[2022] UKUT 00118 (TCC)

Appeal number: UT/2021/000020

VAT – Time limits – EU law principle of legitimate expectation – EU law principle of equal treatment – appeal dismissed

UPPER TRIBUNAL
(TAX AND CHANCERY CHAMBER)

R T RATE LIMITED and others — **Appellants**

-and-

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

TRIBUNAL: MR JUSTICE EDWIN JOHNSON
JUDGE JONATHAN RICHARDS

Sitting in public at the Royal Courts of Justice, the Rolls Building, 7 Rolls Buildings, Fetter Lane, London EC4A 1NL on 9 and 10 March 2022

Michael Firth, instructed by The UK VAT Advisory Limited for the Appellant

James Puzey, instructed by The General Counsel and Solicitor for Her Majesty's Revenue and Customs for the Respondents

DECISION

1. These appeals are brought by RT Rate Limited ("RT Rate") and a number of other taxpayers who ran car-dealership businesses. A full list of the appellants is set out in the Appendix to the decision (the "Decision") of the First-tier Tribunal (Tax Chamber) the ("FTT") released on 7 October 2020 which is under appeal. We gratefully adopt that full list of appellants set out in that Appendix but will throughout this decision refer to the facts of RT Rate's appeal as it is common ground that they are representative of the appeals generally.

2. In 2003 RT Rate claimed, and received, repayments of output VAT paid on supplies of demonstrator vehicles made before November 1992. It based its claim on what are commonly referred to as the "Italian Tables" published in 2003 by HM Customs & Excise, (to which we will refer as "HMRC" which definition includes the successor body, HM Revenue & Customs) which provided guidance on the making of such claims. In 2016, RT Rate formed the view that there was a flaw in the Italian Tables and wrote to HMRC to amend its claim. HMRC refused to accept the amendment on the basis of an argument that the claim had already been satisfied and any new claim was by then out of time. RT Rate appealed to the FTT.

3. In the Decision, the FTT dismissed RT Rate's appeal and RT Rate now appeals to this Tribunal (the "UT"), with the permission of the FTT on the first part of the appeal, and with the permission of the UT on the second part of the appeal. In the remainder of this decision, references to numbers in square brackets are to paragraphs of the Decision unless we say otherwise.

Factual background

4. UK domestic VAT law originally precluded car dealerships such as RT Rate from claiming credit for input tax on the purchase of demonstrator vehicles so that such input tax was, in the jargon of VAT practitioners, "blocked". By contrast, a sale of a demonstrator vehicle was treated as a taxable supply, with output VAT due on the dealer's margin under the margin scheme applicable to second-hand goods. However, the decision of the European Court of Justice (to which we will refer together with its successor body, the Court of Justice of the European Union, as the "CJEU") in Case C-45/95 *Commission v Italy* showed that domestic VAT law was not compatible with the Sixth VAT Directive (77/388/EEC) (the "Directive") which it sought to implement. The correct VAT treatment required a supply of demonstrator vehicles to be treated as exempt on the basis that input tax incurred on purchase of the vehicle had been blocked.

5. That defect in the UK's implementation of the Directive entitled businesses such as RT Rate to make claims for repayment of output tax over-declared. Until December 1996, a dealership could make a claim, under s80 of the Value Added Tax Act 1994 ("VATA") and predecessor legislation, for repayment of output tax overdeclared going back to 1973, when VAT was first introduced. However, as part of a wider attempt to limit taxpayers' rights to make claims going back for such a long period, Parliament legislated in the Finance Act 1997 ("FA 1997") to provide that, with effect from 18 July 1996, any claim for overpaid output tax needed to be brought within 3 years of the end

of the VAT period to which it related, with that time limit applying retrospectively to claims that had already been made. The CJEU held in Case C-62/00 *Marks & Spencer Plc* that the imposition of this time limit was contrary to Community law as it retrospectively denied taxpayers the ability to assert Community law rights. As a result of the CJEU's judgment in *Marks & Spencer plc*, in 2002 HMRC published "Business Briefs" 22/02 and 27/02 indicating that, notwithstanding the legislation enacted in FA 1997, HMRC would offer an administrative transition period. Very broadly, provided other conditions were satisfied, HMRC indicated that they would accept claims for VAT overpaid prior to December 1996 provided those claims were made by 30 June 2003.

6. The core ingredient of any claim by a motor trader for repayment of output VAT wrongly paid on sale of a demonstrator vehicle would be the difference between the sale price of the vehicle and its purchase price since VAT had historically been levied on that margin. However, HMRC realised that, due to the passage of time, it was unlikely in 2002 that traders would hold evidence of precise purchase and sale prices for vehicles that may have been sold up to 30 years previously. In March 2003, HMRC published the Italian Tables which very broadly set out HMRC's estimate of the margin likely to be achieved on sales of cars between 1973 and 1996 and the output tax chargeable on that margin. The Italian Tables divided cars into three categories: "Prestige", "Volume" and "Other" and took into account changes over the years in the rate of VAT. So, for example, the Italian Tables estimated that, in 1996, based on estimated profit per unit and the then applicable VAT rate of 17.5%, a trader selling 27 "Prestige" vehicles would have accounted for output VAT of £6,488.22. HMRC indicated that provided other conditions were satisfied for a claim to be eligible, that would be an acceptable VAT reclaim for a trader selling 27 "Prestige" vehicles so that, if a trader sold 20 such vehicles, a claim could appropriately be made for 20/27ths of the figure. Similar figures were given for sales of "Volume" and "Other" vehicles.

7. The profit that motor traders could make from demonstrator vehicles depended in part on the arrangements that they had with manufacturers. The margin that they made on sale of the vehicle was described in the trade as the "front-end" profit. The amount of front-end profit would depend on the level of discount that the manufacturer would give when selling the demonstrator vehicle. Manufacturers also paid dealers "back-end" bonuses if certain conditions were satisfied. There was some evidence that, before the abolition of car tax in 1992, manufacturers tended to offer larger up-front discounts (and so a smaller amount by way of back-end bonus) but that after 1992 back-end bonuses increased and front-end profits reduced. The FTT referred at [15] to extracts from HMRC guidance published in 2006 which indicated that HMRC were by then aware of this general tendency. The FTT found as a fact at [27] that the Italian Tables published in 2003 did not take into account the change in front-end profits that came about following the abolition of car tax in 1992. It reinforced that conclusion with a finding at [102] that the Italian Tables were "materially incorrect because they failed to take into account the incidence of car tax".

8. The Italian Tables were not set in stone. HMRC could, and did, agree variations to them with advisers who were able to produce evidence to support such revisions. Specifically, HMRC did agree revisions to the tables to reflect the switch between front-

end and back-end profits with certain advisers. Indeed, Beadles Sidcup Limited, which was party to the FTT proceedings and is an appellant in the UT proceedings, was able to persuade HMRC that the gross profit for a "Volume" car in 1973 should be £232 per unit, and not the £134 per unit that appeared in the Italian Tables, because front-end profits were higher before the abolition of car tax ([22]). The FTT also found at [22] that this was an "agreed revision to the Italian Tables for all the appellants".

9. RT Rate took advantage of the extended time limit set out in HMRC's Business Briefs referred to in paragraph 5 above and in 2003 made a claim (the "2003 Claim") for repayment of output tax overpaid. RT Rate based the 2003 Claim on the Italian Tables ([2]). When authorising his advisers to make the 2003 Claim, Mr Rate, a director of RT Rate, relied on the Italian Tables as setting out accurate average profit margins on demonstrator cars for the industry ([12]). By about 2007 the 2003 Claim had been paid ([2]).

10. The legal fallout from Parliament's attempt in FA 1997 to alter time limits retrospectively continued. The logic of the judgment of the House of Lords in *Fleming (t/a Bodycraft) v HMRC and Conde Nast Publications Limited v HMRC* [2008] UKHL 2 was that mere "administrative" practices such as those set out in HMRC's Business Briefs 22/02 and 27/02 could not prevent the retrospective change to time limits set out in FA 1997 from being contrary to EU law. EU law required an appropriate transition period to be given, and since Parliament had not chosen to make appropriate transitional provisions, the courts could not fill the legislative gap. It followed that, applying the reason in *Fleming*, the FA 1997 changes imposing a three-year time limit fell to be disapplied completely unless and until Parliament chose to make adequate transitional provision.

11. In response to the judgment of the House of Lords in *Fleming*, Parliament enacted s121 of the Finance Act 2008 ("FA 2008") which finally put to rest the problems caused by the FA 1997 changes. Section 121(1) provided as follows:

> The requirement in section 80(4) of VATA 1994 that a claim under that section be made within 3 years of the relevant date does not apply to a claim in respect of an amount brought into account, or paid, for a prescribed accounting period ending before 4 December 1996 if the claim is made before 1 April 2009.

12. One effect of this was that dealers who had not yet made claims for repayment of output tax charged on sales of demonstrator vehicles had more time to do so. In 2009, HMRC published revised guidance for use of the Italian Tables. Although HMRC did not alter the figures in the Italian Tables themselves for years prior to 1992, their revised guidance did allude to possible issues arising from the abolition of car tax in 1992 in the following terms:

> 9. Abolition of car tax
>
> An argument has been put forward by some advisors that the abolition of car tax in 1992, which caused a shift in the emphasis of bonus payments from front-end discounts to back-end bonuses, must have resulted in higher margins than those shown in the tables for periods

> before 1992. Whilst HM Revenue & Customs (HMRC) accept that the theory behind this has some credibility, claims based on actual records have not supported the contention in terms of the VAT payable on the margin.
>
> If a business produces evidence to demonstrate changed VAT on margins, HMRC staff should be requested to forward it to the HMRC Motor U of E [i.e. Unit of Expertise] for consideration.

13. On 14 November 2016, RT Rate made the claim which is now in dispute. We refer to this as the "2016 Claim" noting that RT Rate's case is that this was not a new claim at all, but rather represented a variation to the 2003 Claim. It claimed an additional £98,832.55 which was based on revisions to the Italian Tables which Mr Myton, an adviser both to RT Rate and other motor dealers had agreed with HMRC in respect of the abolition of car tax when making claims for his other clients as part of the process described in paragraph 8 above. HMRC refused that claim on 1 December 2016 on the basis that the 2003 Claim had been settled and RT Rate was out of time to make a new claim. That decision was upheld following an HMRC review and, on 24 February 2017, RT Rate submitted a notice of appeal to the FTT.

14. Another taxpayer, Kent Auto Panels Limited ("KAP") had made a claim similar to that advanced by RT Rate and had appealed to the FTT when it was refused. KAP's appeal came on for hearing before the FTT on 1 May 2018. However, during the course of that hearing, HMRC and KAP reached a settlement (which was embodied in an agreement made under s85 of VATA (the "KAP Agreement"). The FTT set out salient terms of the KAP Agreement at [30].

The FTT's decision

15. The following matters were common ground both before us and the FTT:

> (1) Where HMRC settle a claim under s80 of VATA, that claim becomes "closed" and, under common law, a closed claim cannot be reopened or amended. However, provided a taxpayer complies with the applicable time limits set out in VATA, that taxpayer can seek a better outcome than was achieved when a claim was closed by making a <u>new</u> claim for the relevant VAT periods.
>
> (2) Since HMRC settled the 2003 Claim it was, under UK domestic statute law and common law treated as "closed". Therefore, the only way in which RT Rate could, under UK domestic law, seek further repayments of output VAT for the periods in question would be by making new claims under s80 of VATA for those periods. However, under UK domestic law set out in s121 of FA 2008, by 2016 RT Rate was out of time to make new claims.
>
> (3) Therefore, unless EU principles prescribed an outcome different from that given by an application of UK domestic law, HMRC were entitled to refuse the 2016 Claim on the basis that it was out of time.
>
> (4) By contrast, if EU law principles resulted in the 2003 Claim remaining open, then the 2016 Claim constituted an <u>amendment</u> to the 2003 Claim

rather than a new claim. This was broadly because the 2016 Claim covered the same VAT periods as the 2003 Claim and was made for the same reasons and simply involved a claim for a greater amount. Accordingly, if an application of EU law resulted in the 2003 Claim still being open at the time the 2016 Claim was made, the 2016 Claim would not be out of time.

16. Before the FTT, as before us, RT Rate advanced two arguments, both based on propositions of EU law, as to why it was entitled to be paid the amount of the 2016 Claim:

(1) First, it argued that the EU doctrine of legitimate expectation applied. RT Rate had a legitimate expectation that the profit margin figures set out in the Italian Tables were materially correct, as the typical/average figures that they purported to be and further that its 2003 Claim would be closed on the basis of figures that were either correct, or not materially wrong. By purporting to close the 2003 Claim on the basis of the incorrect figures set out in the Italian Tables, HMRC had failed to give effect to that legitimate expectation. Accordingly, HMRC should be required to treat the 2003 Claim as remaining open, so that the 2016 Claim was a mere amendment to that (open) claim. That in turn meant that the 2016 Claim was in-time and HMRC were not entitled to refuse it on the basis that it was out of time.

(2) Alternatively, the EU doctrine of equal treatment applied. That precluded HMRC from treating similar situations differently unless that differentiation is objectively justified. RT Rate was in the same, or a materially similar, situation to that of KAP and so HMRC were precluded from treating RT Rate differently from KAP.

17. HMRC took issue with both aspects of RT Rate's analysis as follows:

(1) HMRC denied that the FTT had any jurisdiction to consider the argument based on the EU law principle of legitimate expectation, arguing that any such case had to be advanced by way of judicial review proceedings in the Administrative Court. Even if the FTT had jurisdiction, HMRC denied that the principle was engaged on the facts of this case.

(2) HMRC did not deny that the FTT had jurisdiction to consider the arguments based on equal treatment. However, they argued that the principle could not be breached by reason only of HMRC reaching a settlement with one taxpayer, but not with a single other taxpayer. A more widespread failure of equal treatment was needed to engage the principle.

18. Neither party criticises the FTT's self-direction, at [36], of the issues it needed to determine which can be summarised as follows:

(1) Whether the FTT had jurisdiction to consider RT Rate's arguments based on the EU law principle of legitimate expectation.

(2) Whether, as a matter of law and fact, RT Rate had the legitimate expectation for which it contended.

(3) Whether the 2016 Claim fell to be treated as out of time by virtue of s121 of FA 2008.

(4) Whether, as a matter of law and fact, the EU law principle of equal treatment required HMRC to pay RT Rate the amount claimed by the 2016 Claim.

19. At [37] to [85], the FTT considered the first issue. Since the FTT was established under the authority of the Tribunals Courts and Enforcement Act 2007, there has been some legal controversy as to the extent of its jurisdiction to hear claims based on the English public law concept of "legitimate expectation". Analysis of that issue in court and tribunal decisions has, to an extent, involved a consideration of whether, when construing the UK statutory provisions conferring jurisdiction on the FTT, Parliament could have intended the FTT to be exercising a power very similar to that of judicial review, but without the procedural safeguards (such as the requirement to obtain permission, and the enforcement of strict time limits for bringing claims) that apply to judicial review claims in the courts. The FTT recognised, however, at [44] that the question of jurisdiction could not be resolved simply by a consideration of the UK statutory provisions conferring jurisdiction. Rather, since RT Rate was inviting the FTT to apply a concept of EU law, the FTT needed to consider whether s2(1) of the European Communities Act 1972 gave the FTT jurisdiction to apply the EU doctrine of legitimate expectation in just the same way as it had power to apply other principles of EU law, such as the fundamental freedoms set out in the EU Treaty.

20. After a detailed analysis of both domestic and EU law authorities, the FTT concluded at [85] that it did not have jurisdiction to consider RT Rate's claims based on the EU doctrine of legitimate expectation. Rather, it concluded that if RT Rate wished to pursue its claim on that basis, it needed to take judicial review proceedings in the courts.

21. That conclusion was sufficient to dispose of RT Rate's legitimate expectation claim. However, the FTT went on to consider, at [86] to [97], whether RT Rate had a legitimate expectation that fell within the scope of the EU doctrine. The FTT set out the legitimate expectation for which RT Rate contended at [89] in the following terms and it is not suggested that the FTT misdescribed RT Rate's formulation of that legitimate expectation:

> The profit margin figures in the original Italian Tables were materially correct as averages or typical figures for the industry, and therefore that claims would be made and closed on such a materially correct basis.

22. At [94], the FTT rejected HMRC's argument that an expectation that figures in the Italian Tables were "materially correct" was insufficiently precise to constitute a legitimate expectation in the EU law sense. However, at [96] and [97], the FTT concluded that the Italian Tables could not be read as containing any unconditional assurance that the figures therein were accurate for the following broad reasons:

(1) HMRC gave no express confirmation that the figures in the Italian Tables were accurate.

(2) The figures in the Italian Tables were based on information supplied to HMRC by trade bodies. RT Rate would have realised that HMRC were in no better position than it was to identify errors in the Italian Tables. Since there were so many ways in which the figures in the Italian Tables could be inaccurate, RT Rate would have realised that HMRC could not be providing any assurance as to the accuracy of those figures.

(3) RT Rate and the other appellants would have realised that they were not obliged to use figures set out in the Italian Tables. If they felt they had better evidence they were free to use that evidence instead. The fact that use of the Italian Tables was not compulsory pointed against a conclusion that HMRC were warranting their accuracy.

23. The FTT also concluded, at [96] that even if, contrary to its view, RT Rate and the other appellants had any reasonable expectation that the figures in the Italian Tables were correct, they could not have had any reasonable expectation that, if they turned out to be incorrect, HMRC would permit closed claims to be re-opened for an indefinite period.

24. The FTT's conclusions on the EU law doctrine of legitimate expectation meant that there was nothing to alter the conclusion flowing from s121(1) of FA 2008, namely that the 2016 Claim was out of time. However, at [98] to [107], the FTT considered what remedy it would have afforded if, contrary to its conclusions, RT Rate had a legitimate expectation to which the FTT had jurisdiction to give effect. RT Rate argued that the appropriate remedy would be to treat the 2003 Claim as still being open so that the 2016 Claim would be treated as a mere amendment to an open claim which was in-time despite s121(1) of FA 2008. The FTT reasoned, however, that in s121(1), Parliament manifested a clear intention that there was to be a final deadline of April 2009 for RT Rate to make its claims relating to VAT periods prior to 4 December 1996. Once that provision was enacted, RT Rate could not have had any reasonable expectation that the 2006 Claim could be reopened after 1 April 2009. Accordingly, the FTT decided that RT Rate was not entitled to any remedy even if it had the legitimate expectation for which it argued, and even if the FTT had power to give effect to that legitimate expectation.

25. At [108] to [117], the FTT considered RT Rate's claim based on the EU law concept of equal treatment. At [115], it expressed doubt whether the principle could apply in circumstances where RT Rate was saying only that a single taxpayer (KAP) had been treated more favourably than it had. The FTT was evidently attracted to HMRC's submission, summarised at [112] and [113], that it was necessary to establish that RT Rate had been treated unfavourably as compared with a group of traders, rather than merely a single trader. However, the FTT found it unnecessary to determine this point. Rather, the core of its conclusion, set out at [115] and [116], was that RT Rate had failed to discharge its burden of proving that it had been treated unfavourably in comparison with KAP. The FTT reviewed the terms of the KAP Agreement and acknowledged that it suggested similarities between KAP's claim and that of RT Rate. However, the FTT was not satisfied that KAP's claim shared all relevant characteristics of RT Rate's claims because (i) there was no reference in the KAP Agreement to the Italian Tables or the basis on which its additional claim was made or calculated (ii) it

was not clear whether KAP's additional claim was based on an assertion that the Italian Tables were inaccurate in not taking into account the incidence of car tax before 1992 and (iii) the KAP Agreement was expressed to take into account "the specific circumstances of Kent Auto Panels Ltd" but RT Rate had not put forward any evidence as to what those specific circumstances were.

The grounds of appeal against the Decision and HMRC's Response

26. RT Rate appeals against the Decision on the following four grounds:

> (1) Ground 1 – The FTT was wrong to conclude that it had no jurisdiction to consider and give effect to the EU law principle of legitimate expectation.
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> (2) Ground 2 – The FTT was wrong to conclude that RT Rate had no legitimate expectation.
>
> (3) Ground 3 – The FTT was wrong to conclude, in reliance on s121(1) of FA 2008, that it would give RT Rate no remedy even if RT Rate had a legitimate expectation which the FTT had jurisdiction to protect.
>
> (4) Ground 4 – The FTT was wrong to reject RT Rate's case based on equal treatment on the basis of its perception that RT Rate had failed to discharge its burden of proof.

27. In their Response to RT Rate's appeal, HMRC broadly supported the Decision for the reasons that the FTT gave. However, it also seeks to rely on the following two arguments which it raised before the FTT, but which the FTT either dismissed or did not explicitly accept:

> (1) HMRC continue to argue that an expectation that figures in the Italian Tables would not be "materially" inaccurate is too vague and insufficiently precise to found the kind of legitimate expectation that EU law protects.
>
> (2) HMRC also continue to argue that RT Rate's argument that a single taxpayer, KAP, was treated more favourably was incapable of founding a claim based on breach of the EU law principle of equal treatment.

Legitimate Expectation – Discussion

The EU law principle of legitimate expectation

28. In joined cases C-181/04 to C-183/04 *Elmeka NE v Ipourgos Ikonomikon*, the CJEU gave guidance to national courts on the EU doctrine of legitimate expectation. In that case, the taxpayer company (Elmeka) was established in Greece and provided services relating to the transport of petroleum products to a recipient (Oceanic) which was established outside the Community. With effect from 1 January 1993, harmonised Community VAT law required Elmeka to subject its services to VAT because, those services were supplied in Greece, even though they were supplied to a person established outside the Community. However, in June 1994, the Piraeus tax authorities wrongly confirmed to Elmeka that the supplies were exempt from VAT. Elmeka relied on this confirmation, by not accounting for VAT on its services and by not passing on

any VAT cost to the price it charged Oceanic. Subsequently the Greek tax authorities discovered the error and sought to charge Elmeka VAT, interest and penalties for tax years 1994, 1995 and 1996.

29. Litigation ensued in Greece which resulted in the Greek courts referring the following question to the CJEU:

> (3) Under the Community rules and principles which govern VAT, is it permitted and subject to what conditions, for tax to be charged for a past period where the person liable did not pass tax on to the other contracting party during that period, and, therefore, tax was not paid to the State, because of the conviction of the person liable, brought about by conduct of the tax authorities, that he did not have to pass on the tax?

30. The CJEU gave the following explanation of the applicable principles at [31] and [32] of its judgment:

> 31. Under the settled case-law of the Court, the principles of protection of legitimate expectations and legal certainty form part of the Community legal order. On that basis, these principles must be respected by the institutions of the Community, but also by Member States in the exercise of the powers conferred on them by Community directives (see in particular Case C-381/97 *Belgocodex* [1998] ECR I-8153, paragraph 26, and Case C-376/02 '*Goed Wonen'* [2005] ECR I-3445, paragraph 32). It follows that national authorities are obliged to respect the principle of protection of the legitimate expectations of economic agents.
>
> 32. As regards the principle of protection of the legitimate expectations of the beneficiary of the favourable conduct, it is appropriate, first, to determine whether the conduct of the administrative authorities gave rise to a reasonable expectation in the mind of a reasonably prudent economic agent (see, to that effect, Joined Cases 95/74 to 98/74, 15/75 and 100/75 *Union nationale des coopératives agricoles de céréales and Others v Commission and Council* [1975] ECR 1615, paragraphs 43 to 45, and Case 78/77 *Lührs* [1978] ECR 169, paragraph 6). If it did, the legitimate nature of this expectation must then be established.

31. There was some doubt in *Elmeka* whether the Piraeus tax authority approached for a ruling on the issue was competent under applicable Greek law to give the ruling. The CJEU accordingly stated in paragraph 35 of its judgment that it was for the Greek national court to decide whether Elmeka could reasonably have believed that the Piraeus tax authorities were competent to give the ruling.

32. The decision of the CJEU in Case C-144/14 *Cabinet MedicalVeterinar Dr. Tomoiagă Andrei* concerned the VAT treatment of the services of veterinary practitioners. Before Romania joined the EU, such services were exempt from VAT in Romania. However, when Romania joined the EU, with effect from 1 January 2007, such services were taxable under harmonised Community VAT legislation. The Romanian legislature amended the law to remove references to veterinary care from the list of transactions exempt from VAT, but the taxpayer argued that he had a residual legitimate expectation that he could benefit from the predecessor exempt treatment. The

CJEU formulated the concept of legitimate expectation in the following terms, in paragraphs 43 and 44 of its judgment:

> 43. In the second place, with regard to the principle of protection of legitimate expectations, the right to rely on that principle extends to any person in a situation where an administrative authority has caused him to entertain expectations which are justified by precise assurances provided to him (see, to that effect, judgment in *Europäisch Iranische Handelsbank v Council*, C-585/13 P, EU:C:2015:145, paragraph 95).
>
> 44. In that regard, it must be determined whether the conduct of the administrative authority gave rise to a reasonable expectation in the mind of a reasonably prudent economic operator, and if that is the case, to establish whether that expectation is legitimate (see, to that effect, judgment in *Elmeka*, C-181/04 to C-183/04, EU:C:2006:563, paragraph 32 and the case-law cited).

33. From those authorities, we derive the following propositions:

> (1) Member states exercising powers given to them in pursuance of Community directives must respect the principle of the protection of legitimate expectations. That principle extends to the situations of domestic tax authorities exercising the power set out in VAT directives to subject, or not to subject, transactions to VAT.
>
> (2) The question of whether the requisite legitimate expectation exists involves the application of a two-part test.
>
> (3) First, it must be established whether the administrative authority has given precise assurances that would have caused a reasonable expectation in the mind of a reasonably prudent economic operator. That involves the application of an objective test.
>
> (4) Second, it must be established whether that expectation is justified.

34. RT Rate argues, by reference to the judgment of the Supreme Court in *R (on the application of Davies and another) v HMRC* and *R (on the application of Gaines-Cooper) v HMRC* [2011] UKSC 47, that the test set out in paragraph 33(3) involves a question of law. We disagree. *Davies* and *Gaines-Cooper* involved an application of the English law concept of legitimate expectation in the context of judicial review proceedings brought by two taxpayers. One of the issues arising in that case was the question whether HMRC had engendered a particular legitimate expectation by the publication of a booklet, known as IR20, which in turn involved an examination of what the relevant paragraphs of IR20 meant. We quite accept that the Supreme Court treated the meaning of the IR20 booklet as a question of law. However, in this case, the meaning of the Italian Tables and accompanying HMRC guidance is not in dispute. The test in paragraph 33(3) does not, therefore, necessitate any determination of the meaning of the Italian Tables. Rather the question is what, if any, expectation a "reasonably prudent economic operator" would have obtained from a reading of the Italian Tables and surrounding circumstances. In our judgment, that involves the application of an objective factual test.

Whether RT Rate had a legitimate expectation

35. In deciding whether to entertain the 2016 Claim, HMRC were not determining whether supplies were taxable or exempt under provisions of the Directive (the situations considered in *Elmeka* and *Andrei*). Rather, they were deciding whether a claim was made in time or not. The determination of the procedure for enforcing EU law rights, and the time limit for making claims, is generally within the competence of individual member states, as distinct from a matter that is harmonised at the level of the Community. However, in their submissions, HMRC did not seek to argue that this provided a reason why the EU law principle of legitimate expectation was not in issue. We therefore proceed on the basis that it was common ground that, if the Italian Tables gave rise to a legitimate expectation in the EU law sense, HMRC were obliged to respect that expectation.

36. In our judgment, the short answer to RT Rate's Ground 2 is that the FTT, a specialist tribunal, has expressed its evaluative conclusion that a reasonably prudent economic operator would not have derived the expectation from the Italian Tables for which RT Rate argued. The FTT's conclusions in this regard were available to it and, since an appeal to the UT lies only on a point of law, we should not interfere with those conclusions.

37. RT Rate seeks to escape from this conclusion by arguing that the FTT's evaluative findings were vitiated by either a failure to take into account relevant factors, or by the reaching of a conclusion that was so outside the reasonable range of conclusions as to involve an error of law of the kind set out in *Edwards v Bairstow* 36 TC 207.

38. The argument that the FTT failed to take into account relevant considerations centred on the fact that the Italian Tables referred to the "typical sale price" of vehicles but the FTT failed to address the significance of that wording. We reject that argument. The FTT quoted an extract from the Italian Tables at [14] and in doing so demonstrated that it was aware that the column containing figures applicable to "Volume" cars was headed "Typical sale price". (In fact, the corresponding columns applicable to "Prestige" and "Other" cars were headed "Sale Price", without the use of the word "typical" though it was not suggested to us that there was any significance in this difference of wording). The FTT also referred in detail, at [90], to RT Rate's arguments that the reasonable expectation was that the figures in the Italian Tables would be correct as typical figures. The FTT did not fail to take this consideration into account. Having properly taken it into account, it was a matter for the FTT to decide how much weight to give that consideration.

39. RT Rate also argues that the FTT's evaluative conclusion fell outside the reasonable range of conclusions available to it. Effectively, this is an argument that the only reasonable conclusion available to the FTT was that a reasonably prudent economic operator would have concluded from the Italian Tables that HMRC were (i) representing that those figures were materially correct as "typical/average" figures and (ii) that therefore any claim made in accordance with the Italian Tables would be closed (if it was closed) on a materially correct basis.

40. RT Rate submits that HMRC must have been giving some representation as to the figures' accuracy because those figures were not presented as arbitrary. In RT Rate's submission, the reasonable basis on which it relied upon the Italian Tables would have been fundamentally undermined if it became clear that HMRC had arbitrarily applied a 50% discount to the figures set out in the tables. One problem with that submission is that it assumes what it seeks to prove. In effect it is said that, because RT Rate and other taxpayers would expect the figures in the Italian Tables to be "accurate", it would be objectionable for HMRC to apply an arbitrary discount when finalising and publishing the figures.

41. However, even putting that objection to one side, RT Rate's argument is incapable of establishing that the only reasonable conclusion was that HMRC were providing some confirmation that the figures in the Italian Tables were accurate. The FTT's conclusion to the contrary set out [96] and [97] was entirely reasonable and, indeed, we respectfully share it. The Italian Tables set out a relaxation to what would otherwise have been a requirement for a trader making a claim for repayment in respect of output tax paid on sales of demonstrator vehicles to establish with precision the precise margin that had been subjected to VAT. The relaxation consisted of HMRC indicating that, provided a claim was otherwise plausible and satisfactory, they would accept claims based on the figures in the Italian Tables. Traders were free to avail themselves of that relaxation or not. If they thought that they had, or could obtain, evidence of their actual margins that would lead to a higher VAT repayment they were free to obtain that evidence and seek to persuade HMRC accordingly. If they could not obtain that evidence, or were unwilling to go to the effort of obtaining it, or if they thought that the figures contained in the Italian Tables were sufficient, they were free to base claims on the Italian Tables. It may well be that, in publishing the Italian Tables, HMRC was giving some assurance that claims based on them would at least be considered. However, the Italian Tables contained no express confirmation of the accuracy of the figures and in the light of the purpose and function of the Italian Tables that we have just highlighted, we do not consider that any such representation should be implied. Still less do we consider that the only reasonable conclusion open to the FTT was that the Italian Tables contain an implicit representation as to the accuracy of those figures.

42. RT Rate also criticises the FTT's conclusion, in the final sentence of [96] to the effect that, even if there was a legitimate expectation that figures in the Italian Tables were accurate, there was no expectation that HMRC would allow closed claims made on the basis of the Italian Table to be re-opened at any point in the future. That, argues RT Rate, is to confuse the nature of the expectation with the nature of the remedy that should be ordered where the expectation is not honoured. We reject that submission. RT Rate's case before the FTT was that its legitimate expectation consisted of two aspects: first that the figures in the Italian Tables were materially correct as the typical/average figures that they purported to be and second that claims it made would be closed on such a materially correct basis. It follows from RT Rate's formulation of its case that a reasonably prudent economic operator would have expected that claims settled on the basis of materially "incorrect" figures would not be "closed" and, therefore, must necessarily have remained "open". In our judgment, in the final sentence of [96], the FTT was considering whether such an expectation could be "justified". Its conclusion was that any such expectation could not be justified because

it would result in apparently settled claims remaining open indefinitely. That evaluative conclusion was open to the FTT.

43. For those reasons, in our judgment we are not entitled to interfere with the FTT's evaluative conclusions as to the absence of a legitimate expectation in the EU law sense and RT Rate's appeal on Ground 2 accordingly fails.

44. We also consider that the point raised in HMRC's Response, referred to in paragraph 27(1) above, supplies a further reason why RT Rate could not have held a legitimate expectation that EU law would protect. As we have noted in paragraph 33(3) above, any legitimate expectation has to be engendered by "precise assurances". We acknowledge the point, made by the FTT at [94], that it can be meaningful to speak of a figure as being "materially" correct where that figure is wrong, but differs by a sufficiently slender margin from the true figure. However, in this case, there are no "true" figures against which the figures in the Italian Tables can be compared. There is no "true" price for the profit that could be made on resale of a "Prestige", "Volume" or "Other" car for a variety of reasons. The three categories of car identified are very broad labels: at the margins it will not be clear which cars fall into which categories. Moreover, one car dealership may be more or less profitable than another. Profit margins may vary depending on where the dealership is located, or the particular month in the year in which a particular car is sold.

45. Therefore, the figures in the Italian Tables cannot easily be compared with "true" figures in order to gauge whether they are "materially" accurate even as typical or average figures. Instead, those figures are best understood as the outcome of a modelling exercise designed to produce a theoretical construct, namely a supposedly "typical" margin achievable on different types of car in different years. Doubtless, there are different ways of approaching that modelling exercise and some ways would be more robust than others. However, in the absence of any "true" figures against which those in the Italian Tables can be compared, we do not consider that there is sufficient precision in the statement that those figures are expected to be "materially" accurate to warrant the protection of the EU law doctrine of legitimate expectation.

Conclusion on the issues of legitimate expectation (Grounds 1, 2 and 3)

46. For the reasons that we have given, RT Rate's Ground 2 fails. That makes Ground 3 (which considers the question of remedy) academic and we will not, therefore, deal with that Ground.

47. We have carefully considered whether it would be right for us to deal with Ground 1 so as to give guidance to the FTT on the scope of its jurisdiction to deal with further claims of this nature. We have concluded, however, that this would not be the appropriate course to follow. We are concerned that any guidance we give to the FTT in a situation where, in our judgment, there was quite clearly no legitimate expectation of the kind that EU law would protect, would be answering a purely academic and theoretical question. We do not think that an issue of this kind is best addressed in a case where, on the facts, it does not actually arise. In short, we consider that the scope of the FTT's jurisdiction is best addressed by a binding statement from this Tribunal

only in a case where such a statement is necessary. We will not, therefore, address Ground 1.

Discussion – Principle of equal treatment

Scope of the principle

48. There is less authority on the scope of the EU law principle of equal treatment than there is on the principle of legitimate expectation. For an articulation of that principle, we were referred to the judgment of the CJEU in *Marks & Spencer Plc v Commissioners of Customs* (Case C3-09/06) [2008] STC 1408 ("*Marks & Spencer 2006*").

49. That judgment, so far as relevant to the principle of equal treatment, concerned legislation in s80 of VATA which entitled HMRC to refuse to repay output tax overpaid by a trader where that repayment would lead to unjust enrichment. In essence the legislation was intended to ensure that traders who had passed the cost of output VAT on to their own customers could not claim what the UK authorities regarded as a windfall consequent on reclaiming that output VAT from HMRC. Significantly, there could be no "unjust enrichment" within the scope of the statutory provision as drafted for "repayment traders", namely taxpayers who were routinely net recipients of VAT refunds from HMRC (generally because they made significant zero-rated supplies and therefore enjoyed significant input tax recovery without any material corresponding obligation).

50. The taxpayer company was a "payment trader" that routinely had a net VAT liability due to HMRC. It successfully established that it had overpaid output tax. Eventually HMRC agreed to make a repayment. However, they would only repay 10% of the amount of output tax at issue, contending that the other 90% would have been passed on to the taxpayer's customers with the result that the taxpayer would be unjustly enriched if paid the full amount of its claim. The taxpayer objected, arguing that it was being treated less favourably than a repayment trader which could have recovered the full 100% of output tax overpaid without any reduction for perceived "unjust enrichment". The UK national courts referred the question of the applicability of the doctrine of equal treatment to the CJEU.

51. At [51] of its judgment, the CJEU summarised the doctrine of equal treatment in the following terms:

> 51 In this connection, the general principle of equal treatment requires that similar situations are not treated differently unless differentiation is objectively justified (Joined Cases 201/85 and 202/85 *Klensch and Others* [1986] ECR 3477, paragraph 9, and *Idéal tourisme*, paragraph 35).

52. At [52] and [53], the CJEU concluded that domestic legislation did breach the principle of equal treatment because "payment traders" and "repayment traders" were in similar situations as regards their entitlement to repayments of VAT. Both categories of trader had overpaid VAT and that fact was not altered by the fact that repayment traders were net creditors of HMRC and payment traders tended to be net debtors to

HMRC. Therefore, there was no objective justification for payment traders being subject to a restriction which did not apply to repayment traders.

Ground 4 – Discussion

53. RT Rate approached the issue of equal treatment before the FTT on the basis that it required the FTT to make factual findings as to the similarity or otherwise between RT Rate's circumstances and the circumstances of KAP. If satisfied that RT Rate's circumstances were similar, or sufficiently similar, it was argued that RT Rate should be afforded the benefit of the same settlement that KAP obtained pursuant to the KAP Agreement. As we have noted, the FTT doubted whether the principle of equal treatment applied in relation to an isolated decision which treats a single taxpayer more favourably than another in the absence of any legislative or policy basis for the unequal treatment. However, the FTT considered that it did not need to address that issue because its factual conclusion, set out at [115], was that RT Rate had not discharged its burden of proving that its circumstances were sufficiently similar.

54. RT Rate has framed its Ground 4 as challenges to the FTT's factual conclusions on the question of similarity. In essence, it is argued that, instead of resorting to the burden of proof, the FTT should have tried harder to find relevant facts based on (i) the evidence that it did have (consisting primarily of the KAP Agreement), (ii) inferences that could be drawn from the terms of the KAP Agreement and (iii) adverse inferences that should have been drawn from HMRC's failure to adduce evidence on KAP's circumstances which were particularly acute given that HMRC was a public authority with a duty to identify "the good, the bad and the ugly" aspects of its case (drawing on paragraph 106(3) of the judgment of the Singh LJ in *R (oao Citizens UK) v Secretary of State for the Home Department* [2018] EWCA Civ 1812. RT Rate also argues that the points on which the FTT relied, at [115], in support of its conclusion that the burden of proof was not discharged were matters raised of the FTT's own motion and did not form the basis of HMRC's submissions.

55. For reasons set out below, however, we do not accept the premise underpinning RT Rate's challenge. The FTT was not obliged to make any factual findings as to the "similarity" between RT Rate's case and that of KAP. That is because we accept HMRC's argument, set out in HMRC's Response to RT Rate's appeal, that even if the circumstances of RT Rate and KAP could be said to be "similar", the principle of equal treatment has no application in the circumstances of this case.

56. To put our reasoning into context, we note that RT Rate and KAP are by no means the only taxpayers who have relied on the Italian Tables when making claims. Rather, the Italian Tables were of relevance to a class of taxpayers comprising a potentially significant number of motor traders. It is important to note the consequences that would flow if a single taxpayer within a class of taxpayers affected by an HMRC practice or decision were able to advance a case on equal treatment of the kind that RT Rate sought to bring:

> (1) As the FTT noted at [113], a single settlement that HMRC reach with a taxpayer, even if reached incorrectly or on the basis of a mistaken

understanding of the law, could become a "precedent" available to any other taxpayer who is capable of asserting a sufficient "similarity" in facts.

(2) That would be the case even if the law clearly prescribed a different treatment for the other taxpayers.

(3) Taxpayers with weak legal cases would therefore have an incentive to seek to discover settlements reached with other taxpayers in the class who are, or could be asserted to be, in similar circumstances. They might make applications requiring HMRC to disclose such settlements and incur the expense of doing so.

(4) Even if taxpayers do not themselves discover settlements reached with others in the class said to be in a similar position, HMRC would nevertheless retain an obligation to draw those cases to the FTT's attention in the case of any dispute. It is unclear how any such duty could ever effectively be monitored or complied with.

(5) Once taxpayers have succeeded in obtaining information on all other taxpayers in the class said to be in a similar situation, the focus of the proceedings before the FTT would be on the degree of similarity between the circumstances of the various taxpayers. The law would be a bystander in these proceedings given that the FTT would be invited to focus on the issue of "similarity" rather than the question whether tax is due in accordance with the law.

57. Of course, the fact that these consequences could flow, and the fact that we regard them as deleterious, does not determine the scope of the EU principle of equal treatment. The law sometimes produces consequences that might be thought unwelcome. However, those consequences demonstrate the central flaw in RT Rate's approach to the principle of equal treatment.

58. The flaw is this. The Italian Tables were evidently targeted at a class of taxpayers: motor traders who considered that they may have overpaid output tax on sales of demonstrator vehicles. Therefore, whenever HMRC make a decision about the claim of a taxpayer in that class, there is nothing particularly surprising about the proposition that that taxpayer might, in some respects at least, be in a similar position to other taxpayers in the class. Some "similarity" follows inevitably from the fact that the taxpayers are members of the same class.

59. Where HMRC make a decision on the tax affairs of a taxpayer who is a member of a class, the comparison which the doctrine of equal treatment requires has to be applied in a way that is workable having due regard to the constituents of the class as a whole. A comparison between the situations of individual members of the class is neither workable, nor mandated by the doctrine. Suppose that, to build on an example considered by the FTT at [114], Taxpayer A, who is a member of the same class as Taxpayers B and C, receives a favourable HMRC decision. Taxpayer B receives an unfavourable decision, considers challenging it, but decides not to and Taxpayer C receives a similar unfavourable decision to Taxpayer B. There is simply no coherent answer to the question whether Taxpayer C has been the subject of "unequal" treatment

given that its treatment is identical to that of Taxpayer B, albeit different from that of Taxpayer A.

60. It follows that, in the present case, where RT Rate is a member of a class of taxpayers capable of being affected by HMRC decisions, any failure to afford RT Rate equal treatment must similarly be evaluated by asking whether HMRC are differentiating between the situations of different classes of taxpayer, in much the same way as the question was approached in *Marks & Spencer 2006*. In the circumstances of this case, RT Rate could not have succeeded with a claim based on the EU doctrine of equal treatment simply by pointing to an allegedly different treatment of a single other taxpayer within the class.

61. In any event, even if the FTT was required to turn its mind to the question whether RT Rate and KAP were in "similar" positions, we see no error of law in the FTT's conclusions in that regard set out at [115]. The only evidence that RT Rate had put forward on the issue of "similarity" consisted of the KAP Agreement. That agreement largely documented the end result, namely the terms on which settlement was reached and the FTT was entitled to conclude that it was not, on its own, sufficient to discharge the burden of proving any necessary similarity between RT Rate's situation and that of KAP. Parties to disputes reach settlements for a vast variety of reasons. Even acknowledging Mr Firth's point that HMRC's freedom to compromise disputes is constrained by its "Litigation and Settlement Strategy", the FTT made a sustainable finding of fact in the last two sentences of [115] in concluding that the KAP Agreement itself contained insufficient evidence as to the specific circumstances of KAP that had resulted in the settlement being reached. RT Rate's argument, that the FTT should have "striven to make a finding on the evidence before it", is on closer inspection simply a disagreement with the finding that the FTT did make, namely that the evidence RT Rate put forward was insufficient and did not establish even a prima facie similarity between RT Rate's circumstances and those of KAP.

62. We are only reinforced in this conclusion by our awareness, derived from email exchanges that RT Rate showed us during the hearing, that RT Rate was in touch with Mr Furneaux, a director of KAP, prior to the FTT hearing. That email exchange indicates that Mr Furneaux had some concerns about revealing details of the KAP Agreement, which contains a confidentiality clause. It also indicates that Mr Furneaux ultimately declined to provide RT Rate with much relevant information. However, RT Rate had the burden of proving its case. Even if Mr Furneaux was unco-operative, there was more that RT Rate could have done to obtain evidence of the averred similarity between its situation and that of KAP. It could, for example, have applied for Mr Furneaux to be made subject to a witness summons under the FTT's rules of procedure. It could have applied for further disclosure of documents from HMRC.

63. RT Rate submits that HMRC's duties as a public authority should have obviated the need for it to take such steps. It argues that HMRC should itself have drawn relevant material to the FTT's attention, relying on the formulation of the duties of "candour and co-operation" of a public law authority set out in paragraphs 86 of the judgment of Singh LJ in *Citizens UK* to which we have already referred. We reject that submission. *Citizens UK* sets out the formulation of duties applicable in judicial review proceedings.

Such proceedings are not concerned with the establishing of facts and indeed, as Singh LJ noted at [106(1)] and [106(2)] of *Citizens UK*, it is precisely because the ordinary rules of disclosure of documents do not apply in judicial review proceedings, that public authorities are subject to the duties of candour and co-operation. The proceedings before the FTT were not judicial review proceedings. They were, in part, proceedings concerned with the establishment of facts, and the ordinary burden on RT Rate, to prove its factual case, applied. That was particularly so given that HMRC was not, before the FTT, advancing any positive case that the situations of RT Rate and KAP were materially different but was instead relying on an argument that, even if similarity could be proved, the EU doctrine of equal treatment was still inapplicable.

64. We would perhaps place less weight than the FTT did, at [115], on the fact that the KAP Agreement does not mention the Italian Tables. Read as a whole, we consider that the KAP Agreement was demonstrably settling some kind of claim based on the Italian Tables. However, that does not alter our conclusion that, overall, the FTT was entitled to conclude that RT Rate had not discharged its burden of proof.

65. RT Rate also argues that the matters relied on at [115] in support of the FTT's conclusion on the burden of proof were unprompted by submissions made by HMRC and so were identified for the first time in the Decision. We see nothing objectionable about that in the circumstances of this case. We accept that HMRC would have made no submissions as to how RT Rate's case could be distinguished from that of KAP since, as we have noted, HMRC's position was that, even if similarity could be proved, RT Rate's case on equal treatment could not succeed. However, having decided that it would not decide the appeal on HMRC's preferred basis, the FTT then needed to decide whether the evidence that RT Rate had put forward was enough. If that evidence had been more extensive, it might well not have been appropriate for the FTT to perform its own review of that evidence that was not tested by submissions from the parties. However, RT Rate's evidence consisted entirely of the KAP Agreement. This ran to three pages (not including the cover page setting out the parties to it) of which one page (at least) can fairly be described as "boiler plate". The FTT was entitled to decide for itself whether such scanty evidence could satisfy the burden of proof and, as we have explained, was entitled to its conclusion that the burden was not satisfied.

66. It follows that we also do not accept RT Rate's argument that the FTT should have drawn an inference from HMRC's failure to adduce evidence of their own as to the circumstance of KAP's case. Having concluded, permissibly, that the KAP Agreement was simply insufficient to discharge RT Rate's burden of proof, the FTT was entitled to conclude that no question of any adverse inference arose. Moreover, since the FTT had concluded, permissibly, that RT Rate's evidence did not even disclose a prima facie case on "similarity", it was entitled to treat that case as not proved, even though HMRC had adduced no evidence of their own.

67. For all of those reasons, we dismiss RT Rate's appeal on Ground 4.

Disposition

68. RT Rate's appeal is dismissed on all grounds.

Signed on Original

MR JUSTICE EDWIN JOHNSON

JUDGE JONATHAN RICHARDS

RELEASE DATE: 13 April 2022