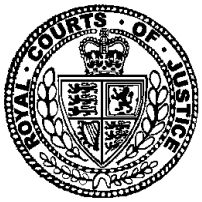

Neutral Citation Number: [2020] EWCA Civ 550

Case No: A3/2019/1352

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER
Marcus Smith J and Judge Sinfield
[2019] UKUT 0100 (TCC)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 24 April 2020

Before :

LORD JUSTICE PATTEN
LORD JUSTICE DAVID RICHARDS
and
LORD JUSTICE MOYLAN

- -

Between :

THE RANK GROUP PLC	**Appellant**
- and -	
THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS	**Respondents**

- -
- -

Andrew Hitchmough QC and **Laura Poots** (instructed by **PwC LLP**) for the **Appellant**
Andrew Macnab (instructed by the **General Counsel and Solicitor to HM Revenue and Customs**) for the **Respondents**

Hearing dates : 17 and 18 March 2020

- -

Approved Judgment

Covid-19 Protocol:

This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunal Judiciary website (press.enquiries@judiciary.uk). The date and time for hand-down is deemed to be 10:30am on Friday 24 April 2020.

Lord Justice Patten :

1. The Rank Group plc ("Rank") is the representative member of a VAT group which operates a number of bingo clubs. In the course of that business it made supplies of mechanised and cash bingo to members of the public. Until 2009 these were treated as taxable supplies and Rank accounted to HMRC for the VAT at the standard rate after setting-off any associated input tax in respect of the relevant periods.

2. As a result of the decision of the CJEU in the joined cases of *Linneweber* (C-453/02) and *Savvas Akritidis* (C-462/02) EU:C:2005:92, it was established that the bingo supplies made by Rank should have been treated as exempt supplies. It followed that Rank was not liable to account for the output tax on these supplies and correspondingly had had no right to deduct the input tax related to them.

3. Rank has made four claims under s.80(1) of the Value Added Tax Act 1994 ("VATA") for the recovery of the VAT. They are set out in chronological order in the table below which shows the date of each claim; the tax periods to which they relate; and the amount of output and input tax relevant to the calculation of each claim:

(1) Claim	**(2) Date**	**(3) Periods**	**(4) Over-declared output tax**	**(5) Associated input tax set-off**	**(6) Amount repaid**	**(7) Outcome**
(i)	30/3/09	6/73 - 9/96	£132.18m	£57.35m	£74.83m	Paid 22/3/11
(ii)	21/10/10	12/02 – 06/04	£10.13m	£3.04m	£7.09m	Paid 16/2/11
(iii)	Various	3/03 – 6/09	£24.57m	£8.48m	£16.09m	Paid 21/5/10
(iv)	9/11/11	12/96 – 12/02	£118.45m	£51.39m	Nil	Rejected
Total (Claims (i) to (iii))			**£166.88m**	**£68.87m**	**£98.01m**	
Total (Claims (i) to (iv))			**£285.33m**	**£120.26m**	**£98.01m**	

4. As appears from the table, HMRC settled claims (i)-(iii) by repaying the net amount of VAT overpaid in each period, being the difference between the over-declared output tax and the associated input tax which Rank had deducted from (i.e. recovered by way of set-off against) its presumed liability for output tax. Claim (iv) was, however, rejected as being out of time. It was made more than 4 years after the end of the prescribed accounting periods comprised within claim (iv) which was the relevant date for the purposes of s.80(4) VATA. Rank appealed against this decision on the ground that the statutory time limit in s.80 breached the EU principles of equivalence, effectiveness and equal treatment. But its appeal was withdrawn following the decision of this Court in *Leeds City Council v Revenue and Customs Commissioners* [2015] EWCA Civ 1293, [2016] STC 2256 and Rank now accepts that claim (iv) was out of time.

5. Notwithstanding this, Rank has sought to recover the net amount of VAT (£67,052,023.65) which it would have been repaid under claim (iv) by contending that

claims (i)-(iii) were wrongly calculated and repaid by HMRC. What HMRC should, it is said, have done was to reduce the amount of input tax which was brought into account to determine their net repayment liability under claims (i)-(iii) by deducting from those sums the £67.05m of overpaid VAT which would have been repayable under claim (iv) but for it being out of time. The gross amount of input tax credited to HMRC as part of the calculation of the amount repayable in respect of claims (i)-(iii) constitutes, it is said, an overpayment of VAT by Rank to the extent of the £67.05m and Rank contends that this sum is now recoverable under s.80(1B) VATA. It made a claim for such repayment in June 2013 which was in time if the relevant date for the purposes of s.80(4) was the date or dates on which the amounts due under claims (i)-(iii) were paid. On Rank's case, these were the dates when Rank "paid" an amount by way of VAT to HMRC for the purposes of s.80(1B).

6. It is convenient at this stage to set out the provisions of VATA 1994 and the Principal VAT Directive (2006/112/EC) ("the Directive") which are relevant to the issues which arise on this appeal. Although most of the VAT was paid when the Sixth Directive (77/388/EEC) was still in force, nothing turns on this and I need refer only to the provisions of the Directive in order to summarise the relevant legislative background.

7. The Directive establishes a common system of VAT for the EU under which VAT at the applicable rate is chargeable on the supply of goods and services "after deduction of the amount of VAT borne directly by the various cost components": see Article 1(2). This is given effect to by the right to deduct relevant input tax under Articles 168 and 179. The taxable person makes the deduction by subtracting from the VAT due "for a given tax period" the deductible input tax arising "during the same period". Only the net amount of VAT is payable for that period: see Article 206.

8. These provisions are given effect to domestically by ss.24-26 VATA as follows:

> "24. Input tax and output tax.
>
> (1) Subject to the following provisions of this section, "input tax", in relation to a taxable person, means the following tax, that is to say—
>
> (a) VAT on the supply to him of any goods or services;
>
> (b) VAT on the acquisition by him from another member State of any goods; and
>
> (c) VAT paid or payable by him on the importation of any goods from a place outside the member States,
>
> being (in each case) goods or services used or to be used for the purpose of any business carried on or to be carried on by him.
>
> (2) Subject to the following provisions of this section, "output tax", in relation to a taxable person, means VAT on supplies which he makes or on the acquisition by him from another

member State of goods (including VAT which is also to be counted as input tax by virtue of subsection (1)(b) above).

…

25. Payment by reference to accounting periods and credit for input tax against output tax.

(1) A taxable person shall—

(a) in respect of supplies made by him, and

(b) in respect of the acquisition by him from other member States of any goods,

account for and pay VAT by reference to such periods (in this Act referred to as "prescribed accounting periods") at such time and in such manner as may be determined by or under regulations and regulations may make different provision for different circumstances.

(2) Subject to the provisions of this section, he is entitled at the end of each prescribed accounting period to credit for so much of his input tax as is allowable under section 26, and then to deduct that amount from any output tax that is due from him.

(3) If either no output tax is due at the end of the period, or the amount of the credit exceeds that of the output tax then, subject to subsections (4) and (5) below, the amount of the credit or, as the case may be, the amount of the excess shall be paid to the taxable person by the Commissioners; and an amount which is due under this subsection is referred to in this Act as a "VAT credit".

…

26. Input tax allowable under section 25.

(1) The amount of input tax for which a taxable person is entitled to credit at the end of any period shall be so much of the input tax for the period (that is input tax on supplies, acquisitions and importations in the period) as is allowable by or under regulations as being attributable to supplies within subsection (2) below.

(2) The supplies within this subsection are the following supplies made or to be made by the taxable person in the course or furtherance of his business—

(a) taxable supplies; …"

9. In the case of a failure by the taxable person to make any or any complete and accurate return for VAT purposes the Commissioners are empowered under s.73 VATA to assess the amount of VAT due from him: see s.73(1). Section 73(2) extends the power to include the recovery of repayments of VAT or a VAT credit under s.25(3) which would not have been made had the relevant facts been known at the time. Assessments under these provisions must be made not later than 2 years after the end of the prescribed accounting period or one year (subject to a 4 year cap) after evidence of facts sufficient to justify the making of the assessment comes to the knowledge of the Commissioners: see ss.73(6) and 77(1).

10. The material provisions governing the repayment of overpaid VAT are contained in s.80 VATA as follows:

> "80. Credit for, or repayment of, overstated or overpaid VAT
>
> (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) Where a person has for a prescribed accounting period (whenever ended) paid to the Commissioners an amount by way of VAT that was not VAT due to them, otherwise than as a result of—
>
> (a) an amount that was not output tax due being brought into account as output tax, or
>
> (b) an amount of input tax allowable under section 26 not being brought into account,
>
> the Commissioners shall be liable to repay to that person the amount so paid.

> (2) The Commissioners shall only be liable to credit or repay an amount under this section on a claim being made for the purpose.
>
> (2A) Where—
>
> (a) as a result of a claim under this section by virtue of subsection (1) or (1A) above an amount falls to be credited to a person, and
>
> (b) after setting any sums against it under or by virtue of this Act, some or all of that amount remains to his credit,
>
> the Commissioners shall be liable to pay (or repay) to him so much of that amount as so remains.
>
> …
>
> (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 to a person under subsection (1B) above,
>
> if the claim is made more than 4 years after the relevant date.
>
> …
>
> (7) Except as provided by this section (and paragraph 16I of Schedule 3B and paragraph 29 of Schedule 3BA), the Commissioners shall not be liable to credit or repay any amount accounted for or paid to them by way of VAT that was not VAT due to them."

11. The provisions of s.80 have been considerably expanded by various amendments made since VATA came into effect. But in the form of the legislation applicable to the present claim for reimbursement it can be seen that the obligation of the Commissioners to credit or repay VAT is imposed by reference to a number of different circumstances which vary according to how the VAT in question came to be overstated or overpaid. Subsections (1) and (1A) are therefore directed to circumstances where output tax has been wrongly accounted for within the returns made by the taxable person or on an assessment by the Commissioners whereas subsection (1B) deals with cases where the taxable person has paid a sum by way of VAT otherwise than as a consequence of an error or overstatement made in accounting for output tax (and any relevant input tax deductions).

12. In a case falling within subsections (1)-(1B), the taxable person must seek to recover the VAT by making a claim under s.80(2). If the claim is made within the 4 year

period permitted under s.80(4) then the Commissioners become obliged to repay the amount in question. But again the liability to repay arises under different subsections of s.80 according to the circumstances in which the liability has arisen. For cases falling within s.80(1B), the Commissioners' obligation to refund the payment is contained within the subsection. But for cases falling within subsections (1) and (1A), it is found in s.80(2A).

13. Both subsections (1) and (1A) refer only to the bringing into account of amounts which were "not output tax due" and to a liability on the part of the Commissioners to credit the taxable person "with that amount". It is common ground that the Commissioners are not obliged to refund more than the net amount of overstated tax which they received, so that in a case where the taxable person has for a particular accounting period miscalculated the amount of output tax due, the input tax deducted from the gross amount of output tax in the relevant return or assessment will still be taken into account in determining the sum due to be repaid. The same will apply, as in this case, where the relevant supply should have been treated as exempt so that no output tax was in fact payable nor was the taxable person entitled to deduct input tax as a set off. In such cases, everyone agrees that the Commissioners' repayment obligation extends only to the net amount which was accounted for and which they received. But the parties are not *ad idem* as to how this result is achieved.

14. It is, I think, common ground that the starting point is s.80(2A). This converts an obligation on the part of the Commissioners under subsections (1) and (1A) to credit the claimant with the amount of the overstated output tax VAT into an obligation to pay or repay so much of the relevant amount as remains after setting "any sums against it under or by virtue of this Act". Mr Macnab submits that these words can and should be read as referring to the right of the taxable person to deduct any input tax that is allowable under s.26 so that in a case where the supplies are taxable but the output tax is overstated, the repayment obligation under s.80(2A) falls to be calculated by taking into account the credit for input tax which the taxable person received. If the amount of output tax that was in fact due is less than the amount of input tax properly deducted in the relevant accounting period then this will still produce a net repayment liability in favour of the taxable person under s.80(2A), just as it would have led to payment of a VAT credit by HMRC under s.25(3) if the claimant had correctly stated the output tax in his return.

15. The present case is more complicated because no output tax or input tax was payable or deductible in respect of the supplies of bingo that were made. Mr Macnab, I think, accepts that the words I have quoted from s.80(2A) are more difficult to apply in a case where neither s.24 nor 25-26 VATA have any application to the supplies made. But he says that such literal difficulties as exist must be overcome in favour of a construction which preserves the correct functioning of the Directive and recognises that those principles were applied when Rank accounted for the VAT that was wrongly thought to be due. The right of the taxable person to recover overpaid VAT does not, he says, extend beyond the net amount which was in fact accounted for and paid.

16. Rank contends that the words in s.80(2A) refer not to ss.24-26 VATA or to any other provisions governing the calculation and payment of VAT but rather to s.81 and, in particular, s.81(3) and (3A). So far as material, s.81 provides:

> "81.— Interest given by way of credit and set-off of credits.
>
> (1) Any interest payable by the Commissioners (whether under an enactment or instrument or otherwise) to a person on a sum due to him under or by virtue of any provision of this Act shall be treated as an amount due by way of credit under section 25(3).
>
> (2) Subsection (1) above shall be disregarded for the purpose of determining a person's entitlement to interest or the amount of interest to which he is entitled.
>
> (3) Subject to subsection (1) above, in any case where—
>
> (a) an amount is due from the Commissioners to any person under any provision of this Act, and
>
> (b) that person is liable to pay a sum by way of VAT, penalty, interest or surcharge,
>
> the amount referred to in paragraph (a) above shall be set against the sum referred to in paragraph (b) above and, accordingly, to the extent of the set-off, the obligations of the Commissioners, and the person concerned shall be discharged.
>
> (3A) Where—
>
> (a) the Commissioners are liable to pay or repay any amount to any person under this Act,
>
> (b) that amount falls to be paid or repaid in consequence of a mistake previously made about whether or to what extent amounts were payable under this Act to or by that person, and
>
> (c) by reason of that mistake a liability of that person to pay a sum by way of VAT, penalty, interest or surcharge was not assessed, was not enforced or was not satisfied,
>
> any limitation on the time within which the Commissioners are entitled to take steps for recovering that sum shall be disregarded in determining whether that sum is required by subsection (3) above to be set against the amount mentioned in paragraph (a) above."

17. Section 81(3) has always been a provision of VATA 1994. Subsection (3A) was added by the Finance Act 1997 and applies with effect from 18 July 1996.

18. As originally enacted, s.80(1) provided that:

> "(1) Where a person has … paid an amount to the Commissioners by way of VAT which was not VAT due to them, they shall be liable to repay the amount to him."

19. The sub-division of s.80 in the way that now exists came about as a result of amendments introduced by the Finance (No. 2) Act 2005 .

20. The Commissioners have therefore always had a right under s.81(3) to set-off against any payment or repayment liability arising under s.80 other liabilities of the taxable person for VAT, penalties or interest. Section 81(3A) is designed to deal with cases where the mistake which gave rise ultimately to the Commissioners' repayment liability under s.80 also caused them not to assess or enforce another VAT liability of the taxable person which the Commissioners could otherwise rely on as a set off under s.81(3). In such cases any limitation periods that would otherwise bar an assessment under s.73 or some other means of enforcement fall to be disapplied.

21. Rank contends that on a proper application of s.80(2A) the Commissioners are entitled to set off against the claim for repayment of output tax under s.80(1) only what is permitted by other relevant statutory provisions within VATA 1994 and their liability to pay or repay the VAT must be calculated accordingly. As set out in the table reproduced above, the result of claim (iv) being out of time was that some £67.05m of VAT which HMRC should not have received was not repaid.

22. The amount of the set-off permitted under s.80(2A)(b) is, on Rank's argument, to be determined by the application of s.81(3). This, on Rank's argument, gives HMRC the right to set-off against their obligation to credit overpaid output tax any sum which the taxable person is "liable to pay" to them by way of VAT and, as I have explained, can include amounts which require to be, but have not been assessed, due to the same misapprehension as caused the overpayment of output tax to be made. In such cases there is a disapplication of any relevant time limits in favour of HMRC under s.81(3A). But in *Birmingham Hippodrome Theatre Trust Limited v Revenue and Customs Commissioners* [2014] EWCA Civ 684, [2014] 1 WLR 3867 Lewison LJ appears to have accepted that, as a matter of EU law, the taxable person would (in a case where HMRC needed to rely on s.81(3A)) have to be afforded equal treatment so as to be able to bring into account any out of time claims for repayments which it might have against HMRC arising out of the same mistake. Mr Hitchmough QC for Rank placed particular reliance on what Lewison LJ said at [59]-[60]:

> "59. The purpose of section 81 (3A) is, in my judgment, clear. It is that where a taxpayer makes a claim for repayment of VAT which has been paid owing to a mistake, all the consequences of the mistake are to be taken into account in assessing the quantum of his claim. That purpose is consistent with the overarching scheme of VAT under the Sixth Directive which treats the payment of output tax and the deduction of input tax as an "inseparable whole". This is borne out by section 81 (3A) (b) which deals with amounts payable "to or by" the taxpayer. It is clear from this that section 81 (3A) was intended to allow HMRC to take into account both credits and debits. It is not, therefore, simply concerned with past claims by the taxpayer for credit of input tax. In evaluating those claims HMRC are

> also to look at amounts payable "by" the taxpayer: in other words output tax. Section 81 (3A) (b) is not limited to particular accounting periods. The main limiting factor is that the payment "to or by" the taxpayer must derive from the same mistake as that which gave rise to the claim. Section 81 (3A) is not part of the general scheme of VAT accounting, which requires a direct and immediate link between an input and an output. Rather it is a special provision, which seeks to undo the consequences (and all the consequences) of the same mistake.
>
> 60. It is true that section 81 (3A) only disapplies time limits in favour of HMRC. But it does not do so in an unlimited way. There are in fact two limitations on the disapplication. The first, as mentioned, is that HMRC are confined to taking into account payments deriving from the same mistake. The second is that HMRC must credit the taxpayer with overpayments made by him. If section 81 (3A) is seen as a limitation on what would otherwise be HMRC's ability to set off rather than a disapplication of time limits in favour of the HMRC, then there is no difficulty with the grain of the legislation. Under the *Marleasing* principle there is no need for the national court to pinpoint the precise verbal interpolations needed to bring the national measure into conformity with EU law. In my judgment the interpretation adopted by the Upper Tribunal was well within the bounds of the principle."

23. Mr Hitchmough says that HMRC were out of time for making an assessment to recover the input tax which Rank was allowed (wrongly) to deduct from its computation of VAT for the periods covered by claims (i)-(iii). They therefore needed to rely on s.81(3A) in order to bring those claims into account but could only do so on the basis that Rank was permitted to rely on any out of time claims of its own arising out of the same mistake.

24. Rank has therefore brought the present claim for a further credit and repayment of the £67.05m on the basis that HMRC should have taken this overpayment into account in determining what sums fell to be set-off against their liability to refund output tax under s.80. Although s.81(3) refers to a liability to pay VAT on the part of the taxable person, this is said to include the amount of wrongly deducted input tax which provided the relevant set-off in the case of claims (i)-(iii). On Rank's argument, these sums were set off against HMRC's s.80 liability by the operation of s.81(3) and (3A) but the set-off was, it is said, wrongly calculated because it should have been further reduced by the deduction of the £67.05m. The only sums therefore which HMRC were entitled to set-off against their s.80 liability under s.81(3) were the amounts of input tax actually deducted by Rank in the relevant period less the £67.05m. The result, it is said, is that Rank has wrongly paid that amount which was not VAT due to HMRC and can now seek to recover it by a claim under s.80(1B).

25. In a decision released on 1 April 2019 the Upper Tribunal (Tax and Chancery Chamber) (Marcus Smith J and Judge Sinfield) [2019] UKUT 0100 (TCC) accepted Rank's argument that s.80(2A) was only a gateway provision; that a set-off in respect of wrongly deducted input tax was effected through the provisions of s.81(3); and that

HMRC were obliged to take into account their own liabilities to refund the £67.05m when calculating the amount of the overpayment recoverable under claims (i)-(iii). But they held that Rank's new claim under s.80(1B) could not succeed because it had not "paid" the £67.05m to HMRC by way of VAT that was not due, which is the pre-condition to the making of a claim under s.80(1B).

26. The First-tier Tribunal ("FtT") (Judge Jonathan Richards) ([2018] UKFTT 0251 (TC)) had also rejected Rank's claim under s.80(1B) on the basis that, as part of the calculation of HMRC's own s.80 repayment liability, Rank had not "paid" anything to HMRC. He regarded the set-off of liabilities under s.81(3) and the *pro tanto* discharge of the Commissioners' obligations under s.80 as inconsistent with there being any payment (or repayment) of the input tax by Rank to HMRC. The Upper Tribunal, whilst concurring in the result, were prepared to accept that a payment under s.80(1B) could in certain circumstances include a set-off of liabilities. But, in this case, there had, they said, been no cross-claims to set-off at the time when claims (i)-(iii) were paid. All that had happened was that in calculating their s.80(2A) liability, HMRC had underpaid what was due by not taking into account their out of time liability in respect of the £67.05m. Rank had paid nothing as part of this process. It had simply received less than it should have done under s.80(2A). Its remedy therefore was not to make a s.80(1B) claim but to have appealed HMRC's determination of claims (i)-(iii).

27. Rank appeals against this decision with the permission of Simler LJ. HMRC, whilst seeking to uphold the result of the first appeal, have filed a respondent's notice in which they challenge the acceptance by the Upper Tribunal of the prior stages in Rank's argument and, in particular, their conclusion that the provisions of s.81(3) and (3A) are engaged in this case. It is therefore convenient to begin by considering what rights s.80 was intended to give effect to in a case of this kind.

28. The Directive makes no provision for the recovery of overpaid VAT. But Member States have an obligation under EU law to refund VAT that was not due and to put in place machinery for giving effect to such claims. In *Investment Trust Companies v Revenue and Customs Commissioners* [2017] UKSC 29 the relevant principles were set out in the following passage from the judgment of Lord Reed (at [90]):

> "90. There is a well-established principle of EU law that a member state is in principle required to repay taxes levied in breach of EU law, and an equally well-established exception whereby repayment can be refused where it would entail unjust enrichment of the taxable person because the burden of the tax has been passed on: see *San Giorgio*, paras 12-13. In the latter situation, however, the Court of Justice has held that the person to whom the tax was passed on should have a right to recover the sums unduly paid, so as to offset the consequences of the tax's incompatibility with EU law by neutralising the economic burden which the tax has imposed on the operator who has actually borne it: *Danfoss A/S v Skatteministeriet* (Case C-94/10) [2011] ECR I-9963, paras 23 and 25. It is for the domestic legal system of each member state to lay down the conditions under which claims may be made, subject to observance of the principles of equivalence and effectiveness:

> *Danfoss*, para 24. These general principles apply to the reimbursement of improperly invoiced VAT: *Reemtsma Cigarettenfabriken GmbH v Ministero delle Finanze* (Case C-35/05) [2007] ECR I-2425. Reasonable limitation periods are compatible with the principle of effectiveness, and the limitation period applicable to claims under section 80 of the 1994 Act has specifically been held to be reasonable: *Marks & Spencer plc v Customs and Excise Comrs* (Case C-62/00) [2003] QB 866, para 35."

29. No one suggests that the machinery of s.80 does not comply with the principles of effectiveness and equivalence in requiring the reimbursement of overpaid VAT to be initiated by a claim made by the taxable person and, as noted by Lord Reed, the time limits for making such claims have also been held to be compliant with EU law. It is therefore perhaps striking that in this case claims (i)-(iii) were made in time by Rank for the net sums due after deduction of the input tax originally credited to Rank so that in each of these cases HMRC repaid the total amount of the claim. Claim (iv) was similarly made for a net sum of £67.05m after taking into account input tax deductions but was out of time. In each case therefore the claims made have assumed that HMRC's s.80(2A) liability could not exceed the net amount of the claim and in each case the total amount of input tax has been brought into account as part of that calculation.

30. Putting aside for the moment the question whether the new claim for the £67.05m can be accommodated within the terms of s.80(1B), it is evident that Rank's ability to revive its pursuit of the £67.05m after failing to bring claim (iv) in time depends entirely on the application of s.81(3) (and therefore s.81(3A)) to the process of set-off conducted pursuant to s.80(2A) in relation to a repayment claim under s.80(1) or (1A). Rank has been candid enough to accept that it was only in the light of what Lewison LJ said in the *Birmingham Hippodrome* case about bringing into account out of time claims by the taxable person that this new claim was made.

31. As I mentioned earlier (see [18]), s.80(1) as originally enacted imposed an obligation on HMRC to repay any sums paid to them by way of VAT which was not VAT due to them. As with s.80(1) in its present form, it made no express reference to account being given for input tax that had been deducted by the taxable person in calculating his VAT liability nor to any set-off in respect of those sums. The obligation to repay what had been "paid" to the Commissioners by way of VAT necessarily took into account prior deductions of that kind so that the only liability of the Commissioners in an ordinary case was to repay the net amount which they received.

32. It was, however, always open to them under s.81(3) to set against that sum any other liabilities of the claimant "to pay a sum by way of VAT". But there was originally no relief given to the Commissioners in the form of what is now s.81(3A) so that this right of set-off was limited to other VAT liabilities which had been accounted for or assessed in time.

33. The separation of s.80(1) in its original form into what is now s.80(1), (1A) and (2A) has created a two-stage process under which the amount of overstated output tax is to be "credited" to the taxable person under s.80(1) and (1A) and then reduced by the set-off referred to in s.80(2A)(b). HMRC are then required to "pay (or repay)" to the

claimant any credit which remains. It is therefore the set-off which crystallises the liability and leads to an obligation to repay.

34. The provisions of s.81(3) have remained unchanged. They apply where "an amount is due from the Commissioners to any person under any provision of this Act". In the present context, that provision was originally s.80(1). It is now s.80(2A). What it is not is s.81(3) itself. That only applies where the liability that is to be reduced and discharged by the claimant's other VAT liabilities is one which already exists ("amount is due"). An amount is only due once it has become payable, which is the result of the set-off under s.80(2A)(b). A reading of the reference to "under or by virtue of this Act" in that subsection as one to s.81(3) is inconsistent with what has always been the language and structure of that provision. It requires one to read the word "due" as applying to the obligation under s.80(1) to credit the claimant with the amount of overstated output tax rather than to the liability to pay which only arises under s.80(2A) once the stipulated set-off has occurred. It would also mean (as is contended in this case) that other tax liabilities of the claimant which may relate to different accounting periods are to be brought into account as part of the set-off to be performed under s.80(2A). This seems to me to be not only inconsistent with the language of both s.80(2A) and s.81(3) but also with the provisions of s.80(1) and (1A) which impose the liability to credit the taxable person with output tax that was overstated in his return or an assessment made for particular accounting periods. There is no such limitation in s.81(3).

35. It seems to me highly unlikely that the amendments to s.80 were intended to alter its relationship with s.81(3). There is nothing in the language of ss.80(2A) and 81(3) to suggest otherwise. What s.81(3) gives HMRC (and has always done so) is the ability to use other VAT liabilities of the claimant as a means of discharging their net liability to pay the amount of any overpaid VAT under s.80. A liability to "pay a sum by way of VAT", which is the language of s.81(3), is not an obvious way of describing the recovery of input tax that, as in this case, was set against an output tax over-declaration in relation to what was properly an exempt supply. The set-off made by Rank in its original returns resulted in a reduction of the amount of net VAT that was wrongly paid to HMRC. But it may be a permissible way of describing the recovery by HMRC of input tax that has been wrongly deducted in relation to other accounting periods where no output tax was over-declared by the claimant and where, consequently, a VAT credit has been wrongly paid by HMRC to the taxpayer under s.25(3). In those cases the deduction of the input tax will have been credited to the taxable person and will have directly reduced the amount of output tax that would otherwise have been recovered as part of the supply chain leading up to the taxable person. In such cases HMRC would need to raise an assessment under s.73(2) in order to recover the lost VAT.

36. None of this, however, applies in my view to the recovery of input tax as part of the operation of s.80(2A) in relation to claims under s.80(1) and (1A). In those cases, s.81(3) has no application and the basis of the s.80(2A) set off must be found elsewhere.

37. This disconnect between the computation of HMRC's s.80 liability and the provisions of s.81(3) was recognised by Lewison LJ in his judgment in the *Birmingham Hippodrome* case. This concerned a claim by the theatre operators to recover (net) VAT that had been overpaid to HMRC in respect of the supply of tickets. The

supplies should have been treated as exempt. The claim to recover the overpaid VAT was made in respect of the period from January 1990 to November 1996 and was not disputed. But HMRC sought to recover overpaid VAT credits arising from input tax which had been reclaimed during 2000 and 2001 when the theatre was closed for refurbishment and no supplies of tickets had been made. Since they were out of time to make an assessment under s.73(2) to recover the overpaid VAT credits, HMRC relied on s.81(3A). The Court of Appeal held that they were entitled to set off the overpaid VAT credits under s.81(3) in discharge of their liability to repay the amount received by way of overpaid VAT in the earlier period.

38. The only judgment was given by Lewison LJ and it is relied on for what he says about equal treatment of the taxable person in the operation of s.81(3A). However, in relation to the prior question of what fell into account for the purpose of s.80(2A), it is clear that he did not regard s.81(3) as having any application particularly where the relevant liabilities related to different accounting periods: see [15].

39. Mr Macnab submitted that the claimant's *San Giorgio* rights do not extend beyond obtaining repayment of what was but should not have been paid to HMRC as VAT in the relevant accounting period covered by the claim. In relation to those periods, s.80(1) must be read as consistent with what are now Articles 179 and 206 of the Directive which impose only a liability to pay a net amount of VAT after deduction of any available input tax. Reliance on an exemption from VAT requires the taxable person to waive any right to deduct input tax and the repayment mechanism under s.80 must give effect to this: see *Sunningdale Golf Club v Commissioners of Customs and Excise* [1997] V & DR 79.

40. There is, as I have said, no dispute that HMRC are required only to repay what they receive by way of VAT, being the amounts of over-declared output tax less the amounts deducted at the time by way of input tax. The dispute is as to whether this is achieved, as HMRC contend, by treating the liability for output tax and the right to deduct input tax as what is often referred to as an inseparable whole. Or whether, as Rank contends, it requires HMRC to rely on s.81(3) and, in most cases, on s.81(3A) because HMRC will be out of time for making an assessment in respect of the input tax that was deducted.

41. I have already explained why in terms of the statute s.81(3) is not a possible candidate for this rôle. But a consideration of the structure and functioning of the VAT system in accordance with the Directive leads in my view to the same conclusion. The reference in s.80(2A) to setting any sums "under or by virtue of this Act" against the credit for output tax means no more than that the output tax credit should be reduced in exactly the same way as the taxable person accounted for or was assessed for VAT on what were then thought to be taxable supplies. Rank never paid to HMRC more than the net amount of VAT thought to be due and HMRC have no obligation under the *San Giorgio* principle to repay anything more in respect of each accounting period. The approach set out in the decision in *Sunningdale* applies as much to s.80 in its current form as it did to the original section.

42. It also follows that HMRC were not required to raise an assessment in order to achieve a set-off of any input tax credits against their s.80(1) liability to credit sums over-declared as output tax where the sums in question relate to the same accounting period nor was there any need for them to rely on s.81(3A). Their s.80 liability was

never more than the net sum for which Rank accounted and paid. This is not a case where in calculating their s.80 liabilities under any of claims (i)-(iii) HMRC also sought to obtain a further credit by reference to the input tax which was deducted by Rank in the period covered by claim (iv). HMRC accept that in order to have done that they would have needed to make an out of time assessment and rely on s.81(3A). I think that Mr Macnab accepts that had they done that then the overpaid output tax for that period would also have had to have been brought into account.

43. It is not therefore necessary to express any view about the *dicta* of Lewison LJ in the passage quoted from the *Birmingham Hippodrome* case as to whether and to what extent the EU principle of equal treatment does require HMRC to take into account any out of time claims by the taxable person when relying on s.81(3A) to bring in other VAT liabilities relating to other accounting periods. There were no such claims in issue in *Birmingham Hippodrome* nor is that an issue in this case.

44. The result is that on a correct application of s.80(2A) Rank made *San Giorgio* claims for the refund of the net amount of VAT which it accounted for and paid in the four separate periods covered by claims (i)-(iv). Of those claims, all but claim (iv) were in time and have been paid. Claim (iv) has failed because it was made out of time but its rejection on those grounds is legally permissible under EU law. In these circumstances, Rank had no entitlement under the *San Giorgio* principle to recover the net amount of claim (iv) (the £67.05m) as a set off in relation to one or more of the other accounting periods and the argument that this can be achieved via s.81(3) and (3A) (although ingenious) involves, in my view, a distortion of basic VAT accounting principles for which there is no warrant in the provisions of either s.80 or s.81.

45. For these reasons, I would dismiss the appeal. It is not therefore necessary to deal with the ground upon which both the FtT and the Upper Tribunal dismissed Rank's earlier appeal, namely the applicability of s.80(1B). But, in my view, even if the question of HMRC's s.80 liability falls to be determined by reference to s.81(3) and (3A), the net result of the accounting exercise which Rank says should have taken place but did not has not been to make Rank pay anything to HMRC. As the Upper Tribunal explain at [70] of their decision, all that would have happened is that HMRC would have paid too little in relation to claims (i)-(iii).

Lord Justice David Richards :

46. I agree.

Lord Justice Moylan :

47. I also agree.