (Respondent) (Scotland) 2022 UKSC [28] On appeal from: [2020] CSIH 14

Date: 19 October 2022

Justices

Lord Reed (President), Lord Briggs, Lord Sales, Lord Leggatt, Lady Rose

Background to the Appeal

This appeal concerns the correct approach to evidence and the burden and standard of proof in the context of historic claims for the recovery of input Value Added Tax ("**VAT**"). Input tax is the VAT incurred when the taxpayer buys in supplies which it uses for the purpose of a business activity.

The NHS Lothian Health Board ("**NHS Lothian**") and its predecessors operated several scientific labs. The labs' main work was providing clinical services to the NHS. This was a non-business activity and so any input VAT incurred on this type of work was not recoverable. However, the labs also undertook some external private work, which was a business activity so that input tax incurred for this type of work was recoverable.

NHS Lothian now claims unrecovered input tax in respect of external private work carried out in the period 1974-1997 ("**the claim period**") under section 121 of the Finance Act 2008. NHS Lothian did not have sufficient records to show how much input VAT had been paid for the work done in the labs, or the split of that work between business and non-business activity over the claim period. It valued its claim by applying to the total amount of VAT incurred, the percentage of its activity that was business activity for the year 2006/2007. That percentage was 14.7%. This was then used as a baseline and adjusted to work out the proportion of total input VAT it was entitled to recover for each year over the claim period.

NHS Lothian's claim was rejected by His Majesty's Revenue and Customs ("**HMRC**") on the ground, broadly, that NHS Lothian had not established that the method of valuing the claim was reasonable, in particular that it was justified in extrapolating the 14.7% figure to the earlier years. NHS Lothian appealed to the First-tier Tribunal (the "**FTT**"). The FTT considered the evidence and dismissed the appeal. A subsequent appeal to the Upper Tribunal was also dismissed. On appeal to the Inner House of the Court of Session ("**Inner House**"), the Inner House allowed NHS Lothian's appeal. HMRC now appeals to the Supreme Court.

Judgment

The Supreme Court unanimously allows the appeal. Lady Rose gives the judgment with which Lord Reed, Lord Briggs, Lord Sales and Lord Leggatt agree.

Reasons for the Judgment

The Inner House's description of the facts

The Supreme Court finds that the Inner House misinterpreted a key aspect of the FTT's factual findings. The FTT had not found that the proportions of NHS Lothian's business and non-business activities were essentially the same across the claim period. Rather, the FTT's finding was that there was not enough evidence to establish what that proportion was, whether it had changed over the years covered by the claim period or as between the end of the claim period and the year 2006/2007 from which the 14.7% was

derived [54-58].

The nature of the right to deduct VAT input tax

The Inner House was wrong to treat the right to deduct some input tax as a right that is independent of the obligation on the taxpayer to quantify properly the amount of tax it could recover. It is not enough for a taxpayer to show that it has incurred some input tax for the purposes of its business activity [59-60]. Proof of the amount incurred is a substantive precondition for the exercise of the right to deduct that or any amount [63]. Generally, the taxpayer proves this by producing the VAT invoices from suppliers showing input VAT paid. Member States may, as the United Kingdom has, specify alternative evidence that can be relied on by the taxpayer but the taxpayer must present a credible method for estimating the amount of the claim with reasonable certainty [65].

The EU principle of effectiveness

The EU principle of effectiveness prohibits national laws which make claims based on directly effective EU law “virtually impossible or excessively difficult” to enforce. The principle of effectiveness does not require the ordinary rules on evidence and the burden and standard of proof to be departed from if the taxpayer cannot comply with those rules [66-69]. The standard of proof applied to NHS Lothian’s claim is the balance of probabilities which applies in the same way to all historic tax claims [72]. The rules of evidence applied in courts and tribunals are based on what evidence is likely to be helpful and fair. These were the rules applied in this case and there is nothing about them that created an unjustifiable hurdle [80]. The court’s role is not to act as forensic accountant and the principle of effectiveness does not require this [76]. The Supreme Court holds that the principle of effectiveness was not infringed in this case. HMRC’s and the FTT’s approach did not make NHS Lothian’s claim virtually impossible or excessively difficult to enforce.

State fault and the EU principle of effectiveness

When applying the EU principle of effectiveness, the State’s conduct in setting procedural requirements to exercise rights is relevant. However, the question of whether the State’s conduct outside of this affects the application of the principle of effectiveness does not arise on the facts in this case because the additional State conduct identified by the Inner House does not establish any fault on the part of the UK Government [83]. There was no failure on the part of the State to implement the recovery of input tax [84]. The court’s role is not to take a view on the way the Government previously organised health boards or made decisions which affected NHS Lothian’s predecessors’ ability to recover VAT at the appropriate time [85]. Finally, in response to NHS Lothian’s argument that State fault contributed to the difficulties in establishing the amount of its claim, the Supreme Court holds that the facts do not support any such finding [86].

No error of law in the FTT’s decision

The Supreme Court holds that the FTT decision as upheld by the Upper Tribunal was correct [91].

References in square brackets are to paragraphs in the judgment

Note

This summary is provided to assist in understanding the Court’s decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document. Judgments are public documents and are available online. [Decided cases](#)