[2015] UKFTT 0229 (TC)

TC04421

Appeal number: TC/2014/3996

VAT – case management - application for addition of second respondent opposed by appellant – whether risk of inconsistent findings of fact in potential subsequent proceedings – whether doctrine of res judicata or abuse of process would apply in later proceedings – application allowed.

FIRST-TIER TRIBUNAL
TAX CHAMBER

BRADONBAY LIMITED **Appellant**

- and -

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

TRIBUNAL: JUDGE BARBARA MOSEDALE

Sitting in public at the Royal Courts of Justice, London on 10 April 2015 and after considering written submissions from the appellant dated 14 April 2015 and from HMRC dated 16 April 2015

Mr McDonnell, Counsel, for the Appellant

Mr A Mcnab, Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. HMRC applied on 12 December 2014 to have WH Industries Delaware Incorporated trading as Gnutti Carlo USA ("Gnutti Carlo") to be added as second respondent to this appeal. The appellant opposed the application. Gnutti Carlo by letter dated before the hearing consented to the application.

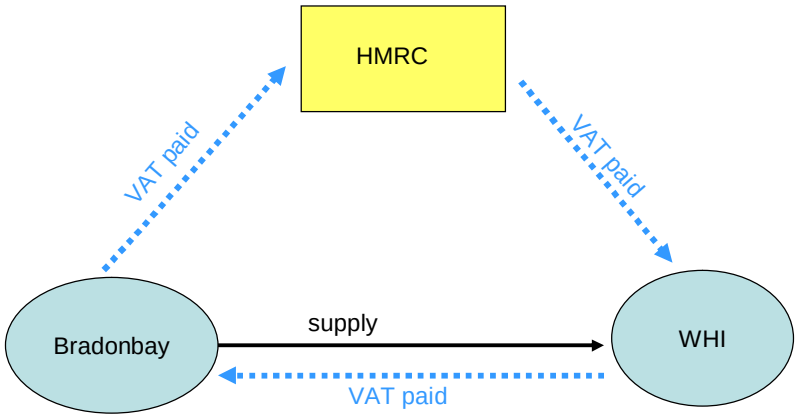
2. As the appellant and respondent neither agreed on the application, nor agreed that it could be determined on the papers, the Tribunal called a hearing. While the Tribunal clerk was instructed to inform all 3 interested parties of the hearing, it appears no notice of hearing was actually sent to Gnutti Carlo. However, it was clear that Gnutti Carlo was aware of the hearing as HMRC had copied to it the Notice of Hearing and it had instructed observers, including counsel Anne Fairpo, to attend the hearing. Gnutti Carlo elected to make no submissions at the hearing.

The dispute in the appeal

3. The facts so far as relevant to this application were not in dispute and I find as follows:

4. The appellant made supplies to a company based in the US called WH Industries Inc ("WHI").

5. WHI and the appellant were in the same corporate group but had separate UK VAT registrations. Before the change in the place of supply rules, the supplies by the appellant to WHI were subject to VAT and the appellant charged and WHI paid VAT. WHI recovered the VAT from HMRC through its VAT returns as it was a fully taxable trader.



6. On 1 January 2010 the place of supply rules changed and as a matter of law those same supplies were from that date outside the scope of VAT. The appellant and WHI overlooked the change in VAT status of the supply and for the next three years the appellant continued to charge, and WHI to pay, VAT on the supplies. The appellant continued to account for the VAT to HMRC and WHI continued to recoup the VAT paid from HMRC.

7. The mistake was realised and VAT was no longer charged on the supplies after the end of 2012. At the same time, on 28 December 2012, the business of WHI was transferred as a going concern to a new company, the proposed second respondent, within the same corporate group. That company took over the VAT registration and VAT registration number of WHI.

8. That company was then, immediately after the TOGC, sold to a buyer in the unconnected US-based Gnutti Carlo corporate group, which explains why the trading name of the proposed second respondent is 'Gnutti Carlo' and no longer WHI.

9. For this reason, Gnutti Carlo was not actually the customer who overpaid the VAT (except, I was told, for the last VAT period). Neither party suggested to me that this made any difference to the application. Both appeared to accept that Gnutti stood in the shoes of WHI. I have proceeded on the basis that that view is correct for the purpose of this interim application but made no findings to that effect.

10. Continuing the recital of events, after its discovery, HMRC were promptly notified of the VAT error. The appellant and Gnutti Carlo originally jointly proposed to HMRC, on the basis the overpaid VAT had moved round in a complete circle, that no action need to be taken by anyone to correct the error other than on paper. See the above diagram.

11. This proposal remained merely a proposal: on 28 October 2013 the appellant withdraw the proposal and filed a claim against HMRC under s 80 Value Added Tax Act ("VATA") for recovery of the overpaid output tax concerned. HMRC refused the claim on the basis repayment would unjustly enrich the appellant on the grounds that WHI had paid the VAT to the appellant so the appellant had never suffered any loss.

12. The appellant's position is that it had suffered loss because it had now, on its case, effectively repaid the overcharged VAT to Gnutti Carlo. It says this because a dispute arose after the sale of Gnutti Carlo between the corporate group which owned the appellant and the corporate group which had purchased Gnutti Carlo. This was settled by an agreement called the Settlement Agreement and Release dated 23 October 2013 ("SAR"). Under the terms of this agreement, it is the appellant's case that a company in its group (to whom it is now in debt) paid the Gnutti Carlo group over $2 million, and that that payment effectively included an amount to repay the VAT overcharged on the supplies by the appellant to WHI in the three years 1/1/10 to 31/12/12.

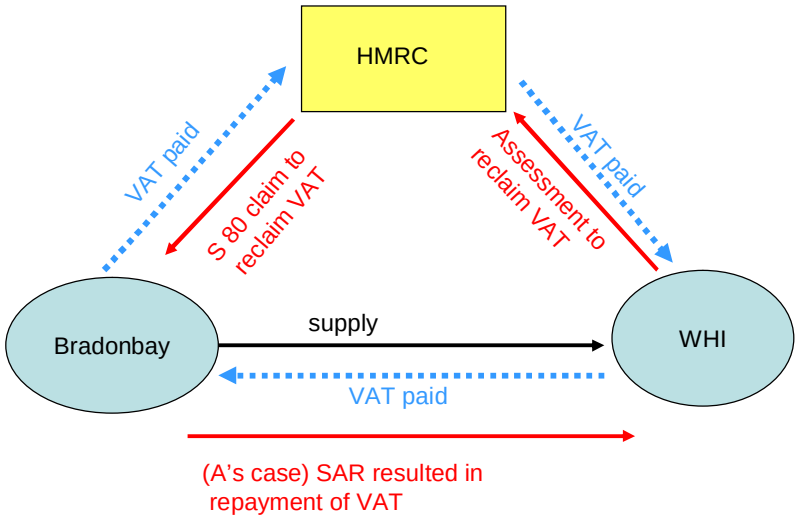
13. HMRC does not accept that that is the correct interpretation of the SAR. It does not accept that the payment of $2 million included in whole or in part reimbursement of the VAT overcharged. Its case remains, despite the SAR, that the appellant recovered from WHI the VAT which it accounted for to HMRC and that therefore any repayment by HMRC would unjustly enrich the appellant.

The reason for the application

14. Despite the mistake in VAT accounting made by the appellant, HMRC were not out of pocket nor did they receive more than they were entitled to. While the appellant paid too much VAT to HMRC, the overpayment had been credited by HMRC to WHI.

15. HMRC's case is that they may lose the appeal brought by the appellant: the Tribunal hearing the substantive appeal may accept the appellant's interpretation of the SAR and decide that repayment would not unjustly enrich the appellant (s 80(3) VATA) because the Tribunal might decide that the effect of the SAR was that the amount of VAT overpaid has not, for practical purposes, been borne by WHI rather than the appellant (s 80(3A)(b) VATA).

16. That would, on the face of it, result in a loss to HMRC as they would be out of pocket as HMRC have already repaid WHI (as a credit in their VAT returns at the time) yet such an outcome would require them to repay the same amount to the appellant aswell. But HMRC have protected their position against such an outcome by making an assessment on Gnutti Carlo to recover all the VAT wrongly repaid/credited to WHI, or at least so I was told, although neither the Tribunal nor the appellant were shown the assessment. We were also informed that that assessment has not been appealed by Gnutti Carlo and that such an appeal is now time-barred. See the below diagram.



17. It was not suggested to me that a reason to join Gnutti as a second respondent in this appeal would be because its owners and/or employee and/or agents could give relevant evidence about the proper interpretation of the SAR. There is no obvious reason why Gnutti would have to be a party in order for anyone connected with it to give evidence. It was certainly not suggested to me that persons who might be able to give relevant evidence were out of the Tribunal's jurisdiction for service of witness summons, still less that if this were the case, it would be a good reason to join Gnutti to proceedings.

18. The hearing was on the assumption that the purpose of joining Gnutti to proceedings was to avoid the risk of inconsistent findings if Gnutti were later to take separate proceedings against HMRC. This raises two separate strands:

- Whether there is a possibility of separate proceedings raising the same issues;
- And if there is, whether joining Gnutti would bring the doctrine of res judicata and/or abuse of process into play so that Gnutti would be estopped from arguing a case in those separate proceedings which was inconsistent with findings made in this appeal (whether ultimately determined at FTT level or on appeal).

Is there a risk of separate proceedings raising the same issue?

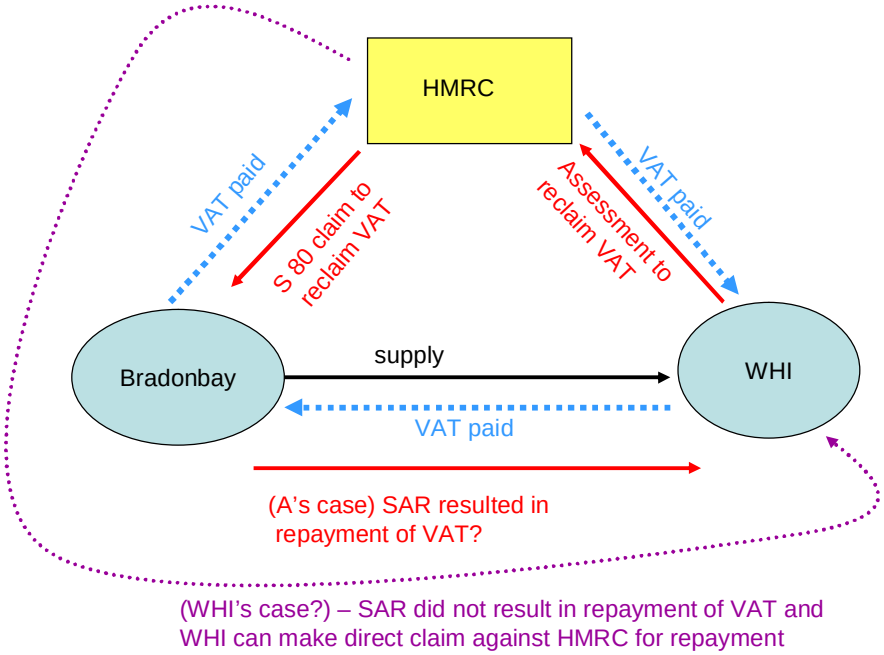
19. The appellant considers that, looking at it from HMRC's point of view, HMRC is fully protected and there is no need for Gnutti Carlo to be joined to these proceedings. The appellant's position is that there is no loss to HMRC if the appellant's s 80 claim is paid: HMRC repays the appellant, the appellant has (it says)

repaid Gnutti Carlo under the SAR; Gnutti Carlo repays HMRC when it satisfies the assessment. And if HMRC wins this appeal and is held not to be liable to repay the appellant then, if it enforces the assessment against Gnutti Carlo, it stands to make a profit and actually be unjustly enriched rather than vice versa. Either way, the appellant sees no reason why it benefits HMRC to add Gnutti Carlo to this appeal.

20. The appellant therefore opposes HMRC's application to join Gnutti Carlo as it considers it unnecessary and further will add to the complexity and cost of the proceedings. In so far as HMRC want to call employees or directors of Gnutti Carlo to give evidence about the SAR, they can do that irrespective of whether Gnutti Carlo is joined as a party to the hearing.

21. But HMRC do not accept that the assessment they have raised against Gnutti Carlo has fully protected their position. The risk that HMRC perceive is that HMRC might lose these proceedings and Gnutti Carlo might, in separate proceedings for restitution, seek to recover the overpaid VAT directly from HMRC. See the below diagram. The risk HMRC perceive is that the court hearing the restitution proceedings might give a different interpretation to the SAR to a hypothetical determination of this tribunal in favour of the appellant: the High Court hearing the claim in restitution might decide that Gnutti Carlo has not been repaid the VAT it overpaid the appellant, and order HMRC to make the repayment direct. So, says HMRC they are at risk that this Tribunal will order it to repay the appellant and the High Court, in separate proceedings for restitution, will order HMRC to repay Gnutti Carlo. (The terminology can be confusing: the sort of action HMRC fear is now often referred to as an action in 'unjust enrichment' but I refer to it in this decision as an action for 'restitution' to avoid confusion with the unjust enrichment *defence* under s 80(3) VATA.)

22. Such an outcome could only come to pass if (amongst other pre-conditions) the Tribunal held that the SAR meant Gnutti Carlo had been repaid by the appellant, and the High Court came to the opposite conclusion. So HMRC want Gnutti Carlo tied in to the findings, particularly findings of fact, made in this Tribunal so that the doctrine of res judicata or abuse of process will bite, in order to avoid the risk of inconsistent findings in different proceedings in front of a different judicial body.



23. So HMRC applies to join Gnutti Carlo (standing in the shoes of WHI) as second respondent so that the Tribunal's decision on the meaning of the SAR binds both the appellant and Gnutti Carlo and avoids, in HMRC's submissions, the risk of conflicting findings in different proceedings potentially resulting in double liability on HMRC.

Proceedings between Gnutti Carlo and HMRC

24. Claims in restitution by customers against HMRC for overpaid VAT were considered in detail in the recent Court of Appeal decision of *Investment Trust Companies* [2015] EWCA Civ 82 (*"ITC")*. I am told that there are applications by both parties to that case for permission to appeal to the Supreme Court and so the Court of Appeal decision may not be the final word. Nevertheless, I am bound by the Court of Appeal decision in the interim.

25. The position in *ITC* was more complicated than in this case. To simplify that case, the court proceeded on the basis that the customers, the investment trust companies, paid £100 in VAT to their managers, the suppliers of the services in question. The managers had applied UK law which wrongly treated their supplies as standard rated rather than exempt. As they had incurred a (notional) £25 of VAT on supplies to them, the managers (wrongly) accounted to HMRC for the notional net sum of £75 in VAT.

26. They later applied to HMRC to be repaid the VAT which they had wrongly accounted for. HMRC repaid only the notional net sum of £75 because the managers

had only paid HMRC that sum. Further, HRMC did not repay the managers any of the overpaid VAT for a period (referred to as the dead period) in which the managers were out of time to make a claim.

27. The managers repaid to the investment trust companies, their customers, all the VAT recovered from HMRC. However, the investment trust companies still considered themselves out of pocket. Ignoring the dead period, for every £100 they had paid the managers they had received only £75 back, so they claimed the difference of £25 directly from HMRC under the common law of restitution. They also claimed the full £100 from HMRC for the dead period on the same basis.

28. The question was whether HMRC had any liability to the investment trust companies. This depended on the normal principles for the law of restitution which are whether:

- HMRC was enriched,
- At the expense of the appellant,
- The enrichment was unjust, and
- and whether HMRC had a defence.

29. So far as the £25 in all periods was concerned, the Court's conclusion was that HMRC was not unjustly enriched by the £25: §30. HMRC had only received £75 of the £100. And this was true through the whole period of the claim including the dead period: §40. While, of course, HMRC had received the £25, HMRC received this not from the managers but from the suppliers to the managers. Their supplies were standard rated and remained standard rated, so the £25 did not unjustly enrich HMRC as the payment of the £25 was in accordance with the law.

30. So far as the remaining £75 in the dead period was concerned, the Court's conclusion was that HMRC was unjustly enriched: the £75 did not represent tax properly due to HMRC. So the Court moved on to consider whether the enrichment was at the expense of the investment trust companies. The Court found case law showed that in some cases enrichment could be at the expense of the claimant even where the claimant had not directly paid the money to the person enriched. In that case, of course, the investment trust companies had paid £100 to the managers, and the managers had then paid £75 to HMRC, so the investment trust companies had only <u>indirectly</u> paid £75 to HMRC.

31. Nevertheless, the Court's decision was that HMRC was enriched at the expense of the taxpayers' customers (the investment trust companies) in so far as the £75 was concerned. What they said implies this would be true in any case where VAT was concerned:

> "[67]….It is enough to say….that in the context of VAT <u>the final consumer who pays the tax</u> has a sufficient economic connection with HMRC to be able to say that they have been enriched at his expense when the tax ought never to have been imposed on the services which were supplied…."

32. The Court of Appeal went on to say HMRC had no defence to the claim: s 80(7) was held not to be a bar to the claims. This conclusion may seem a little surprising because it drives a coach and horses through the time limits set out in the VAT Act. While the immediate taxpayer (the supplier) cannot reclaim overpaid tax more than 4 years after it was paid, the effect of the Court of Appeal decision appears to be that an indirect taxpayer (the customer) can reclaim VAT back to 1973, subject only to the time limit on claims in restitution which requires them to be made within 6 years of acquiring knowledge that the tax was overpaid.

Relevance of ITC to this application

33. HMRC's position is that a straightforward application of the ratio in *ITC* may result in HMRC being liable to repay to Gnutti (the customer) the VAT overpaid by the appellant. HMRC appeared to accept that this was only a risk if the High Court hearing the putative claim for restitution were to decide that Gnutti had not already been repaid by the appellant under the terms of the SAR. If Gnutti Carlo has been repaid the VAT by the appellant, it would be difficult for Gnutti Carlo to maintain that HMRC was enriched *at the expense of* Gnutti Carlo. This is despite the assessment, as the assessment to VAT merely requires Gnutti to repay what HMRC wrongly repaid/credited to it in VAT at the time.

34. HMRC's fears concern the possibility that this Tribunal might decide Gnutti was repaid under the terms of the SAR, and order HMRC to repay the appellant on the basis such repayment would not unjustly enrich the appellant, but the High Court hearing the (currently hypothetical) claim for restitution by Gnutti against HMRC might decide that Gnutti was *not* repaid under the terms of the SAR and order HMRC to repay Gnutti under the doctrine explained in *ITC*. HMRC are concerned that they might have to repay the VAT twice over, once to the appellant and once to Gnutti if the Tribunal decided the appellant's claim reaches different findings of fact to the High Court deciding Gnutti's putative restitution action.

35. Are these fears justified?

Scenario where the appellant wins this appeal:

36. I consider HMRC's fears misplaced. Assuming the outcome of these proceedings is that HMRC is found liable to repay the appellant, for Gnutti to bring successful proceedings against HMRC in restitution it would have to show that HMRC was enriched. Yet the assumption in this scenario is that HMRC will have had to repay the appellant following this appeal: so while HMRC are entitled to enforce the assessment against Gnutti, that will only put them in a tax neutral position: repaying the appellant and reclaiming from Gnutti. HMRC will not have been enriched by the overpaid tax. This would seem a complete bar to the putative claim in restitution by Gnutti, irrespective of any findings of fact on whether or not Gnutti has been repaid by the appellant.

37. So although the High Court in this scenario, hypothetically reaching opposite findings of fact to the Tribunal, may decide that Gnutti has not been repaid under the

SAR, and that therefore it has lost out financially as it also has to pay the assessment, that is not the same as showing that HMRC have been enriched. In the scenario feared by HMRC, therefore, I cannot see how a claim by Gnutti in restitution against HMRC could possibly be successful.

38. Gnutti might, however, feel aggrieved and take restitution proceedings against the appellant. Gnutti might win these proceedings *if* the High court made opposite findings of fact on the SAR to the hypothetical findings of the Tribunal in favour of the appellant. In other words the appellant might win this appeal if this Tribunal decides that did not repay Gnutti under the SAR, but then it might then be forced to pay over the sum recovered from HMRC to the appellant under a possible claim in restitution against by Gnutti if the High Court reaches the opposite conclusion on the SAR. (Ordinarily a supplier, like the supplier in *ITC,* will have the defence of change of position against claims by their customer in that they paid the VAT received from their customer to HMRC: in this scenario the appellant would not have that defence as this scenario is predicated on the basis that the appellant has won its S 80 claim against HMRC and received repayment of the overpaid VAT.)

Position under alternative scenario that appellant loses this appeal:

39. And if the result of the Tribunal appeal is that HMRC do not have to repay the appellant, then it has nothing to complain about if Gnutti does take restitution proceedings against HMRC because HMRC will have been enriched if and when they enforce the assessment against Gnutti (see §16 above).

40. Having said that, if the High Court in such proceedings were to conclude (contrary to the Tribunal's hypothetical findings against the appellant) that Gnutti has been repaid by the appellant, Gnutti would therefore not be considered out of pocket and HMRC will still win the case as Gnutti can not show HMRC's enrichment was at its expense: it is (in the view of the High Court if not the Tribunal) at the appellant's expense.

41. In this scenario, Gnutti, if it has to pay the assessment, might well feel aggrieved. It cannot succeed in an action against the appellant because the appellant will have a change of position defence (having lost its s 80 claim). Its action against HMRC will have failed even though the Tribunal found the appellant had not repaid it. This outcome could not be thought of as fair as it would leave HMRC winning both cases and (at least in the view of the High Court) unjustly enriched.

Conclusion on risk of inconsistent findings in respect of the SAR

42. So, while I cannot understand why HMRC consider themselves at risk in either of these scenarios, I do agree for reasons given at §§38 and 41 above that it would be against the public interest if later judicial proceedings were to reach opposite findings of fact on exactly the same issue in a case involving at least one of the same parties as the parties to this appeal. HMRC could potentially benefit from two different judicial bodies reaching opposite findings of fact. While HMRC's position may be that it

would not enforce the assessment against Gnutti if HMRC wins the Tribunal case against the appellant, I was not told of any such undertaking being given to Gnutti.

43. Moreover, as outlined in the scenarios at §38 in respect of the appellant and §41 in respect of Gnutti, both could be at risk of some appearance of injustice if opposite findings of fact were reached in this appeal and a subsequent action for restitution by Gnutti.

44. Even though I find HMRC's fears of being left out of pocket are unjustified, the above factors indicate that there is a risk of inconsistent findings of fact being made in subsequent proceedings that are not yet out of time to be lodged. Should the Tribunal nevertheless join Gnutti even though the appellant opposes the joining, and Gnutti (apart from consenting to it) has not put a positive case in favour of joining as a second respondent? I consider that I should as it is in the public interest to avoid this potential injustice and it may also make it possible for the parties to settle any claims in restitution (as the findings of fact could not be in dispute) thus avoiding the proliferation of proceedings. So for a different, albeit related, reason to that given by HMRC, I do consider it desirable for the proper administration of justice for Gnutti to be tied to the findings of fact in this appeal. I consider that what is probably a limited increase in the appellant's costs of doing so is outweighed by the benefits of joining Gnutti.

Would the doctrine of res judicata apply?

45. But whether joining Gnutti would bind it to the findings of fact in this appeal depends on whether the doctrine of res judicata and/or abuse of process would apply to prevent Gnutti putting forward a case, in proceedings in restitution against HMRC or the appellant, which was opposite to the findings made by the Tribunal in this appeal.

46. The parties made submissions to me on res judicata and abuse of process following the hearing, as neither appeared prepared to address me on this at the hearing.

47. Mr McDonnell refered me to Lord Keith's decision in *Arnold v NatWest Bank Plc* [1991] 2AC 93 where he drew the following distinction between cause of action estoppel and issue estoppel, which are both elements of res judicata:

> "Cause of action estoppel arises where the cause of action in the later proceedings is identical to that in the earlier proceedings, the latter having been between the same parties … and having involved the same subject matter. In such a case the bar is absolute in relation to all points decided unless fraud or collusion is alleged, such as to justify setting aside the earlier judgment. The discovery of new factual matter which could not have been found out by reasonable diligence for use in the earlier proceedings does not … permit the latter to be re-opened.
>
> …

> Issue estoppel may arise where a particular issue forming a necessary ingredient in a cause of action has been litigated and decided and in subsequent proceedings between the same parties involving a different cuase of action to which the same issue is relevant one of the parties seeks to re-open that issue."

48. It is clear from this that joining Gnutti as a party in this Tribunal would not create *cause of action estoppel* such as to prevent Gnutti taking proceedings in restitution against HMRC or the appellant: cause of action estoppel would only prevent the identical proceedings being re-litigated.

49. HMRC's case is that joining Gnutti as a party in this appeal would or at least might create *issue estoppel,* preventing Gnutti from putting forward a case in any restitution proceedings against HMRC or the appellant that differed from the findings of fact on the SAR made in this appeal. The appellant disputes whether the joining would have such an effect. In *Littlewoods Retail Ltd & others* [2014] EWHC 868 (Ch) Mr Justice Henderson described issue estoppel as arising only where the following three conditions were met:

> "(i) the same question must previously have been decided;
>
> (ii) the judicial decision which is said to create the estoppel must have been a final decision of a court of competent jurisdiction; and
>
> (iii) the parties to the prior judicial decision … must have been the same persons as the parties to the subsequent proceedings in which the estoppel is raised….

50. Questions (ii) and (iii) don't appear to be an issue. The appellant appears to accept that this Tribunal is a court of competent jurisdiction and that there would be identity of parties were Gnutti to be a second respondent in this appeal and then to take restitution proceedings against either or both HMRC and the appellant.

51. Mr McDonnell does suggest that there would be doubt whether the 'same question' would be decided in the restitution proceedings as in this appeal, saying that the interpretation of the SAR, and in particular whether the SAR involved settlement of Gnutti's restitutionary claim against the appellant, is only a subsidiary issue and not one to which issue estoppel would apply. I have doubts whether that is right as the issue would be critical in both sets of proceedings but I do not need to reach a concluded view on this due to the very limited application of issue estoppel in tax appeals.

52. The appellant points out that issue estoppel is of limited application in tax proceedings due to the doctrine described in *Cafoor* [1961] AC 584 PC. That doctrine is that a decision in one tax year does not create an issue estoppel for another tax year. That doctrine was held to apply as much to VAT as direct tax cases in *Littlewoods* (supra) at §190.

53. In that case, there had (in effect) been the equivalent of an FTT decision finding that HMRC was liable to repay an amount of VAT to Littlewoods, on the basis Littlewoods had overpaid it. Littlewoods then made a claim in the High Court against

HMRC for restitution for an amount equivalent to interest on the overpaid VAT. HMRC sought to defend the claim to interest on the grounds it was not due as the VAT had not actually been overpaid and should not have been repaid to the appellant. Littlewoods relied on the doctrine of issue estoppel.

54. That required the High Court to consider the application of issue estoppel in VAT proceedings. Henderson J summarised the jurisprudence in direct tax cases and concluded that, whether or not anomalous, issue estoppel only applies to the amount of tax payable for the relevant year/period of assessment (§175). So exactly the same issue can be re-litigated in relation to any period of assessment that was not the subject of the earlier judicial decision.

55. Mr Justice Henderson's conclusion at §190 is that issue estoppel would have the same limitation in VAT proceedings: so that the same issue can be re-litigated in relation to any VAT accounting period as long as that same VAT accounting period was not the subject of the earlier judicial decision.

56. Moreover, Mr Justice Henderson's conclusion on the law went further. At §206(1) he held that HMRC can raise the question of whether the VAT was due in proceedings for interest on the sums that were repaid following what was in effect a tribunal determination that the VAT was not due. In other words, Mr Justice Henderson appeared to consider that there was no issue estoppel even where exactly the same VAT accounting period was concerned, as long as a different liability was concerned.

57. In this he followed the earlier decision of the High Court in *King v Walden* [2001] STC 822. In that case Mr Justice Jacobs held that decisions of (in effect) the first instance tax tribunal only created issue estoppel as to the actual liability to tax decided by that appeal. So that the taxpayer or HMRC could re-open the question of that liability to pay tax all over again where the issue under appeal was something different, such as, as it was in those two cases, liability to pay interest on the tax. Both High Court judges considered that they were obliged to reach this conclusion by higher authority.

58. This is much the same as saying there is no issue estoppel in tax cases, only cause of action estoppel. I am of course bound by both these decisions of the High Court. If there effectively is no issue estoppel in actions for interest on tax over or underpaid, then it seems an irresistible conclusion that a tribunal determination on liability to VAT cannot create an issue estoppel in actions for restitution of overpaid tax.

Abuse of process

59. But, as Mr Macnab points out, that is not the end of the matter. While not strictly a question of res judicata, a litigant can be constrained by the doctrine of *abuse of process.* In *Littlewoods,* Henderson J held that HMRC were unable to advance the position that the tax was not due in defending the claim for interest

because to do so would be an abuse of process, irrespective of the non-application of issue estoppel to tax cases: [250].

60. Would abuse of process apply if Gnutti were to seek to take proceedings against HMRC or the appellant after the tribunal settled this case one way or another? It certainly seems that it might apply. As Henderson J explained it in *Littlewoods* at [243] there is public interest in the finality in litigation. Intervening events might justify re-litigating (see *Littlewoods* at [251]) so I am unable to say whether or not abuse of process would be found to apply: but there seems to be a real possibility. That issue estoppel does not apply to tax cases appears to be no bar to a court concluding that re-opening a decided issue is an abuse of process.

Conclusion

61. While HMRC urge that at this stage I should not resolve anything least of all whether or not issue estoppel or abuse of process would apply, and indeed I am unable to resolve those questions in that this Tribunal has no jurisdiction over claims in restitution, yet I have to consider the principles involved in order to decide whether it is right to join Gnutti Carlo to these proceedings.

62. While I accept that a third party will add to the expense and complexity of proceedings for the appellant, this expense may be no more than the requirement to file all documents with two other parties, rather than merely one.

63. I reject the appellant's suggestion that adding a third party is virtually unheard of in the tax tribunal: on the contrary, it may be more common in this Tribunal than many tribunals due to the tripartite nature of VAT accounting. It is also routine in cases in this tribunal involving statutory maternity pay and statutory sick pay.

64. I have rejected HMRC's case that it is at risk of double liability if there are inconsistent findings of fact were Gnutti to take restitution proceedings against it; nevertheless, that does not cause me to dismiss their application. I consider that there is a general public interest in avoiding inconsistent findings of fact, so that even though the appellant opposes the joining, as outlined at §44 above, both it and Gnutti (who agrees to the joining) is at risk of potentially inconsistent findings of fact if Gnutti took restitution proceedings following this appeal and there is also a risk that inconsistent findings of fact may leave HMRC unjustly enriched, although that will depend on whether HMRC chooses to enforce the assessment it says it has issued.

65. My view is that for the reasons given in §§42-44 there is a real risk of inconsistent findings of fact being made in potential proceedings for restitution which Gnutti might decide to take either against HMRC or the appellant and which it is still in time to initiate; and that risk is such as to justify what is likely to be a quite limited increase in cost and expense for the appellant in these proceedings by adding a second respondent. While I accept that the risk of inconsistent findings can only be nullified if the Court hearing the subsequent proceedings were to find abuse of process, as res judicata will not apply, it seems a real possibility that such a court might find it abusive for Gnutti, if a party to these proceedings, to seek to re-open the question of

whether the appellant repaid it the VAT when its associated company made the payment of $2 million.

66. For these reasons, I direct that Gnutti Carlo be joined as second respondent to this appeal.

67. 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.

BARBARA MOSEDALE
TRIBUNAL JUDGE

RELEASE DATE: 27 May 2015