TC01522

Appeal number: LON/2008/1050

INPUT TAX – Partial exemption – Capital expenditure – Subsequent claim for input tax not claimed under operation of special method based on the "CVCP Guidelines" for universities and colleges – Whether CVCP method excludes capital expenditure – No
ASSESSMENT –Time limits – Claim for input tax – Whether two year time limit for making assessments runs from the accounting period in which the right to claim was exercised – Whether assessment out of time on grounds that the time for making it runs from the accounting period in which the right to repayment arose, albeit not exercised in that period
LEGITIMATE EXPECTATIONS – Breach of policy – Whether First-tier Tribunal has authority to determine appeal on legitimate expectation grounds – No – Whether in any event Appellant had a legitimate expectation – No

FIRST-TIER TRIBUNAL

TAX

THE MASTER AND FELLOWS OF ST MARY MAGDALENE COLLEGE IN THE UNIVERSITY OF CAMBRIDGE **Appellant**

- and -

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

TRIBUNAL: SIR STEPHEN OLIVER QC
GILL HUNTER

Sitting in public in London on 7 and 8 September 2011

Tim Brown, counsel, instructed by PEM VAT Services LLP, for the Appellant

Sarabjit Singh, counsel, instructed by the general counsel for HMRC, for the Respondents

DECISION

1. This decision covers four issues raised in the consolidated appeal of St Mary Magdalene College ("the College").

The first issue

2. This arises from the College's appeal against a decision of Customs and Excise (referred to as HMRC) in a letter of 7 November 2003 to refuse the College's claim for a refund of VAT in the sum of £379,233 in respect of periods 06/73 and 09/74 to 09/02. For the entire period covered by the claim the College had used the "Committee of Vice Chancellors and Principals Method" (the "CVCP method") to obtain credit for residual input tax. The first issue is based on the acceptance by both parties that, in periods covered by the claim, the College had incurred expenditure on capital projects. The College contends that residual input tax relating to capital expenditure has not been relieved by use of the CVCP method.

3. On 30 June 2003 the College submitted a "gaps" claim for the £379,233, essentially on the grounds that the CVCP method had not afforded relief for the residual input tax relating to that capital expenditure. The claim was refused on 7 November 2003, essentially on the grounds that the operation of the CVCP method had given proper relief for that input tax. In that connection HMRC have relied upon the decision of the VAT and Duties Tribunal in *Wadham College Oxford* and *Merton College Oxford* (2007) VAT Dec 20233 [2007] V&DR 177 ("the *Wadham College* decision").

4. The circumstances of the alleged capital expenditure were not in evidence, save only that in the early 2000s the College had incurred expenditure in the development of premises called "Cripps Court" on the Chesterton Road. In the absence of any hard information as to the amounts and circumstances of the expenditure we decided to treat the first issue as a preliminary issue of law, namely whether, as the College contends, the CVCP method excluded capital expenditure.

The second issue

5. The second issue arises if we decide that the CVCP method does cover residual input tax relating to the capital expenditure. If so, can the input tax on such expenditure be attributed to taxable activities that have not already been accounted for through the so-called "formulaic tunnels" notionally created by the CVCP method?

The remaining two issues

6. These two issues arise from the decision of HMRC to assess the College in the sum of £223,974 to recover input tax of an amount that had previously been repaid to the College on 3 July 2006 in response to a voluntary disclosure claim dated 30 September 2005. The voluntary disclosure related to the input tax believed to have been due to the College in respect of the periods 09/02 to 03/05.

7. The third issue is whether the assessment of 28 September 2007 was out of time.

8. The fourth issue is whether this First-tier Tribunal has the authority to entertain claims based on legitimate expectations which in turn are founded on breaches of published policies. And if we decide that we have a jurisdiction of that nature, the question arises whether HMRC violated the College's legitimate expectations in issuing the assessment of 28 September 2007.

Background to the present appeal

9. We have already observed that the facts underlying the first issue have not yet been determined. However, in the hopes of giving a flavour to the circumstances in which the first issue arises, as well as providing a more fact-based account at the circumstances to which the third issue relates, we now summarise the history of the appeal.

10. From the inception of VAT on 1 April 1973, the College used the CVCP method contained in guidelines explaining the principles: this was sometimes known as the "Concordat" and was used as the basis for recovery of residual input VAT, i.e. input VAT which had been or was to be used to make both taxable and exempt supplies. The CVCP guidelines are, so far as is relevant, explained in paragraphs 6 and 7 of the *Wadham College* decision. The CVCP method provided the College with a formula for input tax recovery in respect of the following three "tunnelled" areas of taxable activity, also known as the "three formulaic tunnels". The first area was outside conferences. The second was separate catering and the third was bar sales. Under the CVCP method, 20% of the output tax due on outside conferences and separate catering and 5% of the output tax due on bar sales could be deducted as input tax. The CVCP method was designed to reduce the administrative burden on the College of accounting for VAT, for example by allowing the College to recover input tax without identifying all of the purchases it had made.

11. On 7 July 1997, HMRC informed each Cambridge University College, including the College, that the Concordat, i.e. the CVCP method, was to be withdrawn with effect from 1 September 1997. HMRC stated that this was principally because a number of higher education establishments had made large retrospective claims for residual input tax in the previous four to five years on a basis said to have been "contrary to the spirit of the Concordat". Addressing their remarks to the Cambridge Colleges, the letter said that these had kept within the spirit of the Condordat and there was no wish to disadvantage them. HMRC stated that – "One of the consequences of withdrawal of the agreement is that the partial exemption methods must be formalised in writing … . I should point out that although a method may be formalised in writing it is nevertheless possible for you to amend the method (by including additional tunnels) at any time, subject to our mutual agreement". The College was asked to contact HMRC if it wished to consider an alternative method while retaining some of the concessions in the Concordat. HMRC stated that

although the Concordat would be withdrawn with effect from 1 September 1997, any new partial exemption methods would not be required to be in place until August 1998. (It appears that the College continued to use the CVCP method after August 1998 without entering into any written agreement with HMRC or indeed replying to HMRC's letter of 7 July.)

12. On 16 October 2002, HMRC wrote to each Cambridge University College which had not been involved in negotiations relating to input tax recovery following receipt of HMRC's letter dated 7 July 1997. This included the College. HMRC stated that – "I assume therefore that you are still using the CVCP percentages to arrive at your input tax reclaim. We have recently agreed a formal method based on the CVCP with one College after they approached us. While we realise that each College will have its own pattern of activities, I am sure that we could come to a mutual agreement that is fair and not cumbersome. We would be very pleased if you could contact us to arrange a meeting to discuss it." The College did not reply to this letter.

13. On 30 June 2003 the College's representatives wrote to HMRC on behalf of the College and proposed a special partial exemption method. The College's representatives claimed that on the basis of the retrospective application of this method, the College was entitled to recover allegedly under-recovered input tax in the amount of £379,233 for the period 1 April 1973 to 30 September 2002. We note that the College's representatives made this claim even though the method they proposed had never been approved by HMRC and although the College had in fact used a different method, namely the CVCP method throughout the period of the claim. [We understand the College has no wish to pursue the adoption of the method it proposed on 30 June 2003.]

14. On 7 November 2003 HMRC rejected the College's claim dated 30 June 2003. The College appealed against this decision on 4 December 2003. That was the first of the College's three appeals.

15. On 30 September 2005 the College made a claim for allegedly under-recovered input tax in the amount of £488,483 for the periods 09/02 to 03/05. On 3 July 2006 HMRC authorised repayment of £223,974 of this amount. On 20 July 2006, HMRC confirmed this payment but informed the College that the remainder of the claim would not be paid. On 18 August 2006 the College appealed against this decision. That had been the College's second appeal. The College formally withdrew this appeal in June 2010.

16. On 2 July 2007 the *Wadham College* decision was released. This case concerned two Oxford University Colleges that had been using the CVCP guidelines between 1973 and 1994 and then sought to recover further amounts of input tax. In the *Wadham College* decision the Tribunal held:

> (i) that the CVCP guidelines could not be construed as indicating that, having used the three formulaic tunnels, there remained an option

for another method or a further calculation for the taxable activities encompassed in those formulaic tunnels (paragraph 110);

(ii) that there could be no appeal against the refusal of a request to use another method where a method had been used for a period and the use of that method had been allowed or approved by HMRC (paragraph 168); and

(iii) that the Tribunal had the jurisdiction to determine what the creditable VAT should be on the proper construction of the actual special method used, but could not treat that as an appeal against the method itself which had been allowed or approved by HMRC (paragraph 169).

17. On 27 September 2007 HMRC wrote to the representative of the College and stated that for periods prior to June/July 2005 there would still be the possibility of a "gap" claim, but following the decision in *Wadham College*, the College would need to quantify or estimate on a reasonable basis "the proportion of the "pot" input tax which relates to taxable activities other than those covered by the agreed "tunnels"".

18. On 28 September 2007 HMRC wrote to the College to inform it that, following the *Wadham College* decision, they had decided that the repayment of £223,974 to the College on 20 July 2006 had been wrong and that they had issued an assessment to the College to recover that amount. In the same letter HMRC explained the basis of the assessment. This stemmed from the decision in *Wadham College* where consideration had been given as to whether or not the CVCP tunnels gave credit for input tax incurred on general overheads relating to the activities of catering conferences and bar income. The Tribunal, HMRC observed, had determined that these percentage formulae had been calculated so as to give universities and colleges what at the time had been thought to be fair approximation of all the residual input VAT that they were entitled to in respect of those particular activities. The Tribunal concluded therefore that overhead residual VAT was included in the formulae percentages.

19. From that it followed, HMRC's letter states, that a university or college would only have a further entitlement to residual input tax if they undertook activities which included taxable supplies that were not included in the formulaic tunnels. Where a university did not have a taxable income from other activities, the Tribunal had determined that applying the standard method of calculation to the whole income of the university would not give the right answer. From this HMRC concluded that any income arising from tunnelled activities (i.e. catering, conferences and bar income) and any income from activities that had already been addressed under a local agreement should be excluded when considering the extent of any further entitlements to input tax recovery. The letter went on to say that – "the Tribunal suggests that the CVCP guidelines created what was essentially a sectorised method, but was limited in scope so as to not necessarily address all the activities of the University. The appropriate approach to calculating further input tax recovery would be in the context of further sectors. Based on that, the letter continued, HMRC had concluded that the payment calculated by applying the standard method calculation to all the supplies of

the College was incorrect and the College's entitlement should therefore be recalculated excluding those supplies that had already been tunnelled.

20. HMRC informed the College that they had issued a preferred assessment of £233,974 for the VAT period 09/05 and an alternative assessment for the same amount for the period 09/06.

21. HMRC's decision in the letter of 26 September 2007 was upheld on review on 11 April 2008. The College appealed against the review decision on 30 April 2008. This was the College's third and final appeal. Its grounds of appeal were that – "the Commissioners were out of time to raise an assessment according to the decision in *Laura Ashley Ltd*. … In any case it is wholly unreasonable in a Wednesbury sense … to assess for a claim which was examined in detail prior to verification and paid in line with the Commissioners' policy at the time". (While the College alleged in its grounds of appeal that the decision to assess had been Wednesbury unreasonable, it has not pursued that allegation.)

22. In case it becomes relevant, in their letter of 29 July 2008 HMRC had also made observations about the income that the College had derived from commercial property. HMRC noted that there would be a small amount of input tax on overhead costs, such as telecoms, IT and general office expenses, used in relation to property. HMRC stated that because of the high values of property rental income in relation to total sales figures, there was potential for considerable distortion if this activity were not considered separately. HMRC indicated that experience had shown that in practice expenditure on overheads and other "non-attributable" costs in relation to external property income was generally very low, typically constituting a proportion of office costs, such as IT, telecoms, stationery and a part of the audit bill.

23. Also by way of background, HMRC had written to the College on 3 March 2009 stating that, following the *Fleming/Conde Nast* appeal, the three year cap had been disapplied for input tax claims in respect of which rights to deduct had accrued before 1 May 1997. However, HMRC maintained their decision to reject the College's claim of 30 June 2003. This had been on the alternative ground that the Tribunal in *Wadham College* had concluded that by operating the CVCP method, credit for input tax, including residual tax, was given in full in respect of activities within the formulaic tunnels, and as such no further input tax credit was due in respect of those activities. HMRC stated that they would accordingly refuse the College's claim on the ground that the College sought to recover additional input tax in relation to its conference and catering activities when these were activities which formed part of the formulaic tunnels used by the College to calculate input tax recovery under the CVCP guidelines.

The first issue

24. The College claims that both parties to the special method agreement, HMRC and the College, had understood capital expenditure to fall outside the formulaic

tunnels. The College did not believe that HMRC had the authority retrospectively to vary the terms of a method which was agreed previously by both parties.

25. We see no reason of principle why capital expenditure should fall outside the formulaic tunnels. Save in certain specific areas (such as the capital good scheme) the VAT code makes no distinction, in either the output tax or the input tax provisions, between capital and revenue expenditure. There is nothing in the CVCP guidelines that gives any support to the College's assertion.

26. An explanation of the principles of the CVCP method is found in paragraphs 103 and 105 of the *Wadham College* decision. We quote:

> "… it seems clear that the effects of changes in the VAT legislation, of the increase in conference activity, and of the increase in the overhead expenditure (including capital expenditure) occasioned by the greater demands of conference attendees, all meant that over time the 20% figure, even if it fairly reflected related overhead and other residual properly recoverable VAT in 1973, ceased to do so at some time in the twenty-four years in which the Guidelines operated. But with any special methods circumstances will change and the method become more or less fair or reasonable. But such a change in circumstances does not mean that the original method – or the continuing method until it is changed – does not give the taxpayer his rights to the recovery of input tax given by the Directive.
>
> On the evidence before us we conclude that the percentage formulae were calculated so as to deliver to universities and colleges what at the time was thought to be a fair approximation of all the residual input tax to which a taxpayer was entitled in respect of those particular activities. … We conclude that overhead residual VAT was included in the 20, 20 and 5% formulae."

We read those observations as actually endorsing the position taken by HMRC that the CVCP method, when adopted by a taxable person, does provide a means for recovering input tax on expenditure of all types to the extent that it is used, or that a due proportion of it is used, in making taxable supplies. It is hard to elaborate on this conclusion, save to observe that the distinctions between capital and revenue expenditure are notoriously imprecise; hence, if the CVCP methods have been designed to exclude capital expenditure from the formulaic tunnels, there would surely have been a full explanation of the ground rules.

27. The College advanced a different argument based on "the Cambridge Colleges' Bursar's Committee Tax Manual" of 1993 ("the Manual"). The Manual contains details of tunnelled activities, one of which is "College Building Development Projects". The existence of this, it was argued for the College, demonstrated that the CVCP method was limited and the gap, regarding capital expenditure on such projects, was filled by the College Building Development Project

"tunnel" (set out in Appendix B19 of the Manual). As the College had not adopted it as its special method, it was still able to fill the gap in its own input tax relief by making a gap claim. The Manual explains, in its definition of "tunnelled activities", in paragraph 2.1, that HMRC had approved a special arrangement whereby each taxable activity, i.e. those where an output tax liability would arise, could be dealt with separately or "tunnelled". In Appendix B19 the Manual describes the College Building Development Project as being applicable in circumstances where colleges themselves might wish to undertake development projects involving the building or modification of residential, office, laboratory etc. premises for use external to the College. It states that those building developments may be treated as a separate tunnel. It provides that directly attributable input tax is directly recoverable "tax". "Indirectly attributable input tax" could be recovered as a "Bursary Cost".

28. That is the only passage in the Manual that even begins to support the College's contention. There is in our view nothing in the Manual that expressly states or even by implication suggests that, because the CVCP method does not cater for capital expenditure, the Manual is designed to fill the gap. The function of the Manual is to deal with specific activities, such as Building Development Project.

29. Alternatively, it was argued, the College should be treated as having adopted the College Building Development Project Tunnel as a "tunnel" because, to use the words in its skeleton argument, it had "clearly received de facto approval … as a result of the letter of 18 January 2006". (That was a letter written by the College accountant to HMRC which in effect described the operation of the CVCP method.) We do not accept this argument. There is nothing in that letter which shows that the College had received de facto approval to adopt, as a special method, the College Building Development Project Tunnel. Nor is there anything in that letter to demonstrate that, under the CVCP method, overheads did not include capital expenditure.

30. Our conclusions regarding the Manual are that the contents provide guidance for the colleges on a basis approved by HMRC. The Manual does not operate as a specific special method. For that, there would have to have been an agreement between the particular college and HMRC. This leaves the CVCP method as the College's special method at least until 2005. Under it, capital expenditure is covered by the 20% and 5% tunnels. Thus there is no capital expenditure "gap".

The second issue

31. Our decision on the first issue means that the question raised in the second issue does not arise.

The third issue

Was the assessment of 28 September 2007 in time?

32. The background facts are these:

(i) The 2005 Claim was submitted on 30 September 2005 by voluntary disclosure. It was made for the periods 09/02 to 03/05. The amount claimed was £488,483 representing input tax believed to be due for those periods and, in arriving at that amount, the standard method of partial exemption set out in Regulation 101 of the 1995 General Regulations had been used.

(ii) On 20 July 2006 HMRC undertook to repay £223,974 in respect of the 2005 claim.

(iii) The *Wadham College* decision was released on 2 July 2007. As already explained, the College had understood that decision to say that, under the CVCP method, recovery of an appropriate proportion of overhead residual input tax had been included in the percentages applied for the purposes of the activities included within the formulaic tunnels. The College had not apparently justified recovery of any additional input tax by reference to the further distinct activities outside of the formulaic tunnels. And in any event it was not open to the College to apply the standard method. HMRC concluded that it had miscalculated the sum payable in respect of the 2005 claim by reference to the standard method. HMRC therefore recalculated the College's entitlement using the principles established in the *Wadham College* decision.

(iv) On 28 September 2007 the assessment was made.

33. Section 73(2) of the Value Added Tax Act 1994 ("VATA") provides that:

> "In any case where, for any prescribed accounting period, there has been paid or credited to any person –
>
> (a) as being a repayment or refund of VAT, or
> (b) as being due to him as a VAT credit,
>
> an amount which ought not to have been so paid or credited, or which would not have been so paid or credited had the facts been known or being as they later turn out to be, the Commissioners may assess that amount as being VAT due from him for that period and notify it to him accordingly."

34. Section 73(6) states, among other things, that an assessment under section 73(2) "of an amount of VAT due for any prescribed accounting period" must be made within the time limits provided for in section 77 VATA and shall not be made after the following –

> "(a) Two years after the end of the prescribed accounting period …"

35. The College contends that this matter is covered by the decision of the High Court in *Laura Ashley Ltd v Customs and Excise Commissioners* [2004] STC 635. There David Richards J construed "prescribed accounting period" in section 73(2) VATA as the period in which the relevant VAT credit originally arose. Referring to the decision in *Croydon Hotel and Leisure Co Ltd v Customs and Excise Commissioners* [1996] STC 1105 (a decision relied upon by HMRC in the present case), the judge said that that decision did not compel "the conclusion that when a claim is properly made by way of correction or adjustment to the return for an earlier period, the ensuing repayment is paid or given not for that period but for the period in which the claim is made."

36. HMRC rely on the *Croydon Hotel* decision. In that case the Court of Appeal had concluded that it was the exercise of the right to claim rather than the bare right to repayment that provided the essential commencement for limitation periods, and the prescribed accounting period was the accounting period in which the right to claim was duly exercised. On the strength of the *Croydon Hotel* case HMRC say that the "prescribed accounting period" in section 73(6)(a) means the period in which the claim for repayment was made. Because the College's claim for repayment was made on 30 September 2005, i.e. in the 09/05 accounting period, HMRC's assessment dated 28 September 2007 was in time, as it was made within two years to the end of the 09/05 period.

37. We think that HMRC are correct in relying on the *Croydon Hotel* decision. The High Court decision in *Laura Ashley* was concerned specifically with the question whether an assessment was invalid because it had been made for the wrong period and therefore failed to conform with section 73(2). Here, we are concerned with the time limit test in section 73(6)(a). More to the point, however, the principles established in the *Croydon Hotel* appeal and in *Customs and Excises Commissioners v DFS Furniture Co Plc* (No,2) [2004] STC 557 (see below), as distinct from their actual application to the facts in *Laura Ashley*, are clear and should be applied to the present circumstances when showing that the assessment of 28 September 2007 was in time.

38. In the *DFS* case the Court of Appeal had held that where the reason for an alleged excess repayment had been an erroneous view of the law, as opposed to lack of knowledge of a relevant fact, the applicable relevant limitation period was the 2-year period prescribed by section 73(6)(a) VATA and that this ran from the expiry of the prescribed accounting period in which the allegedly excessive repayment had been made. HMRC rely on the *DFS* decision to submit in the alternative that if "prescribed accounting period" in section 73(6)(a) means the period in which repayment was made the assessment of 28 September 2007 was in time, as the repayment had been made on 24 July 2006 and this had fallen within the 09/06 period; thus the assessment had been raised within two years of the end of the 09/06 period. That decision in no way undermines the authority of the *Croydon Hotel* decision of the Court of Appeal. So far as is necessary for our judgment, we see it as applying here.

39. For those reasons we have concluded that the assessment of 28 September 2007 was made in time.

The fourth issue

40. The preliminary question is whether this Tribunal, the First-tier Tribunal, has the jurisdiction to entertain claims of legitimate expectation based on breach of policy. By way of introduction, we are not here concerned with any question of whether the decision to assess was based on grounds that were said to be Wednesbury unreasonable.

41. The College has stated in its skeleton argument that if HMRC's assessment of 28 September 2007 had been in time, it (the College) "had a legitimate expectation that the claim would not be assessed". The College also claims that the assessment "should not have been raised as it represents a retrospective change of policy."

42. Following the decision of Sales J in *Oxfam v HMRC* [2010] STC 686, differing views have been expressed at First-tier Tribunal level as to whether this Tribunal has jurisdiction to consider legitimate expectation-type arguments. We understand that the matter is to be decided at Upper Tribunal level in at least one appeal. However, we have to decide whether we have such jurisdiction before we can address the fourth issue.

43. In our view we do not have the jurisdiction to consider legitimate expectation issues. Our jurisdiction is prescribed by section 83 VATA. The language used in that section cannot, we think, be extended so as to enable this Tribunal to consider HMRC's conduct and review whether HMRC are precluded from collecting tax which is due as a matter of tax law.

44. The Courts have held that the VAT and Duties Tribunal could not adjudicate the terms of any extra-statutory concession or a decision not to apply that concession: see for example *Customs and Excise Commissioners v Arnold* [1996] STC 127. Nor, according to the decision of the House of Lords in *Customs and Excise Commissioners v J H Corbitt (Numismatists) Ltd* [1980] STC 231, does the tribunal have the power to review the exercise of a discretion exercised by the Commissioners. Those authorities were reviewed by Jacob J (as he then was) in *Customs and Excise Commissioners v National Westminster Bank Plc* [2003] STC 1072. The claim made before Jacob J had been one of allegedly unfair or unequal treatment by HMRC. Between paragraphs 45 and 56 of his judgment, Jacob J considered whether the Tribunal had jurisdiction to consider such a claim, and he reviewed the relevant authorities on the issue. In paragraphs 47 and 48 the judge stated:

> "The Commissioners riposte by arguing that this complaint of unfair treatment is essentially one about their conduct. It is not a point involving the facts of Lombard's individual case or the law applicable to those facts. The proper remedy for unfair treatment is judicial review, not an appeal to the tribunal. The tribunal is not a body

entrusted with a supervisory, public law, jurisdiction. Here there is a question of discretion involved.

I think the Commissioners are right. The actual decision impugned is that to invoke unjust enrichment in the case of *Lombard*. It is not a decision to invoke unjust enrichment in the case of *Lombard* but not others. That is what happened in fact but there never was a decision to that effect."

45. In *Oxfam*, Sales J indicated that the Tribunal's jurisdiction was wider than previously thought. In essence, he indicated that a legitimate expectation claim could be within the jurisdiction of the Tribunal within section 83 VATA if it were a legal question with respect to the amount of tax due or the amount of tax that should be collected. However, as we read the decision, those comments did not form the ratio of his decision but were made as passing obiter observations. He had already decided that the appellants in that case had failed on its technical tax arguments. In paragraph 90 of his decision he acknowledged that he had done so "without the benefit of detailed arguments to the contrary". He also suggested that taxpayers wishing to raise public law arguments should protect themselves by following the existing practice of issuing judicial review claims; on that basis, we think, Sales J acknowledged that his observations were not binding. In any event, even if we were to agree that the judgment of Sales J in *Oxfam* is more than obiter, we remain bound by the *National Westminster Bank* line of authority which confirms that the First-tier Tribunal cannot adjudicate public law issues of the kind advanced by the College.

46. Finally in this context we note that the authority of the Upper Tribunal to decide legitimate expectation matters is constrained by the Tribunals Court and Enforcement Act 2007. Section 19 requires the transfer of a matter raising a legitimate expectation issue to the Upper Tribunal. Only the High Court, in these circumstances, has the authority to authorise such a transfer: see section 31A of the Supreme Court Act 1981. It would be at odds with the evident intention of Parliament manifested by those provisions if the First-tier Tribunal were freer to consider legitimate expectation matters than the Upper Tribunal.

47. For the record we note that the College contends that it had a legitimate expectation that no assessment would be raised to recover the amount repaid following the 2005 claim. The College says that HMRC had made no reference to the repayment being provisional pending the settlement of any appeals, nor had the College been asked to sign an undertaking agreeing that the amount repaid would be returned in the event of a particular outcome.

48. The College further contends that the assessment should not have been made because it represented a retrospective change of policy. Referring to Business Brief/28B/04 and Business Brief 16/03, the College argues that HMRC have undertaken that policy changes would take effect from a current or further date, but not retrospectively. Specifically the College relies on the passage in Business Brief/28B/04 which states that – "Changes in our interpretation of the law are

therefore essentially retrospective" and that "businesses cannot take the benefit of a change in interpretation of the law without a burden." The Business Brief goes on to state that – "Customs will not expect or require businesses to correct past declaration errors, which were made on the basis of Customs' interpretation of the law". The College relies on this sentence to claim that HMRC "have ignored their published rules in issuing the recovery assessment". There might, on current authority, be a legitimate expectation conferred on the College had there been a clear, unambiguous and unqualified representation (see *R v Inland Revenue Commissioners ex parte MFK Underwriting Agencies Ltd*) [1990] 1 WLR 1545 per Bingham MR on page 1569H). But as we read the Business Brief it gives no such unambiguous or unqualified representation on which the College can found a legitimate expectation claim.

49. Moreover, we cannot see that HMRC have acted unfairly. By assessing they have acted in pursuance of their statutory obligation to manage the tax system properly. Nor is there any evidence that HMRC made a clear, unambiguous and unqualified representation to the College itself that it would not seek to recover the amount repaid regardless of the circumstances.

50. For those reasons, even if we had authority to determine the College's claim based on its alleged legitimate expectations, we would dismiss that claim.

Conclusion

51. For the reasons given above, we conclude that this appeal should be dismissed.

52. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

53. Amended pursuant to rule 17 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 on 21 December 2011.

SIR STEPHEN OLIVER QC
TRIBUNAL JUDGE
RELEASE DATE: 27 October 2011