[2023] EWHC 1572 (Admin)

Case No: CO/2712/2020

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 26 June 2023

Before :

Mr Justice Lavender

- -

Between :

THE KING
on the application of
REALREED LIMITED

Claimant

- and -

COMMISSIONERS FOR HIS MAJESTY'S
REVENUE AND CUSTOMS

Defendants

CHELSEA CLOISTERS SERVICES LIMITED

Interested Party

- -
- -

Kieron Beal KC and Daniel Cashman (instructed by **Levy & Levy**) for the **Claimant** and the **Interested Party**
Isabel McArdle (instructed by the **General Counsel and Solicitor** to the Defendants) for the **Defendants**

Hearing dates: 25 and 26 April 2023

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Approved Judgment

Mr Justice Lavender:

(1) Introduction

1. The Claimant has since 1989 owned the freehold of Chelsea Cloisters, a block of over 600 flats in Sloane Avenue in London. The majority of the flats in Chelsea Cloisters are let on long leases, as to which no issue arises, but since 1989 the Claimant has also provided serviced accommodation in certain flats ("the Retained Flats"), which were over 200 in number in 2019. Until 2019 the Claimant accounted for value added tax ("VAT") on the basis that its supplies of accommodation in the Retained Flats ("the Relevant Supplies") were exempt from VAT.

2. On 14 February 2019 the Defendants decided ("the Liability Decision") that the Claimant was making taxable, rather than exempt, supplies of accommodation in the Retained Flats. The Liability Decision is subject to an appeal to the First-tier Tribunal (Tax Chamber), which has yet to be heard.

3. Between 30 April 2019 and 14 February 2020, on the basis of the Liability Decision, the Defendants made assessments ("the Assessments") for unpaid VAT (in the amount of over £4.8million) on the Relevant Supplies for the period from 1 February 2015 to 31 January 2019. Meanwhile, on 19 July 2019 the Claimant requested a review of the Liability Decision and made what the Defendants treated as a complaint about the Assessments, asserting that the Claimant had a legitimate expectation which could not fairly be resiled from by the Defendants except with prospective effect. The complaint was dismissed on 10 January 2020. The Claimant requested a review on 25 March 2020, but the review resulted in the Assessments being upheld on 5 May 2020.

4. In this claim, the Claimant challenges the decision to uphold the dismissal of its complaint. In effect, however, the parties have treated this claim as a challenge to the Assessments. Three grounds for judicial review are advanced. The Claimant contends that the Defendants' decision to issue the Assessments:

   (1) was unreasonable, conspicuously unfair and/or vitiated by the unlawful frustration of a legitimate expectation held by the Claimant;

   (2) was contrary to general principles of EU law; and/or

   (3) disproportionately infringed the Claimant's rights under Article 1 of the Protocol 1 to the European Convention on Human Rights.

5. The Defendants contend that the making of the Assessments was a legitimate exercise in tax collection and that:

   (1) the Claimant had no legitimate expectation that the Relevant Supplies would be treated as exempt from VAT; alternatively

   (2) any legitimate expectation was defeated by:

      (a) a failure by the Claimant to "put all its cards on the table"; and/or

      (b) a material change in circumstances; and

(3) the other ways in which the Claimant puts its case add nothing to the claim based on an alleged legitimate expectation.

6. It is necessary to say something about the relationship between this claim and the Claimant's appeal to the First-tier Tribunal, including any subsequent appeals against the First-tier Tribunal's decision (together, "the Liability Appeal"):

(1) If the Liability Appeal results in the Liability Decision being overturned, then it is common ground that the Assessments should be set aside. It follows that the present claim is only necessary if the Liability Appeal fails. The Claimant therefore brings this claim on the footing that the Liability Decision is correct.

(2) The Defendants twice applied for an order staying this claim until the Liability Appeal had been determined, but those applications were refused by Jay J, when he granted permission to apply for judicial review on 15 January 2021, and by Foster J, in her order of 15 June 2022.

(3) The Defendants submitted that I should not make any determination on any issue which is disputed in the Liability Appeal.

7. I will deal later in this judgment with the practical problem which arises because I have been asked to determine this claim before the Liability Appeal has been determined.

(2) Relevant VAT Legislation and Guidance

8. Although it is not for me to decide whether the Liability Decision was correct, it is necessary, in order to understand the issues in this claim, to look at the relevant VAT legislation and guidance. It was not suggested that there was any material change in the relevant VAT law during the period from 1989 to 2019. Council Directive 2006/112/EC of 28 November 2006 on the common system of VAT as the source of EU legislation on VAT ("the Principal VAT Directive") codified earlier Directives on VAT.

(2)(a) The Relevant Exemption and the Relevant Exclusion

9. Article 2(1)(c) of the Principal VAT Directive stated that VAT shall be due on the supply of services for consideration within the territory of a Member State by a taxable person acting as such.

10. Article 9(1) stated that:

> ""Taxable person' shall mean any person who, independently, carries out in any place any economic activity, whatever the purpose or results of that activity.
>
> … The exploitation of tangible or intangible property for the purposes of obtaining income therefrom on a continuing basis shall in particular be regarded as an economic activity."

11. Article 24(1) defined a supply of services as "any transaction which does not constitute a supply of goods".

12. Article 135(1) provided for a series of exemptions from VAT for certain supplies of land or real property, including the following ("the Relevant Exemption"):

> "1. Member States shall exempt the following transactions:
>
> …
>
> (l) the leasing or letting of immovable property;"

13. However, this was subject to Article 135(2), which provided for exclusions from the Relevant Exemption, including the following ("the Relevant Exclusion"):

> "The following shall be excluded from the exemption provided for in point (l) of paragraph 1:
>
> (a) the provision of accommodation, as defined in the laws of the Member States, in the hotel sector or in sectors with a similar function, including the provision of accommodation in holiday camps or on sites developed for use as camping sites;"

14. Section 31 of, and Schedule 9 to, the Value Added Tax Act 1994 ("the VAT Act") gave effect, inter alia, to the Relevant Exemption and the Relevant Exclusion. Section 31(1) provided that:

> "A supply of goods or services is an exempt supply if it is of a description for the time being specified in Schedule 9."

15. Item 1 in group 1 of Schedule 9 provided, inter alia, as follows:

> "The grant of any interest in or right over land or of any licence to occupy land, or, in relation to land in Scotland, any personal right to call for or be granted any such interest or right, other than—
>
> ...
>
> (d) the provision in an hotel, inn, boarding house or similar establishment of sleeping accommodation or of accommodation in rooms which are provided in conjunction with sleeping accommodation or for the purpose of a supply of catering;"

16. Note 9 to item 1 gave the following definition of "similar establishment":

> "'Similar establishment' includes premises in which there is provided furnished sleeping accommodation, whether with or without the provision of board or facilities for the preparation of food, which are used by or held out as being suitable for use by visitors or travellers."

17. The essence of the Liability Decision is that the Relevant Supplies fell within the Relevant Exclusion, were therefore excluded from the Relevant Exemption and were consequently subject to VAT, either at the standard rate for the first 28 days or, thereafter, subject to paragraph 9 of Schedule 6 to the VAT Act, which provides as follows:

> "(1) This paragraph applies where a supply of services consists in the provision of accommodation falling within paragraph (d) of Item 1 of Group 1 in Schedule 9 and—
>
> (a) that provision is made to an individual for a period exceeding 4 weeks; and
>
> (b) throughout that period the accommodation is provided for the use of the individual either alone or together with one or more other persons who occupy the accommodation with him otherwise than at their own expense (whether incurred directly or indirectly).
>
> (2) Where this paragraph applies—
>
> (a) the value of so much of the supply as is in excess of 4 weeks shall be taken to be reduced to such part thereof as is attributable to facilities other than the right to occupy the accommodation; and
>
> (b) that part shall be taken to be not less than 20 per cent."

(2)(b) Returns, Incorrect Returns and Assessments

18. VAT is a self-assessed tax. Taxpayers are required by the VAT Act to make returns and the correctness of the returns filed is the responsibility of the taxpayer. Section 73(1) of the VAT Act provides as follows:

> "Where a person has failed to make any returns required under this Act (or under any provision repealed by this Act) or to keep any documents and afford the facilities necessary to verify such returns or where it appears to the Commissioners that such returns are incomplete or incorrect, they may assess the amount of VAT due from him to the best of their judgment and notify it to him."

19. The word "may" indicates that the power to assess is discretionary and therefore subject to judicial review.

20. Section 77(1) of the VAT Act provides as follows:

> "Subject to the following provisions of this section, an assessment under section 73 or 76 shall not be made—
>
> (a) more than 4 years after the end of the prescribed accounting period or importation concerned, …"

21. It is not suggested that any of the other provisions of section 77 apply in the present case. That is why the Assessments covered the 4-year period from 1 February 2015 to 31 January 2019, but no earlier, despite the fact that the Claimant had been making the Relevant Supplies since 1989.

(2)(c) The Deductible Proportion of Input Tax

22. A taxpayer has the right to deduct from the "output" VAT due from him any "input" tax, i.e. VAT which the taxpayer has paid, or is due to pay, on supplies to him of goods or services used or to be used for the purpose of any business carried on or to be carried on by him. The Principal VAT Directive, the VAT Act and the VAT

Regulations make provision for the apportionment of VAT paid, or due to be paid, by a taxpayer in respect of supplies made to the taxpayer and used or to be used in part for the purpose of transactions which are subject to VAT and in part for the purpose of transactions which are not subject to VAT. It is unnecessary to consider the details of this apportionment, save that it required what were often referred to as "partial exemption calculations".

(2)(d) The Non-Statutory Clearance Service

23. The Defendants have since 2003 operated a scheme (known since 2008 as the Non-Statutory Clearance Service) under which taxpayers can ask for guidance or advice from the Defendants and the Defendants may give written advice on which the taxpayer can rely (known from 2003 to 2008 as a VAT Ruling).

(3) Background

(3)(a) Witnesses

24. This case involves consideration of events which took place up to 34 years ago. Although no witness was required to give oral evidence, certain matters were in dispute. It is appropriate, therefore, to begin by noting which witnesses provided witness statements.

25. The Claimant relied on statements from:

    (1) Dr Christopher Moran. Although he did not give details of the ownership structure, he described himself as the owner of Chelsea Cloisters for over three decades. He is also the chairman and CEO of Chesterlodge Limited, of which the Claimant and the Interested Party are subsidiaries.

    (2) Michael Edward Cutting. He is a retired chartered accountant. From June 1989 to December 2014 he was the finance director, and subsequently managing director, of the Claimant, the Interested Party and the other subsidiaries of Chesterlodge Limited.

    (3) Colin James Reilly. He has worked for the Claimant since 9 May 2016. He has been the finance director of the Claimant and the Interested Party since 5 February 2019.

    (4) Jon Claypole. He was until 25 July 2019 a partner in Mazars LLP and has since then been a partner in BDO LLP. He has had, with Jonathan Adam Levy, conduct of this matter on behalf of the Claimant.

    (5) Jonathan Adam Levy. He is the solicitor instructed on behalf of the Claimant in these proceedings.

    (6) Jonathan Glyn Woodhouse. He is a chartered tax adviser with the Chartered Institute of Taxation and a partner in BDO LLP, specialising in VAT. He was a VAT officer working for the Defendants until 1997.

26. The Defendant relied on statements from:

(1) Melanie Jenman. She is an officer of the Defendants and worked as a VAT compliance officer from 1997 to 2020. However, she was not involved in any of the investigations into the Claimant before 2017. She was the officer who made the Liability Decision.

(2) Heather Elizabeth Haslam. She works as a lawyer for the General Counsel and Solicitor to the Defendants and has conduct of the judicial review proceedings on the Defendants' behalf.

27. Ms Haslam has explained the efforts made by the Defendants to obtain evidence from Peter Rubenstein, a retired employee of the Defendants who visited the Claimant's premises on 21 July 2005. Although Mr Rubenstein initially indicated that he was willing to provide a witness statement, he subsequently said that he was unwilling to do so, saying that he was extremely busy and that the passage of time meant that he could not recall what was said during the visit in 2005.

(3)(b) The Claimant's Business

28. The Retained Flats were the Claimant's principal source of income. Its other main source of income was the rent from certain commercial premises in Chelsea Cloisters ("the Commercial Premises"), on which it charged and paid VAT.

29. Throughout the relevant period, the arrangement between the Claimant and the Interested Party in relation to the Retained Flats was that:

(1) The Claimant provided accommodation in the Retained Flats.

(2) The Interested Party provided cleaning and other services (such as dry-cleaning, Wi-Fi, key replacement, luggage storage and linen changes) to the occupiers of the Retained Flats (and, it seems, to the occupiers of some of the other flats in Chelsea Cloisters).

(3) The Interested Party provided two invoices to each of the occupiers of the Retained Flats:

(a) Acting as agent for the Claimant, the Interested Party provided an invoice for the cost of the accommodation. No VAT was charged on the amount of this invoice. At the end of each month, the Interested Party accounted to the Claimant for the total amount received in respect of these invoices in that month.

(b) Acting in its own right, the Interested Party provided an invoice for the services which it had provided. VAT was charged on the amount of these invoices.

30. I use the terms "occupier" and "cost of the accommodation" as neutral terms, without expressing a view whether any or all of the occupiers were, as Mr Cutting characterised them, tenants paying rent. (Mr Reilly described them variously as guests, tenants and occupiers.)

31. Initially, occupiers were required to sign assured shorthold tenancy agreements ("AST agreements"), although these would frequently be agreed with a break clause

exercisable by the occupier at little or short notice. However, it is acknowledged by Mr Cutting and Dr Moran that from about 2001 fewer and fewer occupiers signed AST agreements.

32. According to a fax dated 24 April 1990 from Cathy O'Hagan of "Chelsea Cloisters" to a man from Argentina who had made an enquiry about accommodation:

> "Our minimum letting period is 4 weeks and we let to companies only. The Tenancy Agreement should be signed in advance – by the Company."

33. No-one gave evidence to the effect that this was incorrect as a statement of the Claimant's policy in 1990. However, Mr Cutting said that, as at 2005, some occupiers would stay for only a single night and others would stay for lengthier periods. Mr Reilly said that the composition of the Claimant's customer base has changed gradually over time. The proportion of stays which were for 28 days or more was: 65% in 2007-08; 49.8% in 2014-15; and 38.5% in 2018-19.

34. As for marketing, Dr Moran's evidence was that the business initially relied heavily on direct marketing. There was a period when the business received substantial bookings from human resources teams, particularly for large City institutions, and/or relocation agents, who would demand a commission. However, he said that that form of booking all but disappeared with the advent of the internet.

35. A brochure produced by the Claimant in 2005 contained a number of statements which the Defendants submitted are relevant to the question whether the Relevant Supplies fell within the Relevant Exclusion, on the basis that they show that the Retained Flats were (in the words of note 9 to item 1 in group 1 of Schedule 9 to the VAT Act) "used by or held out as being suitable for use by visitors or travellers":

    (1) "Our Japanese and Far East Department handle enquiries from large corporations through to the leisure traveller …"

    (2) "For leisure and business travellers, London provides … All easily accessible from Chelsea Cloisters."

    (3) "Ideal for short and long term business, secondments, corporate relocation or leisure, Chelsea Cloisters …"

    (4) "We welcome every year thousands of professional and leisure travellers from around the world, …"

36. By 2005 the Claimant had its own website, through which it took bookings, and also used booking agent websites, such as Euracom. Other bookings came from walk-ins and repeat customers. After 2005, the Claimant made more use of internet booking agencies, such as booking.com, hotels.com and expedia.com. Dr Moran accepted in his evidence that the advent of the internet has made the accommodation in the Retained Flats more accessible to short-term and/or leisure travellers. Those agencies also list hotel and other types of accommodation on their websites, although Chelsea Cloisters is only listed under "apartments" and not under "hotels".

(3)(c) The Claimant's Decision that the Relevant Exclusion Applied

37. From 1989, the Claimant completed its VAT returns on the basis that the Relevant Supplies were exempt from VAT. However, none of the Claimant's witnesses addressed the process by which the Claimant decided that it was appropriate to treat the Relevant Supplies in that way. Nor did they address any understanding which the Claimant had as to the conditions on which that exemption was based. They did not, for instance, produce any advice which the Claimant may have received, nor any internal notes or memos which may have been produced, dealing with these questions.

38. Nor did the Claimant's witnesses give any evidence of any process by which the Claimant may have reconsidered from time to time whether it remained appropriate to treat the Relevant Supplies as exempt from VAT. Again, they did not produce any advice which the Claimant may have received, nor any internal notes or memos which may have been produced, dealing with that question.

(3)(d) The VAT Inspections: Contemporary Records

39. The Defendants' officers inspected the Claimant's business in 1992, 1993, 1995 and 2005 and inspected the Interested Party's business in 1985, 1988, 1990, 1994, 1995, 2005 and 2014. I set out first what the contemporary documents show about these inspections. I will deal later with the disputes about what the Defendants' officers ought to have done, and what it is to be inferred that they did, in preparation for and during these inspections.

(3)(d)(i) The Interested Party: 1985, 1988 and 1990 Inspections

40. The inspections of the Interested Party in 1985 and 1988 pre-dated the Claimant's formation and its acquisition of Chelsea Cloisters. It was not suggested that they were of any significance.

41. The only evidence before me which may have related to the 1990 inspection of the Interested Party (since it was disclosed by the Defendants) was the fax of 24 April 1990 to which I have already referred.

(3)(d)(ii) The Claimant: 1992 Inspection

42. One of the Defendants' officers, W Richmond, visited the Claimant on 2 July 1992 and wrote to the Claimant on 9 July 1992. I was shown the officer's hand-written notes and the letter, which was addressed to a Ms Thomas. It is clear from those documents that the officer was well aware that the Claimant was making supplies which it considered to be exempt from VAT. Indeed, the officer's partial exemption calculations showed that the Relevant Supplies made up just under 60% of the Claimant's income. The officer's notes show that the officer carried out a number of checks and examinations, but they do not evidence any consideration of the question whether the Relevant Supplies were properly being treated as exempt from VAT.

43. In the letter, the officer said that an assessment would be sent to the Claimant because the officer had disallowed a proportion of two invoices, one of which was for audit fees, on the basis that the goods and services supplied were used for the purposes of the whole of the Claimant's business. The letter included the officer's partial exemption calculations, which were made on the basis that the Relevant Supplies were exempt from VAT. I assume that an assessment was sent to the Claimant.

(3)(d)(iii) The Claimant: 1993 Inspection

44. Another of the Defendants' officers, Mrs KV Barbosa, visited the Claimant on 12 October 1993 and wrote to the Claimant on 14 October 1993. As with the 1992 visit, I was shown Mrs Barbosa's notes and her letter. As in 1992, it is clear from those documents that Mrs Barbosa was well aware that the Claimant was making supplies which it considered to be exempt from VAT. Her partial exemption calculations were again made on the basis that the Relevant Supplies were exempt from VAT. They showed that the Relevant Supplies made up about 87% of the Claimant's income in the year to 30 April 1992. However, as in 1992, Mrs Barbosa's notes do not evidence any consideration of the question whether the Relevant Supplies were properly being treated as exempt from VAT.

45. In her letter, Mrs Barbosa said that an assessment would be sent to the Claimant because she had recalculated, using the figures for the full year, the deductible proportion of the input tax paid on the invoice for audit fees which had been the subject of the assessment in 1992. I assume that an assessment was sent to the Claimant.

(3)(d)(iv) The Interested Party: 1994 and 1995 Inspections

46. I was shown the notes made by one of the Defendants' officers on two visits to the Interested Party, the first of which is undated and the second was on 20 January 1995. The officer noted that the Interested Party was collecting rent for some of the Claimant's properties.

(3)(d)(v) The Claimant: 1995 Inspection

47. One of the Defendant's officers, Martin Balanow, visited the Claimant on 23 August 1995 and wrote to the Claimant in September 1995. I was shown this letter and a subsequent letter of his. As in 1992 and 1993, Mr Balanow said that he would raise an assessment (as I assume he did) which dealt primarily with correcting the Claimant's calculation of the deductible proportion of the input tax paid on a certain invoice. For this purpose, he made a partial exemption calculation on the basis that the Relevant Supplies were exempt from VAT. This showed that the Relevant Supplies made up about 86% of the Claimant's income in the year to 30 April 1995.

(3)(d)(vi) The Interested Party: 1999 Inspection

48. Simon Koefman was the officer who visited the Interested Party on 20 July 1999. I was shown his notes and his letter of 20 July 1999. His notes record that the Interested Party occasionally received rental income from tenants and said that "this is in effect (exempt) rental income which is passed on to Realreed."

(3)(d)(vii) The Interested Party: 2005 Inspection

49. Busola Adeojo was the officer who visited the Interested Party on 30 June 2005. I was shown a letter sent in advance of the visit and the officer's brief notes of the visit. These note that one of the services provided by the Interested Party was rent collection.

(3)(d)(viii) The Claimant: 2005 Inspection

50. Peter Rubenstein was the officer who visited the Claimant on 21 July 2005. I was shown a letter sent on 28 June 2005 in advance of his visit, Mr Rubenstein's typed notes and his follow-up letter of 22 July 2005. Both letters were addressed to John Simpson, who was the Group Accountant for the Claimant and the other subsidiaries of Chesterlodge Limited and who reported to Mr Cutting.

51. The letter of 28 June 2005 asked for various records to be made available during the visit, i.e. annual accounts, the VAT account, all books of account, sales and purchase invoices and "All supporting documentation e.g. contracts, correspondence etc". The letter also stated:

> "During the visit, the officer will review your business activities and examine selected, relevant business records. He/she will inform you of any findings or recommendation arising from your visit and deal with any queries you may have. Please note that because the officer will not normally have time to examine every aspect of your business, you should not assume, at the conclusion of the visit, that the accuracy of **all** of your business records has been checked and approved by the officer."

52. Mr Rubenstein's notes identify various checks which he carried out. He noted that most of the Claimant's supplies were exempt and he carried out partial exemption calculations for the four quarters to April 2005. The Claimant's own calculation, which it appears that Mr Rubenstein found to be correct, was that it received £3,175,725.30 in income from the Retained Flats in the year to 30 April 2005, but only £366,713.46 in rent from the Commercial Properties, and therefore the Relevant Supplies amounted to over 89% of the Claimant's income. Nevertheless, Mr Rubenstein's notes contain no indication that he investigated the question whether the Relevant Supplies were properly being treated as exempt from VAT, although he did say that:

> "I also checked sample invoices for the exempt supplies that none were taxable. They were all exempt."

53. Mr Rubenstein's notes contain no indication that he was told:

(1) that the Claimant's policy of requiring occupiers to sign AST agreements had changed; or

(2) how the Claimant was marketing the Retained Flats.

54. Mr Rubenstein's letter of 22 July 2005 stated as follows:

> "Based on my visit there are a couple of outstanding matters as mentioned on the day and the visit can then be regarded as closed.
>
> There were two invoices, which you claimed as related to your taxable supplies, which were in fact related to your exempt supplies. The first was from BPS for business cards dated 8 February 2005, for £12.08. … The second was form Flagship e-commerce, dated 14 December 2004 for £17.20, … Please adjust your VAT account and VAT return for the 07/05 period to

> pay this amount. I also notice you still owe us £7.46 from previous interest charged on a prior assessment, please pay this as well.
>
> Should you have any queries relating to the visit do not hesitate to contact me. For any general questions please contact the National Advice Service."

55. The invoice from Flagship e-commerce was for web-hosting services, which was at least an indication to Mr Rubenstein that the Claimant had a website. I was shown what was said to be a print-out of the Claimant's website in 2005.

(3)(d)(ix) Interested Party: 2014 Inspection

56. Richard Prout was the officer who visited the Interested Party on, it appears, 11 March 2014. I was shown the letter sent on 30 January 2014 in advance of the visit, his typed notes and his email of 1 April 2014 to Mr Cutting. The notes focus on the garage operated by the Interested Party, although an issue arose as to the treatment of certain input tax which the Interested Party treated as relating to itself and the Claimant in the proportion 10%/90%.

(3)(d)(x) The Claimant and the Interested Party: 2017 Inspections

57. By letters dated 31 March 2017 the Defendant commenced the investigation into the Claimant and the Interested Party which led to the Liability Decision. This was an "integrated cross-tax enquiry" and was not limited to VAT.

(3)(e) Other Evidence about the Inspections

58. Of the witnesses who made statements, Mr Cutting was the only one to play any part in any of the VAT inspections. In his witness statement:

    (1) He said that he recalled a brief discussion with the VAT officer during the 2005 inspection of the Interested Party, but he did not give details of anything said.

    (2) In relation to the 2005 inspection of the Claimant he gave an account of his practice at the time, which was that: he or Mr Simpson would have a brief discussion with the officer and answer any questions asked of them; they would provide copies of various documents requested and leave the officer to review the documents and address any queries to Mr Simpson in the first instance; and at the end of the visit they would address any particular queries and discuss any next steps.

    (3) As to the documents provided to Mr Rubenstein, he said that they would have provided: the signed financial statements; the Claimant's full VAT file; the cashbooks; the purchase invoices; the bank statements; and any further documents requested by the officer on the day, although Mr Cutting did not recall whether any further documents were requested.

59. Ms Jenman was in 2005 a VAT Compliance Officer at a similar grade to Mr Rubenstein. She gave an account of the type of VAT visits which were being conducted in 2005 which was not inconsistent with the contemporary records which I have seen. She said, in particular, that:

> "VAT visits were not full audits to check for compliance with all relevant aspects of VAT law which might apply."

60. Mr Woodhouse used to be a VAT officer, but he left HMRC in 1997. In preparing his witness statement, he spoke with unidentified colleagues at BDO LLP who had been VAT officers in 2005. He also relied on an HMRC internal guidance manual from 2005, entitled *Assurance of Small and Medium Enterprises*. In his statement, he said that an officer conducting a VAT inspection would have conducted a fuller investigation than that described by Ms Jenman. In particular, he said that:

(1) He would have expected the treatment of the exempt supply of accommodation to be one of the main risks which the officer should have prepared for prior to the inspection.

(2) He would have expected detailed consideration of the exempt supply of accommodation to be a key discussion point with the taxpayer, with the officer establishing the facts, discussing in detail why the accommodation provided was exempt and requesting evidence such as sales invoices, a physical "walk-though" of the accommodation itself, marketing materials and samples of agreements with occupiers.

(3) It would be highly unusual not to note the taxpayer's activities in detail and to consider whether these constituted a risk, especially where significant values of exempt or zero-rated transactions were made.

(4) It was inconceivable to him to suggest that the inspection did not consider the relevant laws, policy and evidence in respect of a trader's business activities to confirm the correct application of the VAT rules.

61. Despite Mr Woodhouse's evidence as to what he would have expected on a VAT inspection, I note that there was no evidence from the Claimant, and no evidence in the contemporary records, that the Defendants' officers ever discussed in detail with the Claimant's representatives why the accommodation provided in the Retained Flats was exempt from VAT.

(3)(f) The Claimant's Response to the Inspections

62. Mr Cutting did not address in his statement his response to the 1992, 1993 and 1995 inspections. In relation to the 2005 inspection, he said as follows, having referred to the Claimant's treatment of the Relevant Supplies:

> "The Officer raised no concerns or queries about such VAT treatment – to the contrary, he positively endorsed it, by distinguishing between [the Claimant's] exempt and non-exempt supplies – and his approach was therefore entirely in line with my understanding that we were following the correct approach for the VAT treatment of [the Claimant]."

63. In his first witness statement, Dr Moran said that he was not involved in the day-to-day management of tax affairs, but he was aware from discussion with Mr Cutting over the years that the Claimant's provision of residential accommodation was treated as tax exempt, that the Claimant and the Interested Party were subject to regular inspections by HMRC and that no substantial concern was ever raised by HMRC with the Claimant's VAT treatment. He said that, had the Claimant been told that it should have been charging VAT:

> "… we may well have sought to review and appeal that decision, but we would then have started charging VAT with immediate effect (precisely as we did from February 2019 when given the liability ruling in this case)."

64. Dr Moran added:

> "Had HMRC indicated back in 2015 that it would not accept the exempt status of [the Claimant's] provision of accommodation, we would have taken a different approach to the business. We would have made one of two changes. One option is, as outlined above, that we would have charged our tenants VAT on their accommodation costs (as we are now currently doing, without prejudice to our contention that it ought not to be so charged). Another option is that we would have found out from HMRC what they considered to be their "redlines" as to why they were no longer content to treat [the Claimant] as exempt, and we would have made whatever adjustments to the business were required to remain treated as exempt."

65. Although he said that the Claimant had in 2019 started charging VAT on the cost of accommodation in the Retained Flats, Dr Moran did not say whether this had involved any increase in the total price payable by occupants. Nor did Mr Reilly.

66. Mr Reilly's evidence was that, when he started work for the Claimant, Dr Moran explained to him that HMRC had always accepted that the Claimant had both exempt and VAT-able supplies and that this was also evident from the records from previous inspections, which he reviewed.

(4) Ground 1: Substantive Unfairness

67. The Claimant's primary case was that the Assessments were unlawful because, in all the circumstances, it was conspicuously unfair, amounting to an abuse of power, for the Defendants to make them. The Claimant relied in particular on *In re Preston* [1986] 1 A.C. 835 ("*In re Preston*"), at 297H-298C and 298A-B (per Lord Scarman) and 310G and 312G-313B (per Lord Templeman), *R v Inland Revenue Commissioners, ex parte M.F.K. Underwriting Agents Ltd* [1990] 1 W.L.R. 1545 ("*M.F.K.*"), at 1568D-1570B (per Bingham LJ) and 1574H-1575B (per Judge J) and *R v Inland Revenue Commissioners, ex parte Unilever Plc* [1996] STC 681 ("*Unilever*"), at 690e-691h (per Sir Thomas Bingham MR) and 694h-696c (per Simon Brown LJ).

68. The Defendants denied that it was either unfair or an abuse of power to make the Assessments and also contended that substantive unfairness, whether or not described as conspicuous unfairness or an abuse of power, was not a ground for judicial review. The Defendants relied in this latter respect on paragraphs 31 to 41 of the judgment of

Lord Carnwath (with whom the other justices agreed) in *R (Gallaher Group Ltd) v Competition and Markets Authority* [2019] AC 96 ("*Gallaher*").

69. In *Gallaher*, Lord Carnwath considered both *In re Preston* and *Unilever* at some length. Before doing so, he said as follows in paragraph 32 of his judgment:

> "Simple unfairness as such is not a ground for judicial review. This was made clear by Lord Diplock in *R v Inland Revenue Comrs, Ex p National Federation of Self-Employed and Small Businesses Ltd* [1982] AC 617, 637:
>
> > "judicial review is available only as a remedy for conduct of a public officer or authority which is ultra vires or unlawful, but not for acts done lawfully in the exercise of an administrative discretion which are complained of *only as being unfair* or *unwise* …" (Emphasis added.)"

70. After considering *In re Preston* and *Unilever*, Lord Carnwath said as follows in paragraphs 40 and 41 of his judgment:

> "40. I have quoted at some length from these judgments to show how misleading it can be to take out of context a single expression, such as "conspicuous unfairness", and attempt to elevate it into a free-standing principle of law. The decision in *Ex p Unilever plc* [1996] STC 681 was unremarkable on its unusual facts, but the reasoning reflects the case law as it then stood. Surprisingly, it does not seem to have been strongly argued (as it surely would be today) that a sufficient representation could be implied from the revenue's consistent practice over 20 years: see eg *De Smith's Judicial Review*, para 12-021. It seems clear in any event from the context that Simon Brown LJ was not proposing "conspicuous unfairness" as a definitive test of illegality, any more than his contrast with conduct characterised as "a bit rich". They were simply expressions used to emphasise the extreme nature of the Revenue's conduct, as related to Lord Diplock's test. In modern terms, and with respect to Lord Diplock, "irrationality" as a ground of review can surely hold its own without the underpinning of such elusive and subjective concepts as judicial "outrage" (whether by reference to logical or moral standards).
>
> 41. In summary, procedural unfairness is well-established and well-understood. Substantive unfairness on the other hand—or, in Lord Dyson MR's words [2016] Bus LR 1200, para 53, "whether there has been unfairness on the part of the authority having regard to all the circumstances"—is not a distinct legal criterion. Nor is it made so by the addition of terms such as "conspicuous" or "abuse of power". Such language adds nothing to the ordinary principles of judicial review, notably in the present context irrationality and legitimate expectation. It is by reference to those principles that cases such as the present must be judged."

71. Miss McArdle submitted that these paragraphs were part of the ratio of the decision in *Gallaher*. Mr Beal did not seek to persuade me otherwise. I consider that I am bound by the decision in *Gallaher* to hold that substantive unfairness is not a ground for judicial review. That is sufficient to dispose of the Claimant's primary case on

ground 1. However, I should add that, for reasons which will become apparent later in this judgment, I do not in any event consider that the making of the Assessments was unfair.

(5) Ground 1: Legitimate Expectation

(5)(a) Legitimate Expectation: The Issues

72. In the alternative, the Claimant contended that it was unlawful for the Defendants to make the Assessments because, in all the circumstances, the Claimant had a legitimate expectation "that it was correct to continue to treat the relevant supplies as exempt from VAT".

73. The Defendants contended that:

(1) They had never made a representation to that effect.

(2) The Claimant did not (in the words of Bingham LJ in *M.F.K.* at 1569E) "put all its cards face upwards on the table" in 2005.

(3) There were material changes to the Claimant's business after the 2005 inspection.

(4) The Claimant had not relied on the alleged representation to its detriment.

(5) It would not be unfair for the Defendants to depart from any legitimate expectation.

74. The Claimant disputed all of these matters:

(1) The Claimant submitted that the Defendants had repeatedly confirmed that the Relevant Supplies were exempt and had even raised assessments which were premised on the Relevant Supplies being exempt.

(2) The Claimant accepted that it could not rely on the alleged legitimate expectation unless it had "put all its cards face upwards on the table", but the Claimant contended that it had done so.

(3) The Claimant also accepted that it could not rely on the alleged legitimate expectation if there had been a material change of circumstance, but the Claimant denied that there had been any such change.

(4) The Claimant denied that it was necessary for it to show that it had relied to its detriment on the alleged legitimate expectation, but, in any event, the Claimant contended that it had done so.

(5) The Claimant accepted that the Defendants were entitled to conclude (if, as I must assume for the purpose of these proceedings, they were right to conclude) that the Relevant Supplies were not exempt from VAT in 2019, but the Claimant contended that it was manifestly unfair for the Defendants to resile from the alleged legitimate expectation with retrospective effect.

(5)(b) Legitimate Expectation: A Practical Problem

75. I expressed concern during the hearing about the question whether I could properly deal with all of the issues in this case before the determination by the First-tier Tribunal of the Liability Appeal. This concern applies in particular to the issues: (a) whether the Claimant put all its cards face upwards on the table; and (b) whether there was a material change in circumstance.

76. The problem arises because I have been asked to decide this case on the hypothetical basis that the Liability Decision was correct, but without there being any agreement as to why the Liability Decision was correct. There are a number of different bases on which the Liability Decision might be held to have been correct. For instance:

    (1) The Claimant's case is that the essence of its business did not change between 1989 and 2019. If that is right, then it may be that the result of the Liability Appeal will be that the Relevant Supplies were never exempt from VAT.

    (2) An alternative, and perhaps more likely, possibility is that it may be concluded in the Liability Appeal that the Relevant Supplies were exempt in 1989, but ceased to be so at some point in the 30 years thereafter, on a date yet to be determined and for a reason or reasons yet to be determined. Potentially significant changes (as to which I express no opinion) include (but are not limited to):

        (a) The Claimant's departure from the policy expressed in the fax of 24 April 1990.

        (b) The Claimant's departure in about 2001 from its policy of requiring all occupiers of the Retained Flats to sign AST agreements.

        (c) The Claimant's marketing of the Retained Flats, as exemplified in its 2005 brochure, as suitable for leisure travellers.

        (d) The Claimant's use (or increasing use) of internet booking agencies, on which Chelsea Cloisters, although not designated as a hotel, was marketed alongside hotels.

77. It follows that I am not yet in a position to determine: (a) whether or not the Claimant put all its cards face upwards on the table at the material stage and in the material respects; or (b) whether there was a material change of circumstance. I make no decision on those issues in this judgment. Had I considered it necessary for me to determine either or both of those issues in order to decide this case, then I would have postponed my determination of them until the First-tier Tribunal had made its decision on the Liability Appeal. However, I have concluded that that is not necessary.

(5)(c) The Nature of the Alleged Legitimate Expectation

78. As pleaded in the Claimant's statement of facts and grounds, the alleged legitimate expectation was that "it was correct to continue to treat the relevant supplies as exempt from VAT". This expectation is said to have applied not merely to the Relevant Supplies under consideration when the Defendants' officer inspected the

Claimant (say, in 2005), but, unless there was a material change in circumstances, to all future Relevant Supplies made by the Claimant until such time as the Defendants realised the correct position.

79. Moreover, given that I am asked to assume that the Liability Decision was correct, and given that it is the Claimant's case that there was no material change in circumstances at any stage, the alleged legitimate expectation is said to apply even though in truth it was incorrect for the Claimant to treat the Relevant Supplies as exempt from VAT.

80. As I have already noted, the Claimant does not contend that the alleged legitimate expectation was to apply indefinitely. It accepts that the Defendants were entitled to realise, and to give effect to, the correct treatment of the Relevant Supplies. If the Liability Decision is correct, then that is what the Defendants did in 2019.

81. The significance of the alleged legitimate expectation is that it is said to have made it unfair, and therefore unreasonable in the *Wednesbury* sense, for the Defendants to seek to give retrospective effect to the Liability Decision and to require the Claimant to pay the VAT due if it accounted correctly for the Relevant Supplies in the years from 2015 to 2019. In other words, the effect of the alleged legitimate expectation is to prevent the Defendants from exercising their statutory power to make assessments in respect of incorrect returns made in the 4 years preceding the assessment.

82. It is relevant to note in this context what Rose LJ said in paragraph 51 of her judgment (with which Sir Bernard Rix and Underhill LJ agreed) in *R (Aozora GMAC) v HMRC* [2020] 1 All ER 803 ("*Aozora*"):

> "I do not accept Mr Ewart's contention that *Gallaher* removes the need for the claimant who is relying on a representation or promise to show a high degree of unfairness in order to establish a legitimate expectation that HMRC will keep to that representation even if they later decide that their view of the law was wrong. Recent cases in which judicial review proceedings have been brought seeking to establish a substantive right arising from a representation made by HMRC in circumstances similar to the present have emphasised the high degree of unfairness that must be demonstrated in order for such a claim to succeed. I agree with the statement of the law by Simler J when she said in *Dixons*:
>
> > "62. It is well-established that it is open to a public body to change a decision if it has acted under a mistake or adopted a mistaken view. However, it will not be permitted to do so where there is sufficient unfairness to justify preventing it from doing so. The authorities, as I have said, make clear that the unfairness must reach a high level.""

(5)(c) Was there a Legitimate Expectation?

83. I accept Mr Beal's submission that a legitimate expectation can be created by an express or implied representation or by a practice: see, for instance, *Rowland v Environment Agency* [2005] Ch 1 ("*Rowland*"), at [67], [68], [72] and [73] (per Peter Gibson LJ). However, it has been said that the practice must give rise to a representation which is "clear, unambiguous and devoid of any relevant

qualification": see *R (Heathrow Hub Ltd) v Secretary of State for Transport* [2020] EWCA Civ 213, at [69].

84. *R v North and East Devon Health Authority, ex p. Coughlan* [2001] QB 213, CA ("*Coughlan*") was described by Lord Kerr in paragraph 56 of his judgment (with which Lady Hale, Lord Hodge and Lady Black agreed) in *Re Finucane's Application* [2019] 3 All ER 191 ("*Finucane*") as the leading case on substantive legitimate expectations. In paragraph 57 of his judgment in *Coughlan*, which was cited by Lord Kerr in paragraph 56 of his judgment in *Finucane*, Lord Woolf MR described three categories of case, the third of which was:

> "(c) Where the court considers that a lawful promise or practice has induced a legitimate expectation of a benefit which is substantive, not simply procedural, authority now establishes that here too the court will in a proper case decide whether to frustrate the expectation is so unfair that to take a new and different course will amount to an abuse of power. Here, once the legitimacy of the expectation is established, the court will have the task of weighing the requirements of fairness against any overriding interest relied upon for the change of policy."

85. This and other judgments speak of a change in policy, which is perhaps not directly apposite in the present case, but the applicable principle is no doubt the same.

86. In my judgment, it is relevant to consider the context in which the alleged legitimate expectation is said to have arisen in the present case:

(1) Taxpayers ought to pay the tax due from them. It is unfair to other taxpayers if they do not.

(2) Although they have a discretion as to how they go about their task, the Defendants' role is to collect taxes, not to waive them.

(3) The general rule (subject to certain exceptions which are not relevant in the present case) is that the Defendants can make assessments to correct incorrect VAT returns, but only if they do so within 4 years. This strikes a balance between the public interest in collecting taxes which are due and the interest of the individual taxpayer in achieving finality and certainty.

(4) The Claimant was liable to pay VAT on the Relevant Supplies. (This is what I am asked to assume. As I have noted, it remains to be determined whether that liability first arose in 1989 or on a later date.)

(5) The Claimant was under a duty to file correct VAT returns. It was incumbent on the Claimant to determine for itself the correct treatment of the Relevant Supplies.

(6) Moreover, the sums involved were significant, which gave the Claimant an added incentive to make sure that its VAT returns were correct. (As I have noted, the Relevant Supplies accounted for the majority of the Claimant's income. By the time of the period covered by the Assessments, VAT on the Relevant Supplies amounted to over £1m per year.)

(7) Nevertheless, the Claimant filed incorrect VAT returns. (This again follows from the assumption that the Liability Decision was correct. Again, it remains to be determined whether the Claimant began to file incorrect returns in 1989 or on a later date.)

(8) The Claimant has provided no evidence as to how it decided to start filing incorrect VAT returns. (Whether it was filed in 1989 or on a later date, the first incorrect VAT return was filed before the Defendants had the opportunity to consider the circumstances which made it incorrect.)

(9) The Claimant did not ask the Defendants for a VAT Ruling, i.e. written advice on which it could rely.

87. Against that background, I turn to consider the inspections in the present case. In my judgment, the inspections of the Interested Party are of limited, if any, significance. They may have contributed to the Defendants' understanding of the Claimant's business, but they did not involve any representations being made to the Claimant and cannot be relied on by the Claimant as giving rise to a legitimate expectation.

88. As for the inspections of the Claimant in 1992, 1993, 1995 and 2005:

(1) The Claimant did not ask for, and the Defendants did not give, any assurance as to how they would exercise their powers under section 73 of the VAT Act in the event that they concluded that the Claimant's VAT returns were incorrect.

(2) The Claimant did not ask for, and the Defendants did not give, any assurance on which the Defendants acknowledged that the Claimant could rely as to the treatment of the Relevant Supplies.

(3) The Defendants did not expressly state that they had considered whether the Relevant Supplies were exempt or not. (I consider later the question whether the Defendants did in fact consider that question.)

(4) On the other hand, the Defendants did repeatedly refer to the Relevant Supplies as exempt and repeatedly carried out partial exemption calculations which were premised on the assumption that the Relevant Supplies were exempt. This is not a case, therefore, in which the Defendants were simply silent as to the taxpayer's treatment of a particular category of supplies.

89. Much of the evidence was directed to the question whether the Defendants' officers did in fact consider whether the Relevant Supplies were exempt or not. I am prepared to accept that they should have done, especially given the amounts involved. I also acknowledge that there was no witness statement from any of the officers who conducted the inspections. However, the contemporary documents would surely have been very different if they had in fact carried out such an inquiry. Moreover, Mr Cutting, who was the only witness who had any involvement in any of the inspections of the Claimant, gave no evidence that the Defendants' officers said that they were carrying out such an inquiry. I find that none of the Defendants' officers in any of the inspections carried out a critical examination of the proposition that the Relevant Supplies were exempt from VAT. However, it is perhaps more significant that the

Defendants did not tell the Claimant that they had done so. That much is evident from the follow-up letters written by the Defendants' officers to the Claimant.

90. Balancing all of these different considerations, I conclude that the Defendants did not give rise to a legitimate expectation on the part of the Claimant to which the Defendants were bound to give effect. Alternatively, I find that any expectation which the Defendants created was such that the Defendants would only be bound to give effect to it if the Claimant had relied on it to its detriment.

(5)(d) Detrimental Reliance: the Law

91. The Claimant submitted that it is not necessary for a claimant, in order to rely on a legitimate expectation, to prove that it relied to its detriment on the express or implied representation, or practice, giving rise to the legitimate expectation. In this context, Mr Beal relied, in particular, on: *Rowland* at [131] (per Mance LJ) ; and *R (on the application of Bancoult) v Secretary of State for Foreign and Commonwealth Affairs* [2009] AC 453 ("*Bancoult*").

92. I accept that there can be cases in which a claimant can enforce a legitimate expectation on which it has not relied to its detriment, but it does not follow that the present case is one of those cases, nor does it follow that the presence or absence of detrimental reliance is without significance in a case such as the present. For instance, Mance LJ said as follows in paragraphs 131 and 132 of his judgment in *Rowland*, referring to *R v Secretary of State for Education and Employment, ex p. Begbie* [2001] 1 W.L.R. 1115, CA ("*Begbie*") and *R (Bibi) v Newham London Borough Council* [2002] 1 W.L.R. 237, CA ("*Bibi*"):

> "131. The judgments in *Begbie*'s case also considered the role of reliance. Peter Gibson LJ was (at p.1124b–d) prepared to accept that the principle of good administration requires adherence by public authorities to their promises, so that change of position as a result of a representation is not always a pre-requisite to relief. But he thought that the significance of reliance in this area should not be understated, and cited *de Smith, Woolf & Jowell, Judicial Review of Administrative Action*, 5th Ed. (1995) p. 574, para. 13–030, to the effect that it might (a) provide evidence of legitimate expectation and (b) be relevant to the decision of the authority whether to revoke a representation. Sedley LJ (at p.1133d–e) distinguished (a) governmental statements of intention regarding the exercise of powers affecting the public at large (where the government might be held to its word irrespective of whether the particular applicant had relied specifically on it) from (b) cases where the basis of claim was, as in *Begbie*, "that a pupil-specific discretion should be exercised in certain pupils' favour" (in which case he found it difficult to see how a person who had not clearly understood and accepted a representation could be said to have such an expectation at all). In cases within (a), consistency of treatment and equality are at stake (see *Bibi*, above, at para. 30); and, since the Human Rights Act 1998, article 14 of the Convention is also directly in point.

> 132.. *Bibi* was a case where the local authority, acting under a misunderstanding as to its obligations, had regularly promised permanent housing to unintentionally homeless people like the two families before the Court. The Court (at para. 19) identified three practical stages as arising in any legitimate expectation case — in summary: (a) the extent to which the public authority may, by practice or promise, have committed itself, (b) whether it is proposing to act unlawfully in relation to its commitment and (c) what the court should do (i.e. relief). Following *Begbie*, the Court endorsed the view that "the significance of reliance and of consequent detriment is factual, not legal" (para. 31). …"

93. I note, in particular:

(1) Peter Gibson LJ's dictum in *Begbie* that the significance of reliance should not be understated;

(2) what Sedley LJ said in *Begbie* about cases in his category (b); and

(3) the reference by the Court in *Bibi* to the significance of reliance and detriment.

94. In paragraph 60 of his judgment in *Bancoult* (which was cited by Lord Kerr in paragraph 69 of his judgment in *Finucane*) Lord Hoffmann said as follows:

> "It is not essential that the applicant should have relied upon the promise to his detriment, although this is a relevant consideration in deciding whether the adoption of a policy in conflict with the promise would be an abuse of power and such a change of policy may be justified in the public interest, particularly in the area of what Laws LJ called "the macro-political field": see *R v Secretary of State for Education and Employment, Ex p Begbie* [2000] 1 WLR 1115, 1131."

95. Lord Hoffmann spoke of a promise, and there was no promise in the present case, but I accept that he was saying that there is no rule of law that the claimant in every legitimate expectation case must establish that he relied on the legitimate expectation to his detriment. However, he also said that detrimental reliance remains a relevant consideration in determining such a case. Lord Kerr put the matter this way in paragraph 62 of his judgment in *Finucane*:

> "From these authorities it can be deduced that where a clear and unambiguous undertaking has been made, the authority giving the undertaking will not be allowed to depart from it unless it is shown that it is fair to do so. The court is the arbiter of fairness in this context. And a matter sounding on the question of fairness is whether the alteration in policy frustrates any reliance which the person or group has placed on it. This is quite different, in my opinion, from saying that it is a prerequisite of a substantive legitimate expectation claim that the person relying on it must show that he or she has suffered a detriment."

96. See also paragraphs 33, 39 and 44 of Rose LJ's judgment in *Aozora*.

97. In the present case, given the circumstances in which the alleged legitimate expectation is said to have arisen, I consider that, if (contrary to my primary conclusion) there was a legitimate expectation capable of binding the Defendants, the Defendants would only be bound to give effect to it if the Claimant had relied on it to its detriment.

(5)(e) Detrimental Reliance: the Facts

98. I do not consider that the Claimant did anything in reliance on the alleged legitimate expectation, let alone anything to the Claimant's detriment.

(5)(e)(i) Reliance

99. The onus was on the Claimant to determine the correct VAT treatment of the Relevant Supplies. The Claimant attempted to do that, albeit by a process which has not been explained in evidence. I am asked to assume that that determination was incorrect. Moreover, as I have already noted, that determination was made by the Claimant before the Defendants had the opportunity to consider the relevant circumstances.

100. The Claimant is well able to form its own view about the VAT treatment of the supplies which it makes. If demonstration of that proposition were necessary, it is to be found in the fact that the Claimant is vigorously challenging the Liability Decision. The Claimant has demonstrated that it is not someone who simply accepts the views expressed by the Defendants.

101. Dr Moran's statement makes clear that any reliance which he placed on what the Defendants said or did was placed in reliance on the negative proposition that the Defendants did not say that the Relevant Supplies were subject to VAT. The courts should not use the jurisprudence of legitimate expectation to reverse the burden created by the VAT Act. It is for the taxpayer to determine the correct treatment of its supplies. As a general rule, the fact that the Defendants do not challenge the taxpayer's treatment of a particular supply on a particular occasion or occasions is not to be treated as shifting the burden from the taxpayer to the Defendants.

102. In any event, the Claimant does not claim in the present case that, as a result of the VAT inspections, it did anything different from what it would have done if there had been no VAT inspections. The Claimant treated the Relevant Supplies as exempt. It did so of its own accord. In the absence of the inspections, it would have continued to treat the Relevant Supplies as exempt.

103. Equally, the Claimant does not contend that it has done anything different from what it would have done if the Defendants had said, in relation to the inspections, words to the effect of, "We make no assurances and you must not rely on anything said or done in relation to this inspection."

104. In reality, the Claimant's case is that the Defendants should have told it that the Relevant Supplies were not exempt. The effect of Dr Moran's evidence is that the only thing which would have made him change the Claimant's behaviour would have been the Defendants saying that the Relevant Supplies were subject to VAT. Even then, he says that he would not have agreed with such a statement, but he would have acted on it.

(5)(e)(ii) Detriment

105. Dr Moran says that there are two things which the Claimant might have done if the Defendants had told it that the Relevant Supplies were subject to VAT. One option was that the Claimant would have spoken to the Defendants and identified a way of adjusting its business so that the Relevant Supplies were exempt from VAT. In fact, the Claimant has not done that in the four years since the Liability Decision, so I disregard that option.

106. The other option was that the Claimant would have charged VAT to its customers. The Claimant has done that. However, as I have already noted, the Claimant has produced no evidence that it has increased its prices in order to do so, rather than including VAT within its existing prices. There is, therefore, no evidence that the Claimant's gross income would have increased if in, say, 2005 it had started charging VAT to its customers. It is, moreover, inherently unlikely that the Claimant could or would at any stage have increased its prices by 20% in order to charge VAT to its customers on top of its existing prices. Indeed, higher prices might have produced a lower overall return for the Claimant, as it is to be expected that some customers would be deterred by the higher prices. It is also to be expected that the Claimant, as a business, has judged for itself each year the prices which would produce for it the maximum return from the Retained Flats.

107. It may be that the Claimant has suffered some detriment if and insofar as the Assessments seek to charge VAT on the whole of the Claimant's income from the Relevant Supplies, rather than on what would have been its net income if the prices charged to its customers had been inclusive of VAT. However, I was not addressed on this point and, in any event, another factor is the amount of VAT which the Claimant ought to have paid, but has not paid, on the Relevant Supplies in the period before 2015. This constituted a benefit to the Claimant which would have to be taken into account in determining whether it had suffered a detriment overall. In the absence of evidence as to the amount of the Claimant's alleged detriment, I cannot find that it has suffered any detriment.

(5)(e)(iii) Detrimental Reliance: Summary

108. In summary, I conclude that:

(1) the Claimant did not do anything in reliance on the alleged legitimate expectation, since the Claimant had already decided to treat the Relevant Supplies as exempt from VAT and would have continued to do so if the alleged legitimate expectation had not been created; alternatively

(2) the Claimant has not proved that anything which it claims that it might have done in reliance on the alleged legitimate expectation resulted in a detriment to the Claimant.

(6) General Principles of EU Law

109. I do not consider that the argument that the Defendants were in breach of the general principles of EU law adds anything to the challenge to the Assessments under domestic law.

110. First, the Claimant relied on the principle of proportionality, referring, in particular, to *R (Lumsdon) v Legal Services Board* [2016] AC 697. There was nothing disproportionate in the making of the Assessments in the circumstances of the present case.

111. Secondly, the Claimant relied on the principle of legal certainty and the related principle against retrospectivity, referring, in particular, to *Case C-384/04 Commissioner of Customs and Excise v Federation of Technological Industries* [2006] ECR I-4191 and *Case C-409/04 Teleos Plc v Commissioners of Customs and Excise* [2007] ECR I-7797. However these principles have no application in the present case. There was no change between 1989 and 2019 in either the law as to whether the Relevant Supplies were or were not exempt from VAT or the law which provided that incorrect VAT returns made by the Claimant could be corrected by the Defendants by assessments made up to 4 years later.

112. Thirdly, the Claimant relied on the principle of protection of legitimate expectations, referring, in particular, to *Case C-271/06 Netto Supermarket GmbH v Finanzamt Malchin* [2008] ECR I-771 and *Case T-81/95 Interhotel v Commission* [1997] ECR II-1265. I have already dealt with the Claimant's claim under domestic law based on the alleged legitimate expectation. Approaching the matter from the perspective of EU law does not produce a different result on the facts of the present case.

113. Fourthly, the Claimant relied on the principle of fiscal neutrality of VAT, referring, in particular, to *Case C-396/98 Grunstückgemeinschaft Schloßstraße Gbr v Finanzamt Paderborn* [2000] ECR I-4296. The Claimant submitted that the Assessments placed the liability to pay VAT on the Claimant, rather than on the occupants of the Retained Flats, because the Claimant had not charged VAT to its customers in the period from 2015 to 2019. However, it was, as I have said, for the Claimant in the first instance to determine the correct VAT treatment of its supplies for VAT purposes and, in any event, the Claimant has not shown that it has suffered any detriment.

114. Fifthly, the Claimant relied on the principle of effectiveness of protection of rights under EU law, referring, in particular, to *Case C-362/12 Franked Investment Income Group Litigation* [2014] S.T.C. 638. This was not relied on as a ground of judicial review in itself, but in support of a submission that I should not allow the fact that the Claimant has had to bring two separate proceedings to prejudice the determination of the present application. Given the way in which I have dealt with the practical problem created by the basis on which I have been asked to address this claim, I do not consider that the Claimant has been prejudiced.

(7) Article 1 of Protocol 1 to the ECHR

115. As with the argument based on the general principles of EU law, I do not consider that the Claimant's argument that the Defendants were in breach of Article 1 of Protocol 1 to the ECHR adds anything to the challenge to the Assessments under domestic law.

116. Article 1 of Protocol 1 provides as follows:

> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public

> interest and subject to the conditions provided for by law and by the general principles of international law.
>
> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary … to secure the payment of taxes ..."

117. Taxation is in principle an interference with the right guaranteed by the first paragraph of Article 1 of Protocol 1, since it deprives the person concerned of a possession, namely the amount of money which must be paid. Such an interference is generally, but not necessarily, justified under the second paragraph of the Article: see *Iofil AE v Greece* (2022) 74 E.H.R.R. SE7 184. The Claimant submitted that the Assessments were not justified under the second paragraph of the Article because they were disproportionate, applying the test of proportionality set out in *Bank Mellat v Her Majesty's Treasury (No 2)* [2014] AC 700, at [20] (per Lord Sumption) and [72]-[76] (per Lord Reed).

118. Applying that test, I conclude that the Assessments were not disproportionate, given the circumstances to which I have already referred in this judgment.

(8) Conclusion

119. Accordingly, I dismiss the Claimant's application for judicial review.

120. I express my gratitude to counsel and solicitors on both sides for their considerable assistance in enabling so much material to be dealt with so efficiently and effectively.