[2015] UKFTT 0516 (TC)

TC04674

Appeal number: TC/2012/2755

VAT – claims under s.80 VATA 1994 – Art 4(4)b Sixth Directive (Art 11 Principal VAT Directive) – s.43 VATA - entitlement to claim repayment of overpaid VAT – effect of companies leaving VAT groups on entitlement to claim – whether representative member or generating member entitled to claim – held representative member so entitled – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

GALA LEISURE LIMITED **Appellant**

- and -

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

TRIBUNAL: JUDGE DAVID DEMACK

MS GILL HUNTER (Member)

Sitting in public at Bedford Square London on 12-14 March 2014 and at the Royal Courts of Justice, London, on 3 March 2015

Mr Jonathan Peacock QC instructed by Messrs Ashursts, solicitors, London, for the Appellant

Mr Peter Mantle of counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

INTRODUCTION

1. This appeal by Gala Leisure Ltd ("GLL"), a company which owns and operates a number of bingo halls, is brought as a result of the respondent Commissioners for Her Majesty's Revenue and Customs ("HMRC") having rejected certain parts of two groups of claims it made under s.80 of the Value Added Tax Act 1994 ("VATA 94") to recover amounts brought into account as output tax that were not output tax due.

2. That was because the supplies on which the tax was charged and paid were incorrectly treated as standard-rated whereas it was later held that they were exempt from VAT. Further sums which were not deductible input tax were also incorrectly deducted as input tax, for the same reason. Stated colloquially, VAT was overpaid.

3. The overall claim period ran from 1 April 1973 to 30 September 1996.

4. One of the groups of claims relates to supplies of mechanised cash bingo ("MCB") and the other to main stage bingo ("MSB").

5. The total sum involved in the appeal is some £28 million. However, we are not required to deal with quantum, but rather to make a decision in principle on the issue before us.

6. That issue, in the form suggested by HMRC, takes the following form:

> "In circumstances where
>
> 1) the representative member of a VAT group accounted to HMRC for VAT for a prescribed accounting period and brought into account an amount as output tax that was not output tax due;
> 2) the company whose trading activities gave rise to that overdeclaration of output tax ("the generating member") was a member of that VAT group during the relevant prescribed accounting period;
> 3) that VAT group remains in existence, but the generating member has ceased to be a member of that VAT group;
>
> is it the generating member (or a company to which the generating member has assigned any right which it has to claim under s.80 VATA 94 ("Section 80") which is entitled to make a claim under Section 80 in respect of the overdeclared output tax?"

7. The relevant scenario may be shortly explained in the following way. A generating member, X, ceased to be part of a VAT group which still exists. Transactions actually carried out by X, whilst it was in that VAT group, were wrongly treated as taxable, when they were exempt. The representative member of the VAT group accounted for and paid to HMRC amounts by way of VAT, which were not due ("the Departure Scenario"). GLL's case includes the fact that X transferred the relevant amounts to the representative member in respect of VAT due (or believed to be due) to HMRC from the representative member on transactions actually carried out by X.

8. Mr Jonathan Peacock QC, instructed by Ashursts, solicitors of London, appeared for GLL, and HMRC were represented by Mr Peter Mantle of counsel. Counsel provided us with an agreed bundle of documents, two bundles of authorities and a document entitled "Statement of Agreed Facts". We also agreed to accept a witness statement provided by Mr Nicholas Andrews, a partner in Grant Thornton, but might say at the outset that it did not prove helpful to us as he was unable to speak as to the facts with which we are concerned.

THE RELEVANT LEGISLATION

9. The question of principle with which we are required to deal turns on the interpretation of Section 80 in the context of the legislation on VAT grouping and, so far as relevant, EU law on the repayment of wrongly levied tax.

10. We then proceed to set out the relevant legislation.

a) VAT grouping - a single taxable person

11. Article 4(4) of the Sixth VAT Directive (77/388/EEC) ('Article 4(4)') provided by its second paragraph:

> "... each Member State may treat as a single taxable person persons established in the territory of the country who, while legally independent, are closely bound to one another by financial, economic and organisational links."

(We might add that the Sixth VAT Directive has now been replaced by the Principal VAT Directive (2006/112/EC) but the relevant article remains in the form set out above).

12. Article 4(4) was implemented in the UK by ss 43 – 43D VATA 94 (for convenience jointly, "Section 43"). In particular section 43(1) provides:

> "(l) Where under sections 43A to 43D any bodies corporate are treated as members of a group, any business carried on by a member of the group shall be treated as carried on by the representative member, and
>
> (a) any supply of goods or services by a member of the group to another member of the group shall be disregarded: and
>
> (b) any [supply which is a supply to which paragraph (a) above does not apply and is a supply] of goods or services by or to a member of the group shall be treated as a supply by or to the representative member:
>
> . . .
>
> and all members of the group shall be liable jointly and severally for any VAT due from the representative member."

13. Eligibility for treatment as members of a VAT group depends upon the existence of "control", essentially control by one member of all of the other members, or by one person of all of the members, the controller being a holding

company, or empowered by statute to control the activities of the members (see section 43A VATA 94).

14. By s 43B VATA 94 once a VAT group has been formed, other companies can subsequently join it as members and/or members of the VAT group can cease to be members of it, with effect from the date the relevant application is received by HMRC or another date specified by HMRC (see s 43B(2)(a)-(b) and 43(4)).

15. The representative member of a VAT group is liable to submit VAT returns, account for and pay VAT to HMRC in respect of the single taxable person, which the VAT group is for VAT purposes. This is the result of section 43(1) VATA 94 and obligations in the Value Added Tax Regulations 1995, in particular regulations 25(l), 40(1) and (2).

b) Claims for repayment of overpaid VAT

16. Section 80 provides, and provided at the date the claims by GLL were made:

> "(1) Where a person --
> (a) has accounted to the Commissioners for VAT for a prescribed accounting period whenever ended, and
> (b) in doing so has brought into account as output tax an amount that was not output tax due,
> the Commissioners shall be liable to credit the person with that amount.
> …
> (2) The Commissioners shall only be liable to credit or repay an amount under this section on a claim being made for the purpose.
> (2A) Where-
> (a) as a result of a claim under this section by virtue of subsection (1) or (1A) above an amount falls to be credited to a person, and
> (b) after setting any sums against it under or by virtue of this Act, some or all of that amount remains to his credit,
> the Commissioners shall be liable to pay (or repay) to him so much of that amount as so remains.
> . . .
> (7) Except as provided by this section, the Commissioners shall not be liable to credit or repay any amount accounted for or paid to them by way of VAT that was not VAT due to them."

17. Thus the person to whom HMRC are liable is the person who accounted to HMRC for and overdeclared output tax. HMRC's repayment obligation (under Section 80(2A)) is to the same person.

18. There is no EU legislation relating to the repayment of VAT levied by a member state in breach of EU law. However, the position is well-established in the case law of what is now the Court of Justice of the European Union ("the CJEU"), see e.g. Case C-62/93 *BP Supergas* [1995] STC 805 at pp 40-41:

"40. … the right to obtain a refund of amounts charged by a member state in breach of rules of Community law is the consequence and compliment of the rights conferred on individuals by the Community provisions as interpreted by the court (see [authority cited]).

41. While it is true that such a refund may be sought only in the framework of the substantive and procedural conditions laid down by the various relevant national laws, the court has consistently held (see inter alia, [authority cited]) that those conditions and the procedural conditions and rules governing actions at law for protecting the rights which individuals derive from the direct effect of Community law may not be less favourable than those relating to similar, domestic actions nor be framed in a way such as to render virtually impossible the exercise of rights conferred by Community law."

THE FACTS AND EVIDENCE

19. From the Statement of Agreed Facts we take the following information.

20. On 15 December 1997 GLL became registered under VAT registration number 705 8765 12 as the representative member of a group of companies treated as a group for the purposes of Section 43 ("the Gala VAT group"). The Gala VAT group was established on that date, and continues to exist with GLL as its representative member.

21. The Gala VAT group presently includes a number of companies which offered MCB and/or MSB for at least part of the claim period, and which have been or are in the process of being dissolved resulting in their being removed from the Gala VAT group. We shall refer to those companies as the "trading companies". Some trading companies existed throughout the claim period; others existed for only part of the period.

21. During the periods they existed, each of the trading companies was either:

a) in a group other than the Gala VAT group which is extant; or
b) in a group other than the Gala VAT group which ceased to exist prior to 27 March 2009; or
c) not in a VAT group, but was separately registered for VAT in its own right under its own name and registration number; or
d) in a sequence of two or more of the other three categories.

22. For those periods in which companies were in categories (b) and (c) above, HMRC accept that GLL has the right to claim under Section 80 providing it can demonstrate that the entire trade and assets of the generating member concerned (including the right to claim under Section 80) were transferred to GLL, and it made a valid Section 80 claim.

Main stage bingo

23. By letter of 27 March 2009, within the prescribed statutory time limit, GLL sought to reclaim amounts that had been accounted for to HMRC as output tax in

relation to MSB for prescribed accounting periods in the claim period ("the MSB claim"). By letter of 21 March 2011 HMRC rejected part of the claim, but accepted and paid the remainder of it. As at 20 February 2014 HMRC had made repayments of output tax overdeclared in the claim period by:

1. Gala Leisure (1999) Ltd
2. Gala Leisure (1998) Ltd
3. Gala Holdings Ltd (for the period from 1.4.73 to 11.12.80)
4. Bergenia Ltd
5. Emburg Entertainments Ltd
6. Bonningtree Ltd
7. Essoldo Ltd
8. Moderne Enterprises Winton Ltd
9. FLD Cardiff Ltd (Amount approved, but payment not yet made)

24. HMRC subsequently accepted that GLL was entitled, in principle and subject to quantification, to repayment under Section 80 of the MSB claim for transactions by certain other trading companies for specified periods. (In some cases HMRC made repayments). Those companies are:

10. Moderne Bingo Southsea Ltd
11. Lowsid Entertainments Ltd
12. Kingsway Entertainments Ltd
13. Roy Squire Ltd
14. Zetters Enterprises Ltd
15. Dorchester Ballroom Ltd
16. Crystal Entertainments Ltd
17. Lance Barratt Agencies Ltd
18. Hereford Entertainments Agency Ltd; and
19. Beakborough Ltd.

25. We were informed that HMRC were currently giving further consideration to GLL's entitlement under its MSB claim in respect of transactions carried out by certain other trading companies in specified periods. Those companies included Beacon Entertainments Ltd and Fawnhall Ltd.

Mechanised cash bingo

26. By a second letter of 27 March 2009 GLL sought timeously to claim amounts from HMRC that had been accounted for as output tax in relation to MCB in accounting periods in the claim period ("the MCB claim"). HMRC rejected the MCB claim, which was then subjected to a statutory review. HMRC subsequently accepted parts of the claim in relation to transactions relating to the 9 companies listed at paragraph 24 above.

27. We were further told that HMRC were giving consideration to GLL's MCB claim relating to certain other trading companies for certain specified periods. Those companies are listed at paragraph 25 above.

VAT group registration

28. Prior to 1 January 2010, the VAT Information Exchange System ("VIES") was capable of confirming the validity of a known registration number, but not of providing the name or address of the person registered. Prior to that date there was no other information in the public domain that would have enabled a person to identify the representative member of an extant UK VAT group.

29. From 1 January 2010 VIES was able to provide the name and address of the person registered under a specific VAT registration number, but not a VAT registration number for a name or address. Since the same date there has been no other information in the public domain that would enable a person to identify the representative member of an extant UK VAT group.

Details of selected trading companies

30. For the purpose of demonstrating the points with which we have just dealt, GLL selected three trading companies and agreed details of them with HMRC. The companies in question and the agreed details are as follows:

1) Gala Leisure (1991) Ltd

31. Gala Leisure (1991) Ltd ("GL 1991") was incorporated on 15 October 1943, originally being named being Granada Theatres Ltd. Subsequently it changed its name again, on this occasion to Granada Leisure Ltd. The latter change took place on 30 September 1991.

32. In all relevant years, GL 1991's principal activity was the operation of bingo social clubs and amusement arcades in the UK. GL1991 carried out MSB and MCB between April 1973 and 9 May 1991. HMRC accepted that VAT was overdeclared in respect of those transactions and, in so far as those transactions related to periods when GL1991 was a member of a VAT group, accounted for to HMRC by the representative member of the relevant VAT group.

33. Since it was incorporated, GL 1991 has acquired other companies which also provide bingo as all or part of their businesses; and in some of those cases the bingo businesses of those companies were transferred as going concerns to GL 1991.

34. From 3 October 1982 at the latest, GL 1991 was a member of a VAT group known as the "Granada VAT group". That group continues in existence to this day.

35. On 9 May 1991 GL 1991 was acquired by Bass Leisure Activities Ltd (now named Gala Holdings Ltd ("GHL")). GL 1991 transferred its business, assets and liabilities to GHL, including any rights it owned to reclaim overdeclared output tax.

2) Gala Holdings Ltd

36. Gala Holdings Ltd ("GHL") was incorporated on 20 April 1964 under the name Tudor Bingo Ltd. It has changed its name on a number of occasions: to Coral Bingo and Social Clubs Ltd (31 December 1977), Bass Leisure Ltd (6 September 1983), Bass Leisure Activities Ltd (14 March 1984), and Gala Holdings Ltd (13 November 1997). (GHL changed its name again, on 6 February 2014, on this occasion to Gala Bingo Ltd, but for present purposes we continue to refer to it as GHL).

37. Throughout the claim period (and continuing to date), the main business of GHL was the provision of bingo. Since the company's incorporation it has acquired ownership of other companies in the same line of business, and their businesses were transferred to GHL by way of going concern.

38. HMRC accept that throughout the claim period GHL carried out MSB and MCB transactions on which it overdeclared VAT. In so far as those transactions related to periods when GHL was part of a VAT group, HMRC further accept that the representative member of that group accounted for all VAT due.

39. Prior to 12 December 1980 VAT on MSB and MCB transactions carried out by GHL was accounted for under a VAT registration number which was no longer extant on 27 March 2009.

40. On 12 December 1980 in connection of the purchase by Bass plc of the entire share capital of Coral Leisure Group Ltd (previously GHL's ultimate holding company) the ownership of GHL changed, and it became a member of a group of companies registered under VAT registration no 232 1538 95 ("the Bass VAT group"). The Bass VAT group was extant on 27 March 2009.

41. On 2 August 1997 GHL transferred the entirety of the bingo business it owned (including any rights under Section 80 in respect of MSB and MCB) to GLL.

42. On 15 December 1997, on a change of ownership, GHL left the Bass VAT group and joined the Gala VAT group.

3) Gala Leisure Ltd

43. Gala Leisure Ltd ("GLL") was incorporated on 6 March 1964 under the name of EMI Social Centres Ltd. It changed its name on a number of occasions: to Thorn EMI Social Centres Ltd (16 March 1983), to Coral Social Clubs Ltd (12 March 1984), and to Gala Leisure Ltd (30 September 1991).

44. In 1975 GLL began carrying out MSB and MCB, and continued to do so until 1 October 1984. HMRC accepted that VAT was overdeclared in respect of those transactions and, in so far as those transactions related to periods when GLL was a member of a VAT group, accounted for to HMRC by the representative member of the relevant VAT group.

45. From 1 April 1973 GLL was a member of a group of companies registered under VAT registration number 194 2952 34 ("the 194 VAT group") and remained so until 8 September 1983 when it left the group. During the period GLL was in the 194 VAT group various other companies joined that group. HMRC confirmed that the 194 VAT group was extant on 9 October 2012.

46. On 9 September 1983, following a change in its ownership, GLL joined a group registered under VAT registration number 232 1538 95 ("the Bass VAT group").

47. On 1 October 1984 GLL transferred all its bingo businesses to GHL. On 2 August 1997 GLL acquired a number of bingo businesses (including the right held by

GHL to reclaim VAT that had been overpaid in respect of bingo) owned by GHL. GLL remained in the Bass VAT group until 14 December 1997.

48. GLL remained a member of the Bass VAT group until 14 December 1997. On 15 December 1997, as we mentioned earlier, GLL became the representative member of the Gala VAT group. GLL remains in the Gala Coral group of companies and the representative member of the Gala VAT group.

THE PROGRESS OF THE PRESENT APPEAL

49. At the end of a three day hearing commencing on 12 March 2014, the tribunal adjourned the appeal and directed that the parties be allowed to make written submissions on three decisions on the same or a very similar point to that before us which were then expected in four appeals. Decisions have now been released in

1) *Standard Chartered PLC v HMRC* and *Lloyds Banking Group PLC v HMRC* (a single decision for the two appeals) [2014] UKFTT 316 (TC), released on 31 March 2014 (Judge Berner and Mr Collard) ("*Standard Chartered*");

2) *MG Rover Group Limited v HMRC* [2014] UKFTT 327 (TC), released on the same day (Judge Mosedale) ("*Rover*"); and

3) *Taylor Clark Leisure PLC v HMRC* [2014] UKUT 0396 (TCC), released on 8 September 2014 (Lord Doherty sitting as a Judge of the Upper Tribunal) ("*Taylor Clark*").

50. Both parties did make written submissions, but we did not immediately act on them since in both the *Rover* and *Standard Chartered* appeals permission was given for them to be appealed to the UT. We directed that a further hearing take place to determine how we should proceed against that background. The hearing which took place on 3 March 2015 was essentially a case management hearing. Both parties invited us to produce our own decision based on the case which had heard, written submissions made after the release of the three decisions referred to above, and their latest oral submissions.

THE FACTS

51. In his skeleton argument, Mr Peacock kindly included a summary of the facts on which each of the three tribunals was required to make its decision, together with a summary of the relevant tribunal's conclusions and an outline of the key factors relied on by the tribunal. We gratefully adopt his summary.

Rover

52. In *Rover*, output tax had been over-accounted for by the *Rover* VAT group between 1973 and 2000. *Rover* sought repayment of such tax on the basis that it was the original supplier of the vehicles which gave rise to the overpayment in the first place or at least was the assignee of rights from one or more generating members. *Rover* left the *Rover* VAT group in 2000 and joined a new VAT group. For a period between 1995 and 2000 it was also the representative member. HMRC rejected *Rover*'s claim to recover the overpayment. BMW also sought to recover the same overpaid tax in the period 1978 to 1988 on the basis that it was the representative member of the *Rover* VAT group for the time being, i.e. the period in respect of which its claim to recover was made.

53. Judge Mosedale determined the right to recover overpaid VAT rested, initially at least, with the old representative member of the relevant VAT group. However, on the departure of the generating member from the old VAT group, the right to recover overpaid tax in respect of supplies made (absent VAT grouping) by the generating member reverted to the generating member itself (or the representative member of any new VAT group it joined).

54. In arriving at that conclusion Judge Mosedale reasoned as follows:

(1) The old representative member was not a mere "trustee" for the companies which were members of its VAT group (FTT, paras 34-43), nor was it merely an "agent" of the generating member (FTT, paras 44-46).

(2) The generating member would, but for Section 43, have been the supplier of the goods and the person who over-accounted for the VAT. The effect of Section 43, however, may have been so limited that where it no longer applied, the generating member remained entitled to recover overpaid VAT (FTT, paras 47-49).

(3) The key question was then whether the deeming effect of Section 43 applied for all times and all purposes (FTT, para 58).

(4) The purpose of Section 43 (and of Article 4(4) of the Sixth Directive) was to ensure that the VAT code applied, on a simplified, convenient, "joined" basis, to separate legal entities where they were sufficiently closely linked (FTT, paras 72, 74).

(5) That purpose was not served by a continued application of Section 43 after the close economic link had ceased to exist (FTT, para 91). Indeed, the continued effect of Section 43 after the close link was broken was

contrary to the intention of the legislation (FTT, paras 92-96).

(6) BMW's contention that repayment must be made to the entity which was the old representative member from time to time would have led to anomalous and absurd results (FTT, paras 106-111). In particular, if BMW were correct, a claim to recover overpaid tax would have remained with the old representative member even if the generating member and the old representative member, at the time of relevant supplies, left the group and joined a competitor (paras 106, 109). Such an absurd result could not have been intended by Parliament (FTT, para 110).

(7) The fact that assessments could be made on a representative member even in circumstances where it did not hold that position at the time of the events giving rise to the assessment did not help the analysis (FTT, paras 117-122). Equally, there was nothing in the *Thorn Materials Supply Ltd and Thorn Resources Ltd v CCE* [1998] STC 725 ("*Thorn Materials*") or *Chubb Ltd v HMRC* [2013] UKFTT 579 (TC) ("*Chubb")* cases that would have altered that analysis (FTT, paras 122, 133, 136)

(8) The bad debt relief cases *Triad Timber Components Ltd v CCE* [1993] VATTR 384 ("*Triad Timber*") and *Proto Glazing Ltd v CCE* (1995) Decision no. 13410 ("*Proto Glazing*") were rightly decided on the basis of a limited application of the statutory fiction in Section 43 (FTT, paras 137-159).

(9) The effect of Section 43 ended when the generating member left the old VAT group so that, thereafter, the generating member was entitled to claim to recover overpaid tax in respect of supplies made (but for Section 43) by it. That construction of Section 43 was the only way in which anomalous and absurd results could have been avoided (FTT, para 163).

(10) BMW's and HMRC's suggestion that any anomaly could have been cured by the generating member's right of reimbursement against the old representative member (a claim in restitution) was wrong since the old representative member was not unjustly enriched at the expense of the generating member unless HMRC paid the old representative member and that might not have occurred if the old registered member had been dissolved or otherwise chose not to claim (FTT, para 184). Moreover, the generating member should not have been left to the vagaries of a claim against the old representative member (FTT, paras 188-189).

(11) If the issue were looked at as a matter of EU law, Section 43 did not correctly implement Article 4(4) since the latter permitted certain persons to be treated as a single taxable person while the former treated only the representative member as the taxable person (FTT, paras 231, 238). In consequence, all members of the VAT Group had EU law rights to recover the overpaid tax (FTT, paras 240, 283) so that no member (the representative member) had rights to the exclusion of another (the

> generating member), especially after the latter had left the VAT group (FTT, para 242). Where a generating member left the VAT group, the right to recover overpaid tax of which it had borne the economic burden passed to it (FTT, paras 251, 255, 283).

Judge Mosedale concluded, as a matter of UK law that, in the Departure Scenario, the person entitled to claim under Section 80 was the generating member. (She qualified that by saying that if the generating member joined a new VAT group it was the representative member of the new VAT group which was entitled to claim under Section 80). Judge Mosedale's reasoning was essentially that s 43(1)(b) VATA 94 was a deeming provision, and that the deeming effect ended at the moment when the generating member departed from the VAT group, otherwise absurd, unjust and anomalous consequences would result both for Section 80 claims and other matters (summarised at *Rover* decision paras 201-202). Judge Mosedale did not base her decision on EU law, and, had it been necessary to, indicated that she would not have been sufficiently certain to decide without making a reference for a preliminary ruling to the CJEU (see decision paras 286-287).

Standard Chartered

55. The facts in *Standard Chartered* were that the claimant company made nine separate claims in respect of various matters and in relation to various periods. Put simply, a company (Chartered Trust – the generating member) originally in its own VAT group ("VAT Group 1") made supplies on which VAT was over-accounted for in the period 1973-1990. The generating member then left VAT Group 1 (which ceased to exist) and joined the *Standard Chartered* VAT Group ("VAT Group 2") in 1990; the generating member continued to make supplies on which VAT was over-accounted for. Subsequently in 2000 the generating member was sold to *Lloyds* Bank group and became a member of the *Lloyds* VAT group ("VAT Group 3").

56. *Standard Chartered* and *Lloyds* claims SC2, SC3, L3 and L4 (FTT, paras 16-24 and 32-35) raised the relevant issue, namely whether it was the old representative member of a VAT group or the generating member that was entitled to make Section 80 claims where the generating member had left the group. HMRC's position in that case (see FTT, paras 22-23) was that:

> (1) The representative member of VAT Group 2 was not entitled to claim in respect of the period when the representative member was a member of VAT Group 1 because VAT Group 1 had ceased to exist and such a claim could therefore only be made by the representative member itself (see also FTT, para 125). That stance justified the rejection of claims SC2 and SC3.
>
> (2) The representative member of VAT Group 2 was, however, entitled to claim in respect of the period in which the generating member had been a member of VAT Group 2 (which continued to exist). That stance justified the rejection of Lloyds claims L3 and L4.

57. Judge Berner analysed the expression the "single taxable person". He concluded:

i) that the effect of the single taxable person as a fiction is not limited to administrative convenience and simplicity, (para 69);

ii) that the single taxable person construct operates only at the level of the VAT consequences of the group members' transactions (para 70);

iii) that the single taxable person construct operates only whilst constituent members are members of the group (para71);

iv) that rights and obligations arising from activities taking place for VAT purposes by constituent members of a group during a period of group registration are not the rights and obligations of the individual members but those of the single taxable person (para 72);

v) that under UK law the concept of the single taxable person is properly implemented through the representative member; the representative member is the domestic law embodiment of the single taxable person (para 73).

vi) that in relation to group members' supplies made during their group membership, the representative member has all the relevant rights (including that to recover overpayments of VAT) and obligations under the VAT legislation (para 74);

vii) that while the group registration subsists the single taxable person endures, despite changes in the group; the rights and obligations arising whilst the group exists remain those of the representative member (para 75).

58. The EU law right to recover overpaid taxes, found in the ECJ's judgment in *Amministrazione delle Finanze dello Stato v SpA San Giorgio* (*C*ase 199/82) [1983] ECR 3595 *("San Giorgio"*), provides for the payer of the taxes to recover them; there is no general right for the person who bore the economic burden of such taxes to recover them (FTT, paras 77-87). Instead, the latter person may have a remedy to recover taxes against the tax authority only where it is impossible or excessively difficult to recover from the taxable person (FTT, paras 91, 93-94) or where it has to bear the legal liability to pay those overpaid taxes (FTT, para 96).

59. A distinction is to be drawn depending on whether or not the burden of tax has fallen on a person as a consequence of the VAT system itself (para 95); arrangements for the contribution of a group member's share of the VAT to the representative member are irrelevant to the issue of who is entitled to make application for repayment of overpaid tax (para 113).

60. There can be exceptional cases where restricting the right to claim overpaid VAT to the representative member does not comply with the EU law principle of effectiveness (para 113).

61. In circumstances where a group has ceased to exist, or a company formerly in a group has left in circumstances where a claim by the representative member would not provide an effective remedy, in determining where a claim should lie regard should be had to the real transactions undertaken. In those cases the single taxable

person fiction should not be applied; the right to claim should fall on the person who would otherwise have been the taxable person (para 114).

62. Taking into account both EU law and national law, Judge Berner concluded that, in the Departure Scenario, the right to repayment of overpaid VAT in normal circumstances was that of the single taxable person, represented by and embodied in the representative member, and that the right did not leave the VAT group with the departing member. Thus the person entitled to claim under Section 80 was the representative member at the date of the claim. The only exception was if repayment to the representative member had been "impossible or excessively difficult" (summarised at FTT para 116).

Taylor Clark

63. In Taylor Clark Leisure Ltd ("TCL") the appellant was a supplier of bingo and other games (and thus a generating member) between 1973 and 1990; thereafter the appellant's relevant bingo business was carried on by a company originally called Leisurebrite Ltd, but which subsequently became Carlton Clubs Ltd ("Carlton"). Between 1973 and 2009 TCL was the representative member of the VAT group and between 1990 and 1998 Carlton was a member of that VAT group. In the period 1973 to 1998 output VAT was overpaid in respect of the bingo business by TCL as the old representative member. Carlton made claims to recover overpaid VAT and, in error, one such claim was paid to TCL; TCL also sought repayment in respect of sums claimed by Carlton. The question of entitlement to recover overpaid VAT – whether in the old representative member or in the generating member that had left the old VAT group – was thus raised again in this case.

64. On appeal, the FTT held (inter alia) that TCL's claims were time-barred; that TCL had assigned the right to recover for the period 1973-1990 to Carlton; and that Carlton, and not TCL, was entitled to claim for the period 1990-1996 from the point at which it left the old VAT group or on cessation of that group.

65. On further appeal to the UT (Lord Doherty), both parties submitted that the reasoning of the FTT in *Standard Chartered* should be preferred to the reasoning in *Rover* (see UT, para 10). In consequence, the UT preferred the approach in *Standard Chartered* and indicated that the right to recover remained with the old representative member notwithstanding the departure from the old VAT group of the generating member (UT, para 38).

66. In his conclusions on the "entitlement" issue in *Taylor Clark* Lord Doherty addressed the FTT's analysis of:

1) the relationship between the representative member and group members as being one of agency;

2) the "Departure Scenario";

3) the consequence of the disbandment of a VAT group.

67. Lord Doherty concluded (at p38):

> "I agree with the parties that the FTT fell into error in relation to those matters, and I find the analysis of the FTT in *Standard Chartered* persuasive in relation to them (and preferable to the approach taken by the FTT in MG *Rover*)."

SUBMISSIONS OF THE PARTIES

Submissions for GLL

68. Mr Peacock contended that the proper starting point for the analysis of GLL's rights to recover overpaid VAT in relation to its two claims required an appreciation of six factors. Those factors and the parties' submissions on them took the following form.

Factor 1: **An overpayment of VAT gives rise to a directly enforceable right to its recovery as a matter of EU law (see *Danfoss A/S v Skatteministeriet* (case c-94/10) [2003] STC 1651).**

69. Mr Peacock submitted that HMRC's retention of such sums gave rise to the "wrong" amount of tax being collected, and thus offended the principle of fiscal neutrality (see *Elida Gibbs v HMRC* (Case C-317/94) [1996] 1387, per the ECJ at paras 18-24).

Factor 2: The economic burden of VAT unlawfully levied is borne by a generating member (or companies that assigned their rights to the generating member)

70. Mr Peacock claimed that the overpaid VAT in point in the appeal was borne by a generating member that now formed a part of the Gala VAT group (or by a generating member or companies that assigned their rights to a company that now formed part of the Gala VAT group), and related to bingo game services provided by them.

71. He submitted that the companies that had borne the tax, or their assignee, should benefit from the recovery of the overpaid tax. As the ECJ said in *Danfoss* at para 23:

> "the right to the recovery of sums unduly paid helps offset the consequences of the duty's incompatibility with EU law by neutralising the economic burden which that duty has unduly imposed on the operator who, in the final analysis, has actually borne it."

Factor 3: The right to claim under Section 80 VATA 1994 can be assigned

72. HMRC do not dispute that the Section 80 claim rights can be assigned but, as Mr Mantle observed, that acceptance does nothing to help the tribunal decide the appeal.

Factor 4: No other representative members have made rival claims for the amounts in dispute

73. In reliance on Factor 2, Mr Peacock observed that no other claims had been made to recover the overpaid VAT; to the best of GLL's, admittedly limited,

knowledge no earlier representative member of a group of which a generating member making relevant supplies had been part had sought to recover the VAT overpaid in respect of MCB or MSB.

Factor 5: When VAT is overpaid by a representative member for a generating member and a claim is later made by that representative member when the generating member remains a member of that group, the representative member is the correct claimant, even if it is a different legal entity from the old representative member.

74. It was common ground that there was no requirement that the legal entity that actually bore the overpaid tax in the first place was the entity by which a claim must be made or to which repayment must be made. Mr Peacock submitted that the reference in Section 80 to HMRC crediting the person who had made the overpayment had to be read in the light of Section 43 as referring to crediting the legal entity that was then the current representative of the person who made the overpayment.

Factor 6: HMRC accept that the right to make a claim and receive repayment can be enjoyed by the generating member that provided the goods or services that give rise to the overpayment where that company leaves a VAT group and the group is disbanded.

75. Mr Peacock submitted that that was the correct answer as a matter of principle because it was the departure from the VAT group that meant that the representative member no longer had the right to act on behalf of the generating member: in such circumstances the deemed group fiction in Section 43 was no longer necessary. Accordingly, again the reference in Section 80 to HMRC crediting the person who made the overpayment had to be read, in light of Section 43, as referring to crediting the company that bore the burden of the overpaid tax (or its assignee).

Trust and agency

76. Mr Peacock submitted that the right to claim repayment of overpaid VAT under Section 80 held by the representative member of a VAT group which continued to exist after a generating member left it was always held for the generating member; it had a beneficial entitlement to it. When the generating member left the "old" VAT group it took with it the right to claim overpaid VAT in respect of goods or services provided by it, and that was so whether the "old" VAT group ceased to exist or continued. Where the generating member joined a new VAT group that right remained in the generating member (or its assignee).

77. HMRC's position would involve the "old" representative member continuing to represent its former members for many years after their departure from the "old" VAT group. That was a recipe for administrative chaos, inefficiency and failure to recover overpaid tax, thereby breaching the principle of fiscal neutrality.

78. Mr Peacock maintained that GLL's position as set out in the penultimate paragraph was borne out by a consideration of the authorities. It was settled law that any business carried on by the representative member, and all supplies made by members of the group to third parties were treated as made by the representative

member. The VAT group was thus treated as a single taxable person, taxable through the representative member (see *CCE v Kingfisher plc* [1994] STC 63 and *CCE v Thorn Materials Supply Ltd* [1998] STC 725). Mr Peacock accepted that that was the case under Section 43 where companies "are" members of the group; but the deemed state of affairs thus provided did not apply where companies "are *or were*" members of the VAT group.

79. The single "unity" did not, however, address the intra-group relationship between a member of the group and the representative member. In *Shop Direct et al v HMRC* [2013] EWHC (Ch) 942 (a UT decision with a High Court reference) [2013] STC 1709, the tribunal concluded that Shop Direct was properly liable, as a trading company, to corporation tax in respect of repayments of overpaid VAT paid to the representative member of its VAT group on the basis that a member of a group had a beneficial entitlement to such sums as against the representative member.

80. Such a beneficial entitlement of a member of a VAT group was enforced by the representative member for as long as the company remained in the group but, in Mr Peacock's submission, once it left it took with it its beneficial entitlement which it could enforce whether or not the "old" VAT group continued to exist. He maintained that such an outcome could be seen in the context of bad debt relief, where the legislative provisions were relevantly identical; see *Proto Glazing Ltd v CCE* (1995) Decision no. 13410.

The way forward

81. In *Taylor Clark* the UT simply preferred the approach in *Standard Chartered* without analysing that approach further. Consequently, Mr Peacock submitted that the decision in *Taylor Clark* should not be seen as determinative of the present appeal or as some kind of 'casting vote' in favour of the approach in *Standard Chartered*. Instead the tribunal should determine, as a matter of principle and authority, the correct approach. In doing so, he contended the tribunal would see that:

> (1) The FTT in *Rover* concluded that the purpose of Article 4(4) and Section 43 was given effect to only if a right to recover overpaid tax passed with the generating member on its leaving a VAT group since only in those circumstances were absurd and anomalous results avoided. In effect, the legal fiction embodied in the representative member and group registration number had a limited role which could not be taken to extreme lengths (see in particular paras 93, 102 and 103). The fact that the constituent members of a VAT group might, and frequently did, change was important and could not be ignored. Where the membership of a VAT group changed there was, in effect, a series of single taxable persons (or VAT groups) represented by the same group registration number and embodied in the representative member from time to time. However, companies that left the group stood on their own thereafter, including as regards any claims that related to the past period in which they were a member of a VAT group. The provisions in VATA 94 dealing with claims and bad debt relief (sections 36, 80) must be read in that light.

(2) The FTT in *Standard Chartered* concluded that the right to recovery of tax overpaid during the currency of a VAT group rested always with the representative member of that group, save in circumstances where the economic burden of the tax was not neutralised because the representative member could not or had not made a claim. In effect, and save for special circumstances, the fact that companies might or might not have been members of a group registration from time to time - and the fact that they might change - was a distraction. What was important, and all that one needed to address, was the legal fiction created by the group registration, which subsisted regardless of any changes in the constituent members of that group, and regardless of which company was the representative member of that group from time to time (see in particular paras 75 and 125).

82. Against that background, Mr Peacock made three submissions.

a. First, the approach of the FTT in *Rover* should be preferred to that in *Standard Chartered* and be adopted here.

b. Secondly, and in the alternative, if the tribunal preferred the approach of the FTT in *Standard Chartered*, it should recognize that the present appeal fell into the category of cases identified by the FTT in which the right to recover sat with the generating member or its assignee (here GLL) because, in the circumstances, the economic burden of the tax would not otherwise be neutralised.

c. Thirdly, should the tribunal be left in doubt, given the range of views expressed in the recent decisions, and in particular as to the compliance of the UK legislation with the Sixth Directive, a reference should be made to the CJEU. (Since it is common ground that if we are to decide the instant appeal in favour of HMRC GLL should be allowed to appeal our decision to the UT hopefully alongside the appeals of *Rover* and *Standard Chartered*, we need not take the third submission further).

83. Mr Peacock then developed his first two submissions.

(1) Preferring the *Rover* approach

84. In *Rover*, Judge Mosedale concluded that the generating member should be able to recover "overpaid tax" notwithstanding the continued existence of VAT Group 1 and its representative member on its leaving the VAT group of which it was part when it made the supplies leading to the overpayment because it was only in that way that the anomalous result of 'no recovery' could be avoided. Mr Peacock submitted that she correctly identified the purpose of VAT grouping (to ensure that the VAT code applied, on a simplified, convenient "joined" basis, to separate legal entities where they were sufficiently closely linked (paras 72, 74)) and that such a purpose was not served by a continued application of Section 43 after the close economic link had ceased to exist (para 91). Indeed, she held that the continued effect of Section 43 after the close link was broken gave rise to anomalous or absurd results, and was contrary to the intention of the legislation (paras 92-96). In particular, and bearing in mind that the VAT system was designed to be "fiscally neutral" so that the tax was borne ultimately by the final consumer with tax charged and recovered at preceding

steps in the chain of production, Judge Mosedale concluded that it was only in that way that overpaid tax could be recovered by the person who had borne the economic burden of that tax.

85. Judge Mosedale set out her conclusion on the construction of s.43(1)(b) in the following way:

> "200. The purpose of s 43 was to enable companies in common control to be treated for VAT purposes as a single entity. This goes beyond administrative convenience to the point that it can affect the nature of what is supplied (Kingfisher) subject to the normal rules of single and multiple supplies
>
> 201. Its purpose is therefore limited in time to when the companies are in common control: its purpose is not fulfilled if companies no longer in common control are yet treated to some extent as still grouped. Moreover if the deeming effect of s. 43(1)(b) does not end when the RWS leaves the VAT group absurd, unjust, and anomalous consequences follow in cases involving VAT overpayments. Allowing the deeming effect to continue after the RWS has left the group uncouples the burden of paying the VAT from the liability to pay it. It leads to a situation where Company X overpays the VAT but Company Y recovers if from HMRC, or Company X underpays VAT but Company Y is primarily liable for the assessment, even though Company X and Y are no longer connected, and (in some cases) may never have been connected.
>
> 202. So I conclude that as a matter of UK law, and applying the principles outlined in DCC, the deeming effect of s 43(1)(b) ceases when RWS leaves the group. At that point the RWS (or its new representative member if it joins another VAT group) is able to make (and assign) s 80 and BDR claims for VAT accounted for by the RWS's erstwhile representative member, and the RWS is primarily liable for VAT underpaid while it was a VAT group member (albeit the companies in the group at the time, including the erstwhile representative member, will retain joint and several liability).
>
> 203. That conclusion is consistent with the outcome of the case of *Triad, Proto Glazing, Taylor Clark, Thorn plc* and *Chubb* and consistent with the reasoning in those cases in so far as they were based on the limited extent of the deeming provisions of s 43. It is not consistent with the decision and outcome of *Thorn Materials*, although that case concerned s 43(1)(a) rather than s 43(1)(b)."

86. In contrast, in *Standard Chartered* Judge Berner recognised the need to achieve fiscal neutrality (para 94) and identified, in broadly the same terms as the FTT in *Rover*, the purpose of VAT grouping (paras 40, 45, 50). However, Judge Berner then assumed that the status of a VAT group (and its representation by the representative member) endured forever in relation to matters that occurred during the group's existence (see paras 111, 112). In that way, Judge Berner assumed that the statutory fiction, which was introduced to achieve a particular purpose, endured forever even when it was no longer necessary to achieve the purpose in question.

87. If one then analysed the basis for that conclusion, Mr Peacock maintained that the FTT in *Standard Chartered* seemed to say that it followed inevitably from the fact that there was a single taxable person, embodied by the representative member, during

the currency of the VAT group. In short, the FTT reasoned that because there was a VAT group, and thus a single taxable person, embodied by the representative member, the representative member had all rights and responsibilities for the VAT affairs of that VAT group forever more, and even after the single taxable person was no more. Mr Peacock submitted that that was illogical. There was no reason (and certainly none was identified by the FTT) as to why the simple existence of a VAT group and a representative member in years 1975-1985 (say) should have continued to have effect in 2014 (or, indeed, 2050 or some later date far in the future). No legislative purpose was identified which would have been achieved by such a result nor was there any basis for such an approach in the language of Section 43 or Article 4(4).

88. Mr Peacock accepted that such an approach might, in some cases, have offered some administrative simplicity to HMRC (in that HMRC would only have had to deal with the old representative member for all matters concerned with the period of existence of that VAT group) but, given the complexity of modern commercial life and the long periods in respect of which claims had been made, he further submitted that such a stance would often have meant that the economic burden of the overpaid tax was not neutralised and the person who "ought" to have recovered (the generating member) would have been unable to do so. Such a construction of Section 43 would therefore have breached the principle of fiscal neutrality. Given the overarching aim of the VAT code was to levy tax on the final consumer (and not on taxable persons) that breach of fiscal neutrality must have far outweighed any transient, and uncertain, administrative convenience for HMRC.

89. It was there that Mr Peacock identified Judge Berner's error in approach in *Standard Chartered* saying that at no point (before consideration of the exceptions identified by Judge Berner) did the FTT recognise the anomalies and absurdities that were bound to arise on its approach. In particular, he claimed that the FTT in *Standard Chartered* took insufficient account of the difficulties, rightly identified by the FTT in *Rover* (see *Rover*, paras 106-110, 163) of ensuring that overpaid tax was recovered. Equally, the FTT in *Standard Chartered* did not recognise that the very purpose of VAT grouping – of treating persons with sufficient economic ties as one – came to an end for a member once it left the group and that to persist in the old representative member continuing to represent that member forever more deprived the departing member of its full attributes as a taxable person going forward. In short, Mr Peacock submitted that the FTT in *Standard Chartered* took the statutory deeming further than was necessary and so as to give rise to an anti-purposive result (see *Rov*er, para 110). That was particularly acute given the transient nature of VAT grouping in many large commercial groups and that, in all operational, commercial and economic senses, the old VAT group did not represent a former generating member once that member was sold and left the commercial group. That former member had real, rather than technical, independence which the VAT code must respect.

90. For those reasons Mr Peacock invited us to prefer the approach in *Rover* to that in *Standard Chartered* submitting that the proper inter-action of Section 43 and Section 80 in relation to the MCB and MSB claims required that when an old representative member overpaid VAT on behalf of a generating member then a member of that old VAT group and the generating member left the old VAT group,

which continued to exist, and then joined a new VAT group, it was the generating member (or its assignee) that was the correct claimant under Section 80. In the present case, and as a matter of principle, that meant that HMRC should pay GLL in relation to its claims. Shortly put, the right to claim held by the old representative member was always held on behalf of the generating member concerned; when that generating member left the old VAT group it took with it the right to claim for overpaid VAT in respect of goods or services provided by it and that was so whether the old VAT group ceased to exist or continued. Where the generating member joined a new VAT group that right remained in the generating member (or in its assignee).

91. Mr Peacock maintained that to be a simple, clear and effective regime for the recovery of overpaid tax by those entities that had borne such overpayments. HMRC's position, and the approach in *Standard Chartered*, would, however, involve the old representative member continuing to represent its former members many years (possibly even 20-30 years) after their departure from the old VAT group and, in all likelihood, after many further changes in the make-up of commercial and VAT groups. He submitted that that was a recipe for administrative chaos, inefficiency and the failure to recover overpaid tax (thereby breaching the principle of fiscal neutrality).

(2) The exception to the *Standard Chartered* approach

92. In the alternative, and assuming that the tribunal preferred the approach in *Standard Chartered*, Mr Peacock contended that it was necessary to determine whether the present case fell within the exception identified by the FTT in *Standard Chartered*. At para 113 the FTT indicated that the position differed from its basic analysis if the right of the old representative member to recover did not provide an effective remedy in a case, inter alia, where the old VAT group continued to exist. In such a case a right to recover, a *San Giorgio* right, arose in favour of another person, that person being the entity that would have been the supplier (and thus the taxable person) but for the VAT grouping (paras 113, 114). In such circumstances Section 80 must be construed so as to give effect to such a right on a claim being made by a generating member since only in that way was it possible for an EU compliant construction to be given to the domestic, UK, legislation. Such a right would arise in a case where the old VAT group continued to exist because, although the group existed, the individual member that had left had ceased to be the subject of the statutory fiction (para 114). That factor "dictated" (para 114) that regard should be had to the real world supplier and thus that a right of recovery should be available to the generating member where a claim by the old representative member did not provide an adequate remedy. The FTT identified that such a right to recover would be found in the generating member if the old representative member had made no claim and was unlikely, given the commercial circumstances, to make a claim (para 115, discussing *Triad Timber*).

93. Mr Peacock claimed the present appeal to be a simple application of that reasoning. Here GLL was the generating member (or the assignee of rights from that company) and was no longer a member of the old VAT group, which continued to exist. GLL was no longer the subject of the statutory fiction in so far as it applied to the old VAT group. In the present case it was simply not possible for GLL to seek to recover via the old representative member of the old VAT group because, putting any

commercial matters aside, GLL could not have known the identity of such an old representative member when the claims were made in March 2009 – indeed, GLL left the 194 VAT Group on 8 September 1983, over 25 years before the claims were submitted. Moreover, so far as GLL knew, no old representative member had made a claim and would, in any event, have been out of time to do so; HMRC were also not aware of any other claims having been made by one or more old representative members. The present appeal was, in that sense, clearly distinguishable from the appeals in *Standard Chartered* which related to overlapping claims.

94. Accordingly, Mr Peacock submitted that GLL was entitled to recover under Section 80 as the generating member that bore the economic burden of the overpaid VAT. It was to be noted, in that regard, that there was no prospect here of any 'double payment' (to GLL and another person). HMRC's case here was that, in effect, no-one could recover the tax that had, it was agreed, been overpaid.

Submissions for HMRC

95. Mr Mantle dealt with the five of the six basic factors relied on by Mr Peacock on which there was not complete agreement in the following way:

Factor 1 – recovery of overpaid VAT

96. In response to Mr Peacock's claim that a taxpayer had the right to recover overpaid VAT, Mr Mantle accepted that there was an EU right to repayment of VAT levied contrary to EU law (see e.g. *BP Supergas* at paras 40 and 41). However, he maintained that there was not necessarily a breach of EU law if VAT levied contrary to EU law was not repaid. In particular, Member States might rely on time limits which were compatible with EU law (see e.g. *Marks & Spencer plc v HMRC* (Case C-62/00) [2002] STC 1036 at para 35). In the UK, the time limit provided by s. 80(4) VATA 1994, as modified by s.121 of the Finance Act 1988, applied.

Factor 2 – who bore the overpaid VAT?

97. Mr Mantle was unable to accept as a matter of fact that the trading companies bore the burden of the VAT unlawfully levied on the single taxable person and paid by the representative member, as Mr Peacock claimed. He submitted that it was unnecessary for us to embark on an analysis of which of the companies in the VAT group actually bore the ultimate economic burden of funding the amounts actually paid by the representative member to HMRC.

Factor 4 - no rival claims have been made for the amounts in dispute

98. To Mr Mantle that factor was simply a "bad point", of no assistance to GLL or to the tribunal. He submitted that either the individual trading companies had a statutory right to claim under Section 80 but had not claimed (it did not follow that the trading companies were entitled to claim), or that GLL must have the benefit of the right to claim. As in the case of Factor 1, it was not contrary to EU law for HMRC to

rely on time limits. It was no part of HMRC's defence to GLL's claims that the appeal should be dismissed because others had made rival claims.

Factor 5 – who is the correct claimant when a generating member leaves a VAT group?

99. Mr Mantle observed that sections 43 and 43B VATA 94 expressly provide that one company might be substituted for another as representative member. HMRC's position was that it was indeed the representative member of the VAT group at the time at which a Section 80 claim was made that was entitled to bring a claim for overpaid output tax in respect of the single taxable person, which the VAT group was for tax purposes. That was wholly consistent with the reasoning and result in *CCE v Thorn Materials Supply Ltd and another* [1998] STC 725 and reflected the particular statutory position given to the representative member, and the provision permitting substitution. Mr Mantle submitted that that gave no support for the notion that once a generating member left a VAT group, the status of that VAT group as a single taxable person must be ignored, or at least in part dissected and unravelled, and the right to claim transferred from the representative member to the generating member.

Factor 6 – HMRC's acceptance that the correct claimant on the disbandment of a VAT group is the generating member

100. Mr Mantle observed that in *Proto Glazing Ltd v HMRC* Decision no. 13410, the tribunal considered, in the context of bad debt relief provisions, the effect of the dissolution of a VAT group. The tribunal concluded that, after dissolution of a VAT group, it was the company that carried out the relevant transaction which was entitled to claim. He added that HMRC had accepted that the tribunal's decision should be applied to Section 80 claims when a VAT group had been dissolved; Mr Peacock's submission was correct in that respect.

101. However, Mr Mantle contended, it did not follow that a company ceasing to be a member of a VAT group was analogous to a VAT group being dissolved; *Proto Glazing* gave no support to the proposition that it was. He submitted that a VAT group continued to exist, despite a company or companies ceasing to be members, unless or until it was dissolved. Once a VAT group was dissolved the single taxable person in the form of the representative member no longer existed; the legal person that had been the representative member at the date of dissolution of the group might well have continued to exist, but its role as representative member had ended.

The way forward

102. By way of introduction to this section of Mr Mantle's submissions, we record that Judge Berner in *Standard Chartered* and Judge Mosedale in *Rover* reached opposite conclusions on the law on the issue of whether the generating member or the representative member was entitled to claim under Section 80 for repayment of "overpaid VAT". Both decisions required determination of the person entitled to claim in the "Departure Scenario".

103. The reasoning of Judge Berner and that of Judge Mosedale on the law are irreconcilable. Judge Berner largely accepted the submissions made on behalf of HMRC. Judge Mosedale rejected materially identical submissions put to her by HMRC (and BMW (UK) Holdings Ltd). Mr Mantle informed us that HMRC's submissions on the law in each of those appeals were materially identical to their submissions to the tribunal in the instant appeal. *Lloyds*' (*Standard Chartered's*) and *Rover's* submissions on the law were, again to quote Mr Mantle, "put at its lowest, similar to those made by GLL in this appeal, and they were extremely similar in key respects".

104. Nevertheless, Judge Mosedale and Judge Berner were in agreement in certain important respects relevant to GLL's submissions in the instant appeal. Both concluded that the representative member of a VAT group was not the agent of the generating member/companies in the VAT group (see *Rover* decision at para 46 and *Standard Chartered* decision at para 73). The relationship between representative member and trading companies, arising out of VATA 94, was not that of trustee and beneficiary (see *Rover* decision at para 36 and *Standard Chartered* decision at para 73).

105. Against that background Mr Mantle submitted that to determine the way forward the tribunal should start with UT's decision in *Taylor Clark*. He accepted that the UT's reasoning on the "entitlement" to claim issue was not binding on the tribunal, as it was obiter dicta, and noted that HMRC's appeal succeeded on the "time-bar" issue and that was determinative of the appeal.

106. Nevertheless, the UT had heard arguments on the "entitlement" issue, although *Taylor Clark* did not ultimately seek to support the FTT's analysis of VAT grouping in *Taylor Clark*. Written submissions were made by both parties on the *Standard Chartered* and *Rover* decisions after the conclusion of the hearing. Thus, Mr Mantle maintained, the UT had good opportunity to consider, compare and evaluate the *Standard Chartered* and *Rover* decisions.

107. Mr Mantle next submitted that in circumstances where the UT had considered two FTT decisions which conflicted, identified one as persuasive and preferred it to the other decision, the right course for the present tribunal was to follow the UT's lead, rather than to cause a proliferation of decisions adopting inconsistent interpretations of the law. He informed us that permission to appeal to the UT had been granted in both the *Rover* and *Standard Chartered* cases and the two appeals were listed together to be heard on 6 July 2016. Mr Mantle further contended that until decisions were given in those further appeals, the UT decision in *Taylor Clark*, and thus the legal reasoning in the *Standard Chartered* decision, should be followed. Further, applying the legal analysis in *Standard Chartered*, GLL's appeal should be dismissed.

108. Most usefully for present purposes he added that thereafter, given that permission to appeal had been granted in both the *Standard Chartered* and *Rover* appeals, HMRC accepted that in the event of our deciding the present appeal in their favour, it would be appropriate for GLL to be given permission to appeal to the UT.

109. Mr Mantle also accepted that different considerations might arise if the tribunal were satisfied that Judge Berner's reasoning was clearly wrong. However, he further submitted, that reasoning was elegant and compelling, and the judge's analysis avoided the "absurdities" that drove Judge Mosedale to adopt an "extreme analysis" of UK VAT grouping legislation.

110. Alternatively, Mr Mantle maintained that, at minimum, given the UT decision in *Taylor Clark*:

1) the reasoning and conclusions of the FTT in *Taylor Clark*, concerning Section 80 claims and VAT grouping, squarely rejected by the UT, could no longer give any support to GLL;

2) Lord Doherty's decision to include his considered view that the analysis in *Standard Chartered* was persuasive and to be preferred to that in *Rover* added significant weight to the decision in *Standard Chartered*.

Trust or agency analysis of the role of the representative member is wrong

111. Given the *Standard Chartered* FTT, *Rover* FTT and *Taylor Clark* UT decisions, Mr Mantle also submitted that GLL's reliance on trust (a generating member's supposed "beneficial entitlement") and on agency should be dismissed out of hand (see *Rover* at para 36 and para 46 and *Standard Chartered* at para 73). He maintained that the reasoning of the FTT's two recent decisions on those issues (with the analysis in *Standard Chartered* expressly endorsed by the UT in *Taylor Clark*) was cogent and compelling.

112. Mr Mantle invited us to note that GLL relied repeatedly on the existence of a beneficial relationship between representative member and generating member. Indeed, it was a central part of GLL's rationale for a generating member's entitlement in the Departure Scenario that the generating member was always beneficially entitled to repayment of the "overpaid VAT" and for that reason, as soon as it left the VAT group, it could bring the claim itself. Any trust analysis was now demonstrated to be misconceived.

113. Mr Mantle then submitted that GLL's reliance on the *Shop Direct* decision was misconceived. That was a corporation tax case where repayments had been made by HMRC pursuant to Section 80 and the court was required to consider the private law arrangements between members of a VAT group; there was no issue over whether it was the current representative member who had been entitled to claim under Section 80. The representative member, having been paid by HMRC, had then made a payment on to the generating member.

114. As Judge Mosedale succinctly put it in *Rover* at para 171:

> "All the *Shop Direct* case really shows is that the tribunals and Court of Appeal were satisfied that the payment by the representative member to the generating member was not a gift but reflected an obligation owed by the representative member to the generating member."

115. The Court of Appeal concluded that the generating member was entitled to the repayment as against the representative member. However, that was, and could only be, as a result of the private law obligations between them. (It arose out of a contract between them on the facts of that case). The Court of Appeal considered that Section 43 was irrelevant to the question before it (see *Rover* at paras 41-42).

116. *Shop Direct* in the FTT and UT was cited to Judge Berner in *Standard Chartered*. He did not refer to it in his decision. Given that Judge Berner was very familiar with *Shop Direct*, having heard the case in the FTT, Mr Mantle submitted that his considering it insufficiently relevant to mention added weight to Judge Mosedale's observation.

117. GLL also relied, expressly and sometimes inferentially, in the alternative or cumulatively with its trust analysis, on an agency analysis ("…the old representative member no longer has the right to act on behalf of the generating member"). Mr Mantle submitted that the agency analysis was also now demonstrated to be misconceived.

The Standard Chartered decision

118. Mr Mantle contended that the *Standard Chartered* decision correctly stated the relevant law (with the exception, or possible exception, of certain limited points with which we shall later deal). Judge Berner's legal analysis was directly applicable to the facts of the instant case. Applying the correct legal analysis in the *Standard Chartered* decision, he submitted that GLL's appeal should be dismissed.

119. He added that the analysis of the law in the *Standard Chartered* decision largely spoke for itself, but made some brief submissions which we take into account below.

120. The *Standard Chartered* tribunal's analysis of the law begins at para 39 of its decision with analysis of the single taxable person concept (paras 39-76), followed by analysis of the *San Giorgio* principle (at para 77-98), and the effect of a company ceasing to be part of a VAT Group (at paras 99-116).

Single taxable person

121. Judge Berner opened his reasoning on the analysis of the single taxable person concept by identifying the purpose of the relevant provision, i.e. Article 4(4) of the Sixth Directive (para 39), adding that the purpose of Section 43 was to allow Member States not to treat as individual taxable persons for the purposes of VAT those whose independence was purely technical (paras 40, 45, 50). The operation of VAT grouping applied only to those matters which took place (or were deemed to take place) when the group relationship existed (paras 57, 71).

122. As Judge Berner's analysis of the single taxable person, as summarised at paras 69-75, plays an important part in our conclusion, we include it at this point:

> 69. "… the single taxable person is a fiction, …" that has real consequences in terms of the effect on intra-group supplies and the treatment of the single taxable person as a taxable person for all relevant purposes. Furthermore,

whilst the objective of the single taxable person as a fiction may be administrative convenience and simplicity, its effect is not so limited. It is a concept that should not be construed restrictively";

70. "That is not to say that the single taxable person concept is all encompassing. It operates only at the level of the VAT consequences of the transactions carried out by the group members, and does not coalesce the group members for all purposes. Those group members remain individual entities as a matter of law. Regard must be had to the real transactions they carry out. It is only the VAT effect of those transactions, once identified by reference to the real facts that is governed by the single taxable person construct. The single taxable person fiction does not alter the character of the actual transactions, or combine what would otherwise be separate supplies into a single supply.";

71. "The single taxable person construct operates only as regards matters that take place, for VAT purposes, in respect of the constituent members of the group at a time when those persons are members of the group.";

72. "Rights and obligations arising in respect of activities taking place, for VAT purposes, in relation to constituent members during the period of the group registration, that would, absent the grouping provision, be those of individual taxable persons within the group, are not the rights and obligations of those individual members but are, according to EU law, rights and obligations of the single taxable person.";

73. "Under UK law, as set out in s 43 VATA 94, the concept of the single taxable person is properly implemented through the representative member. The representative member is a necessary construct, because the single taxable person is a mere fiction, and to be effective there must, under domestic law, be a legal person to undertake the obligations which, under EU law, are those of the single taxable person, and likewise to exercise the EU law rights attaching to the single taxable person. The representative member is the means to this end. The representative member is not the agent or trustee of the constituent members of the group. It is, by being treated for VAT purposes as carrying on the businesses of those members, and as making and receiving all the external supplies of the group, the domestic law embodiment of the single taxable person.";

74. "It follows that, in relation to supplies made by members of the group during the currency of their group membership (which are treated as made by the representative member, representing or embodying the single taxable person), the representative member will have all the relevant obligations under the VAT legislation. The representative member will likewise acquire all the relevant rights under that legislation, including rights in respect of overpayments of VAT arising as a consequence of activities of a constituent member of the group which, for VAT purposes, take place at a time when that person is a member of the group.";

75. "While the group exists, which according to UK law refers to the particular group registration subsisting, the single taxable person endures, despite changes in the composition of the group by constituent members leaving

or joining the group. The rights and obligations arising during the currency of the group, which are the EU law rights and obligations of the single taxable person, remain those of the representative member from time to time. The rights and obligations are those of the representative member as such, and not the rights and obligations of the particular company that happens to be the representative member. Accordingly, where there is a change in the representative member of a continuing group registration, the rights and obligations of the representative member as such will devolve, as a matter of UK law, upon the successor representative member."

123. Mr Mantle submitted that Judge Berner's analysis of the single taxable person concept consisted of "compelling reasoning, securely founded on EU and UK case-law, and [was] particularly powerful in its illumination of the interaction between the EU Directives and VATA 94."

124. As Judge Berner observed at para 74, it followed "from his holding that, for VAT purposes, the representative member was to be treated as carrying on the business of the group members, and on making and receiving all the group's external supplies during the currency of its group members membership, it was the representative member that has all obligations and rights under the VAT legislation.

Scandia America Corp

125. Mr Mantle brought to our attention the recent judgment of the CJEU given on 17 September 2014 in (Case C-7/13) *Scandia America Corp* ("SAC's"). That case involved a consideration of the consequences of VAT grouping under Article 11 of the Principal VAT Directive (although not in circumstances involving repayment of overpaid VAT). He maintained that we should take that judgment into account in reaching our conclusion for it reinforced the nature of the single taxable person concept identified by Judge Berner. In what Mr Mantle referred to as "slightly crude terms", one question in that case was whether there could be a taxable transaction when services were provided from a company's ("SAC's") main establishment, in a third country, to its own branch in a Member State, when the branch belonged to a VAT group.

126. At paras 29-31 the CJEU, noting that individual VAT group members could not continue to be identified as individual taxable persons (citing *Ampliscientifica Srl and another v Ministero dell'Economia e delle Finanze and another* (Case C-162/07) [2011] STC 566 at para 29 "...treatment as a single taxable person precludes the members of the VAT group from continuing to be identified, within and outside their group, as individual taxable persons...), reasoned that it followed from the single taxable person concept that, for VAT purposes, the services provided by a company such as SAC to a branch belonging to a VAT group must be regarded as supplied to that VAT group, and not to the branch. As the CJEU put it at para 31:

"In as much as the services provided for consideration by a company such as SAC to its branch must be deemed, solely from the point of view of VAT, to have been provided to the VAT group, and as that company and that branch cannot be considered to be a single taxable person, it must be concluded that the

supply of such services constitutes a taxable transaction, under Article 2(1)(c) of the VAT Directive."

127. To Mr Mantle that further affirmed the strength of the concept of the single taxable person, distinct from the VAT group members. He claimed it vividly to illustrate that it could not be the case that the consequences for VAT flowing from that concept (in UK terms from the existence of a VAT group) could change with retrospective effect, when a company departed from a VAT group.

San Giorgio Rights

128. We find it helpful at this juncture to set out the *San Giorgio* principle, and do so by adopting para 72 of Judge Berner's decision in *Standard Chartered*:

> "77. The *San Giorgio* principle … is that entitlement to the repayment of charges levied by a Member State in breach of Community law is a consequence of, and an adjunct to, the rights conferred on individuals by the Community provisions preventing such charges. The Member State is therefore in principle required to repay charges levied in breach of Community law (see *Societe Comateb v Directeur general des douanes et droits indirects and related references* [1997] STC 1006)."

129. Following extensive consideration of case-law on the *San Giorgio* principle, Judge Berner identified a distinction depending on whether or not the burden of tax had fallen on a person as a consequence of the VAT system itself. He held:

> 95. "The relationship between the VAT system itself and the right to make such a claim [for 'overpaid VAT'] is, we consider, key to understanding the boundaries of the right to make a claim. There can, in our view, be no principled basis for an extension of the right to claim to a person other than one, such as the final consumer, on whom the burden of the tax has fallen as a consequence of the VAT system itself. It is not a consequence of the VAT system that taxable persons, whether individually or as a group, may choose to fund the payment of VAT in a particular way, or may elect that the burden should be borne or shared in a manner specified by private agreement. That is not what the ECJ is referring to when it describes the burden of the tax."

130. Later, to make clear that it followed that arrangements for the contribution of a group member's share of the VAT to the representative member were irrelevant to the issue in the instant case, Judge Berner said:

> 113. "Questions of internal funding, whether they are general intra group funding arrangements or arrangements for the contribution of a group member's share of the VAT to the representative member, are not relevant in identifying the person with the right to claim."

131. Mr Mantle submitted that Judge Berner's identification of the distinction between whether or not the burden of tax on a person as a consequence of the VAT system itself was "powerful reasoning, based on a clear, apt and necessary distinction, solidly grounded on CJEU and UK case law, indeed illuminating the decided cases. It

explains why the question of which company funded and bore the economic cost or burden of amounts paid to HMRC by way of VAT by the representative members in this appeal is entirely irrelevant, whether involving full consideration of group funding issues or the narrower focus on which Mr Andrews, as expert witness for GLL, gave his expert accountancy evidence, namely "whether or not the trading companies accounted for the amount [of VAT] due to the representative member"."

132. Mr Mantle further contended that a number of practical difficulties and unsatisfactory consequences would ensue if, in the VAT group context or other contexts, Member States' revenue authorities were required to investigate, and courts and tribunals were required to adjudicate on, who had actually borne the economic burden of funding a payment which the person liable to pay VAT had actually paid to the tax authority. That would be inimical to ensuring the straightforward remedy the CJEU required be available to a person liable to pay VAT who had paid more than was due to the tax authority. In the case of VAT grouping such an enquiry would run entirely against the grain of the single taxable person concept, which recognised that for periods when persons were closely bound "by financial, economic and organisational links". As Judge Berner recognised, from the VAT perspective, for business carried on during the period of grouping, "independence" of the members was really a legal "technicality" and it would be economically unrealistic and inappropriate to try to disentangle the financial and economic relationships between group members that existed while they were grouped and, on occasions, would have endured afterwards.

Company ceasing to be part of a VAT group

133. At para 99 Judge Berner went on to consider, in the light of the tribunal's view of EU *San Giorgio* rights, whether the person entitled to claim was the generating member that later ceased to be a member of the VAT group, or the representative member of the VAT group. Having considered the decision in *Triad Timber*, *Proto Glazing* (1995**)** Decision No.13410, and *Taylor Clark* (FTT), Judge Berner held at paras 109-111:

> "109 . . . We consider that reliance by the [*Taylor Clark* FTT] tribunal on a concept of the affairs of individual members of the group being represented by the representative member is wrong in principle. We share the view of the tribunal in *Thorn* [plc v Customs and Excise Commissioners [1998] V&DR 80], that the role of the representative member is not one of agency. The authorities are in our view clear that the effect of s. 43 VATA 94 is to create the single taxable person envisaged by Article 4(4) of the Sixth Directive, and that the representative member does not represent the individual members of the group, but represents or embodies the single taxable person.
>
> 110. Accordingly, a change in composition of the group, whether by a member joining the group, or a member leaving it, can in our view have no effect in itself on the entitlement of a representative member to claim for overpayments of VAT made by the single taxable person during the currency of the group registration. One has to look at the single taxable person as if it were a legal person with its own VAT registration. If, on that analysis, the single taxable

person would, if it had legal capacity, be entitled to claim, then that is the entitlement of the representative member for the time being. In consequence… those entitlements that do arise to the single taxable person remain as such, and accordingly it is the representative member of the group that has that entitlement, and not the member leaving the group, even if that member was the generating member.

111. That is the position under s 80 VATA, which looks to the person who has accounted for the tax to HMRC, or who has been assessed. That is apt, in normal circumstances, to relate to the representative member or, exceptionally, to a group member that has been assessed to tax under the joint and several liability provisions in s 43(1). In a continuing group, there is no basis for holding that such a provision of national law does not accord with the principle of effectiveness."

134. In the present case, strictly speaking, it is unnecessary for us to consider the situation where the VAT group has ceased to exist, the "Disbandment Scenario", as it did not arise in the three appeals Judge Berner considered, and does not arise in the GLL appeal. However, as GLL relies on it by analogy we include Judge Berner's consideration of it:

"112. In our judgment the position is essentially the same in the case of a group that has ceased to exist. The single taxable person fiction ceases to apply, but it ceases to apply for the future only. There is no retrospective unravelling of the effect of the single taxable person fiction; in particular, intra-group supplies continue to be ignored, and supplies made by or to the group during the currency of the group continue to be treated as having been made to or by the representative member. The position of the single taxable person, and consequently of the representative member that is the embodiment of that fiction, is that it has simply ceased to be a taxable person. Although the statutory fiction has ended, its historical effect, as regards the accounting and payment of the tax, endures. Respecting the fiction for the past, the position is no different from the VAT perspective to that of an individual taxable person who has ceased to be such. In such a case, there would be no argument but that the individual would be entitled to make a claim under s 80 for any tax wrongly levied on him while he was a taxable person. The position of the single taxable person is the same. Section 80 gives a right to claim to the person who has accounted for the tax, namely the single taxable person through the representative member for the time being, or to the person who has paid the tax to HMRC by reason of joint and several liability. In ordinary circumstances, therefore, the s 80 right is that of the representative member of the group immediately before the group registration came to an end. That right under national law cannot, as a matter of principle, be regarded as in breach of the principle of effectiveness."

135. Mr Mantle submitted that Judge Berner's reasoning on the position where a VAT group had ceased to exist as set out in para 112 of the *Standard Chartered* decision was, again, "compelling", and undoubtedly made his analyses of the "Departure Scenario" and the "Disbandment Scenario" entirely consistent.

136. In GLL, at the hearing before the present tribunal, as well as before the FTT in *Taylor Clark*, *Standard Chartered* and *Rover*, Mr Mantle explained that HMRC argued that when a VAT group was disbanded, the former representative member no longer had the right to make a Section 80 claim in relation to overpayments of VAT made during the existence of the VAT group. Rather, the Section 80 claim fell to be asserted by the generating member. Mr Mantle informed us that that submission, which was in accordance with HMRC published policy, was based on HMRC's reading of *Proto Glazing*.

137. However, after consideration of the *Standard Chartered* decision, and with the endorsement of that decision in *Taylor Clark* UT, HMRC changed their former primary position on claims when the relevant VAT group had ceased to exist. Mr Mantle said that they now accepted Judge Berner's conclusion that, in general, it was the representative member of the group immediately before the group registration came to an end which was entitled to claim under Section 80 – the position they adopted in *Taylor Clark* before the UT. He thus admitted that HMRC's former approach was incorrect. Mr Mantle claimed that that ensured the statutory effect of the VAT grouping was given proper effect and avoided a retrospective alteration of the VAT rights and obligations of the various group members. It was also in accordance with administrative simplification and legal certainty which were policy aims underpinning the VAT group legislation.

138. That was of some significance because GLL relied on HMRC's former position on claims when the relevant VAT group had ceased to exist and sought to use HMRC's former position to undermine their case on the "Departure Scenario". Mr Mantle claimed the true thrust of GLL's argument was that HMRC were inconsistent, and that their conclusion in the "Disbandment Scenario" was correct and had to be applied to the "Departure Scenario". If, as Mr Mantle submitted, echoing Lord Doherty, Judge Berner was right in his legal analysis that entire ground relied upon by GLL fell away.

Exceptional cases

139. Judge Berner did however recognise that there could be exceptional cases where restricting the right to claim to the representative member, and only the representative member, did not comply with the EU law principle of effectiveness. At paras 113-114 he stated:

> "113. The position is different, however, if the right of the representative member does not, in given circumstances, provide an effective remedy. This applies both to the case of a continuing group, and one that has ceased to exist. In those circumstances, if it is impossible or excessively difficult for the representative member to obtain reimbursement from the tax authority, so that the burden of the tax on the group has not been economically neutralised, a San Giorgio right will arise in favour of another person. However, such an enquiry does not encompass ascertaining where the burden of the tax has fallen, otherwise than through the operation of the VAT system itself. Questions of internal funding, whether they are general intra group funding arrangements or arrangements for the contribution of a group member's share of the VAT to the

representative member, are not relevant in identifying the person with the right to claim.

114. Such an issue is likely to arise only in a case where either the group has ceased to exist, or a company that was formerly in the group has left in circumstances where a claim by the representative member of the continuing group does not provide an effective remedy. In the former case, the group itself has ceased to be subject to the statutory fiction, and in the latter it is the individual company that has so ceased. In each of those circumstances, that factor in our view dictates that, in determining where the claim should lie, regard should be had to the real transactions that have been undertaken. On that basis, such a right would, in our view, fall on the company that, had the single taxable person fiction not applied, would have been the taxable person in relation to the activity giving rise to the tax."

140. As Judge Berner emphasised, at paras 113 and 114 of his decision, Mr Mantle contended that what a generating member must establish to have a right to claim was that it was impossible or excessively difficult for the representative member to obtain reimbursement from HMRC, for that right arose only if the EU law principle of effectiveness would otherwise be breached.

141. Mr Mantle informed us that HMRC accepted that, in such circumstances, the courts might be required to find that an EU *San Giorgio* right must arise in favour of a generating member. Hard cases on their facts, typically where the representative member had become insolvent, might require a direct remedy against HMRC be given to a generating member, but he maintained the general and normal rule was that only the representative member had the right to claim against HMRC.

142. In the instant appeal there was nothing before the tribunal to suggest that the representative members of the extant VAT groups were insolvent. The fact that a representative member had not claimed could not in Mr Mantle's further submission of itself support the inference that it was, at the material time before the time limit for Section 80 claims expired, impossible or excessively difficult for that representative member to claim under Section 80. The focus was properly on the position of the representative members of the relevant "194", "Bass" and "Granada" VAT groups. GLL had relied on the agreed fact that the identity of the representative members of the relevant 194, Bass and Granada VAT groups was not available, including prior to the relevant time limit expiring on 31 March 2009, from HMRC, and was not otherwise in the public domain. However, if GLL's own means of knowledge was relevant at all, there was no evidence about private arrangements between, or potential to obtain information from, other companies which had been members of those VAT groups, including companies that had entered into assignments of rights to GLL.

143. Mr Mantle submitted that it was important to emphasise that the focus was on the representative member's ability to claim against HMRC. Questions of internal VAT group financing were irrelevant to the *San Giorgio* right to claim (see *Standard Chartered* para 113). However, a generating member Y necessarily had close financial, economic and organisational links to the other members of its VAT group so long as it was a member (indeed under VATA 94 there would be common control). Thus there was good reason why a tribunal should be reluctant to infer, given the

obvious scope for private arrangements between members of a VAT group addressing potential rights and liabilities relating to VAT (whether made when Y joined the VAT group, or made or modified in contemplation of Y leaving the VAT group), that it would be excessively difficult or impossible for the representative member to make a claim after Y had left the VAT group. Thus he contended that GLL had no *San Giorgio* type right to bring its claim.

144. Alternatively, even if that were wrong and GLL did have such a right, Mr Mantle submitted that it could not bring its claim under Section 80. The UT in *Earlsferry Thistle Golf Club v HMRC* [2014] UKUT 250 (TCC) (decision released 2 June 2014) decided (definitively, so far as the FTT is concerned) that:

1) a claim under Section 80 may only be made by "the person who has accounted for and paid to HMRC the tax now being reclaimed" (see para 21); and

2) the FTT has no jurisdiction to entertain a *San Giorgio* type "direct effect claim" for repayment which is not within the scope of Section 80 (see para 22).

145. Judge Berner considered the scope of Section 80 (at *Standard Chartered* para 98). It was clear, again in Mr Mantle's submission, given the judge's correct analysis of the irrelevance of funding arrangements mentioned above, and his compelling analysis of succession by a new representative member in the context of the single taxable person (at para 75), read with the decision of the UT in *Earlsferry*, that subsection 80(1) (and subsection 80(1B)) must be interpreted as giving only the representative member from time to time the right to claim under Section 80, because it was the representative member of the VAT group which had in fact accounted for and paid VAT to HMRC.

146. Judge Berner recognised that where HMRC sought to apply joint and several liability under VATA 94 to an individual group member, not the representative member, exceptional cases of that type were brought into the scope of Section 80 by subsection 80(1A), which relates to assessments by HMRC. Mr Mantle claimed it notable that Judge Berner did not refer to a right to claim under Section 80 in paras 113 to 115, although he did refer to "a *San Giorgio* right arising in favour of [a person other than the representative member] "(at para 113). If direct effect of EU law and the EU law principle of effectiveness required a generating member to be given a direct claim against HMRC, then that generating member must be given a right to claim direct in national law. However, Mr Mantle claimed it was clear that the principle of effectiveness did not require the claim to be under a particular statutory provision, leaving the Member States a choice as to the particular direct remedy (so long as the remedy did not mean recovery was impossible or excessively difficult). That was clearly illustrated, in the context of "overpaid VAT", by, e.g., *Investment Trust Companies v HMRC* [2012] STC 1150 upholding common law claims for "overpaid VAT" by recipients of supplies. If para 98 of *Standard Chartered* contradicted that, Mr Mantle submitted that it went too far. The *Standard Chartered* and *Lloyds* appeals did not require a decision on the scope of Section 80 in exceptional cases. Accordingly, applying the legal analysis in *Standard Chartered*, GLL's appeal should be dismissed

The Rover Decision

147. As we earlier explained, Judge Mosedale decided that in the Departure Scenario, as a matter of UK law, the generating member (referred to in her decision as the RWS ("real world supplier")) was entitled to claim under Section 80. In reaching that conclusion she rejected as erroneous reliance on an agency or trust analysis of VAT grouping, and the notion that Section 43 was (simply) a measure for administrative convenience (see para 200).

148. The key conclusions supporting her conclusion are at paras 200-203 of the decision. Judge Mosedale based her decision on Section 43 being a deeming provision. She reasoned that its purpose was "limited in time to when the companies are in common control" and the deeming effect had to be held to end when the generating member left the VAT group. If it did not she considered "absurd, unjust and anomalous consequences" would follow relating to VAT overpayments and other matters. At para 201 she described the generating member as the company that "overpays the VAT".

149. Mr Mantle observed that GLL had submitted that once a generating member left a group there was no longer any need or role or purpose for the statutory fiction found in Section 43, although that submission was typically linked to submissions relying on an agency and/or trust analysis of VAT grouping. He submitted that Judge Mosedale's analysis and conclusion were wrong for the reasons set out in the *Standard Chartered* decision. That decision also clearly demonstrated that the "absurd, unjust and anomalous consequences" which drove Judge Mosedale to interpreting Section 43 did not arise in the normal case. Any case in which it was impossible or excessively difficult for the representative member to claim repayment from HMRC could be satisfactorily addressed, with a direct remedy provided for the generating member.

150. Mr Mantle made the following further submissions on the *Rover* decision:

1) Judge Mosedale did not properly understand the EU law concept of the single taxable person. Her analysis of UK and EU law in that regard was flawed and, in significant respects, internally inconsistent. At paras 71-72 she appeared to accept that the concept went beyond administrative simplification and was intended to be a reflection of economic reality, when legally separate entities were so closely linked that their supplies should be seen as joined. She accepted that properly applying the single taxable person concept could affect the amount of VAT due. However, the result of her analysis of the "Departure Scenario" was that economic reality must, in significant respects, be disregarded altogether, as if there had never been a single taxable person. Her analysis required the single taxable person concept (and the economic justification for it) to be disregarded from the moment a company left the VAT group, and with full retrospective effect. Transactions of a generating member which the VAT regime had, for good reason, classified as a supply by the single taxable person, must be reclassified as a supply by that generating member. Mr Mantle submitted that that was unsustainable.

2) It should have been obvious that when a company left a VAT group it did not retrospectively affect the economic reality of the intra-group relationships that existed throughout the period of membership, when the relevant business activities were carried on. Further, Mr Mantle claimed that the single taxable person concept was not and could not be downgraded to an administrative simplification measure, with one person required to represent the group, but only until a member left. Yet Judge Mosedale's reasoning effectively reduced Section 43 to such a (temporary) administrative simplification measure. When regard was had to Judge Berner's analysis of the single taxable person concept, and the role of the representative member in relation to it, it was obvious why his analysis was to be preferred to that of Judge Mosedale.

3) Further Judge Mosedale misapplied *DCC Holdings (UK) Ltd* [2010] UKSC 58, concerning the construction of deeming provisions. Indeed, the judge seemed to have treated DCC as conferring on the FTT an ad hoc power to ignore a deeming provision, which applied on the ordinary and natural meaning of its words, if it disapproved of the result of the application of the statute to the scenario before it.

4) In any event, as the *Standard Chartered* decision showed, the deeming provision in Section 43 did not produce absurd, anomalous or unjust results. "Absurdities, anomalies or injustices" should not be presumed without any regard to commercial reality, and the scope for commercial decisions to put in place (private) internal intra-group arrangements, whether assigning rights or simply leaving them with the representative member, either when a generating member joined or exited a VAT group (given that the VAT group members would be under common control at that point). The members of a VAT group were free to arrange their affairs as they saw fit around the legislative framework. More generally the *Standard Chartered* analysis did not produce, absurd, anomalous or unjust results. If, because of an intervening event, of which insolvency was the paradigm, it became impossible or excessively difficult for the representative member to claim the "overpaid VAT", then there was the possibility of a direct claim by a generating member against HMRC.

5) The approach taken in *Rover* offended against basic notions of legal certainty and non-retroactivity, which dictated that the VAT consequences of transactions were determined at the time they took place and when they had to be accounted for. Although Judge Mosedale accepted the VAT consequences of VAT grouping while a company remained a group member, she failed to identify any plausible legal mechanism by which those consequences were required to be unravelled retrospectively, because a generating member left the VAT group (with prospective effect). Judge Mosedale identified no basis in EU or UK law for annulling the past effects of VAT grouping or treating them as void from the start.

151. In conclusion, Mr Mantle submitted that HMRC's essential position remained that the legal analysis in the *Standard Chartered* decision was to be preferred to that in *Rover*, as Lord Doherty considered. To HMRC; the *Standard Chartered* decision

was particularly satisfying as it demonstrated that there was a coherent straightforward approach to remedies for overpayments of VAT under Section 80 in the VAT grouping context, and that an exceptional case could be addressed, if a remedy given to the representative member would not meet the requirements of the EU law principle of effectiveness.

CONCLUSION

152. We should say at this point that there is nothing in the main case presented by Mr Mantle for HMRC with which we disagree, and which we are unable to accept as representing the law which we must apply. As his case was based on the decision of Judge Berner in *Standard Chartered*, it follows that we endorse that decision and we do so without qualification. Indeed, we regard the decision as providing the clearest exposition possible of the single taxable person concept, and the application of that concept in practice.

153. As Mr Mantle suggested we should, we reject the submission of Mr Peacock that GLL has, as generating member, an entitlement to the monies it claims on the basis of the existence at the relevant time or times of supply of a beneficial relationship between the representative member of its VAT group and itself. We agree with Mr Mantle that the reasoning of the FTT and conclusion in favour of HMRC on that point in the *Standard Chartered* and *Rover* decisions, coupled with the UT endorsement in *Taylor Clark*, are cogent and compelling. We find ourselves unable to understand the basis of Mr Peacock's case that GLL had throughout its periods of membership of various VAT groups a beneficial relationship with the relevant representative member without there being in existence an agency or trust relationship for, as we understood him, he accepted the correctness of the reasoning in the three decisions to which we have just referred. We do not regard the decision in *Proto Glazing* as offering support for Mr Peacock's submission, it being the subject of a bad debt relief claim - an entirely different point.

154. We then turn to the subject of the legal analysis of the single taxable person concept. In the *Standard Chartered* decision Judge Berner carried out a lengthy and detailed analysis and reached a conclusion following on from that of the VAT and Duties Tribunal in *Thorn plc v CEC* [1998] V&DR 80. The *Thorn* case concerned the succession of a new representative member of the rights and obligations of the former representative member in relation to an existing group. The tribunal was required to determine the validity or otherwise of an assessment made by HMRC on the current representative member of a group on supplies made in periods where another company occupied that role. The tribunal accepted the appellant's case that the assessment ought to have been made on the former representative member, in so doing referring at p.83 to the statutory consequences of a group registration under Section 43 as subsisting "for so long as the group is in being", and at p.84 to the effect for VAT purposes of a group registration as being for the group to subsist through its "representative member", the expression applying to whichever company was currently undertaking that role. Further, the tribunal found at p. 85 that the representative member was not a representative in the sense of being an agent of, or trustee for, other members of the group; the representative member had the statutory role conferred by Section 43 which was quite distinct from the legal roles of those "acting in a representative capacity" within section 73(5) VATA 94.

155. As Judge Berner observed at para 63 of *Standard Chartered*, "there is no authority to suggest that a representative member will acquire rights or become subject to obligations of a company in respect of matters occurring while that company is separately registered or is part of a different group registration."

156. Nor could Judge Berner find anything in the House of Lords judgment in *CCE v Svenska International plc* [1999] STC 406, "concerning any possible succession by the representative member of a new group to the rights and obligations set out in *Standard Chartered* of a company joining the group, whether formerly registered in its own right or as the representative member or part of another group," or in two further CJEU cases that assisted the tribunal in dealing with the analysis required "when the artificial world of supplies and groups collides with the real commercial world". We too are unable to find anything in the *Svenska* case to contradict the points Judge Berner made.

157. As we earlier explained, Judge Berner summarised the principles in relation to the single taxable person he considered could be derived from EU law, domestic law and the authorities at paras 69-75 of his decision in *Standard Chartered*. Having most carefully considered his analysis, we conclude that it is correct in every respect. It consists of a perfectly logical progression of deductions which are completely in accord with the recent CJEU case of *Scandia America Corp*. As Mr Mantle claimed, the analysis is not only securely founded on EU and UK case law, but the judge's reasoning is "compelling".

158. We particularly note the following observations of Judge Berner:

> (1) Para 71 – that it is only the VAT effect of group members' transactions, once identified by reference to the real facts, that is governed by the single taxable person concept;
>
> (2) Para 73 – that the representative member is, by being treated for VAT purposes as carrying on the business of its group members and as making and receiving all the external supplies of and to the group, the domestic embodiment of the single taxable person; and
>
> (3) Para 74 – "It follows that, in relation to supplies made by members of the group during the currency of their group membership (which are treated as made by the representative member, representing or embodying the single taxable person), the representative member will have all the relevant obligations under the legislation. *The representative member will likewise acquire all the relevant rights under the law."(*our emphasis)

159. It follows that, in accepting the correctness of Judge Berner's analysis of the single taxable person concept, we reject the submissions of Mr Peacock as to the ending of the fiction on a generating member leaving the relevant VAT group. We are unable to accept his contention that despite the representative member having all the responsibilities for the VAT group, its rights, and particularly that to the repayment of overpaid VAT, terminated on its leaving its VAT group. In so saying, we are not prepared to read the reference in Section 80 to HMRC crediting the person who made the overpayment, in the light of Section 43, as referring to crediting the generating member as the company that bore the burden of the overpaid tax. As we have said, we

do not accept as fact the generating member as the company that bore the burden, for the group was free to make whatever arrangements it chose to fund the payment of VAT in a particular way, or to share the payment as specified in a private agreement.

160. We find ourselves able quickly and easily able to deal with the question of the *San Giorgio* principle for again we accept in its entirety Judge Berner's view of the matter as expressed at para 95 of the *Standard Chartered* decision. We particularly note Judge Berner's observation that "there can, …, be no principled basis for an extension of the right to claim overpaid VAT to a person other than one, such as the final consumer, on whom the burden of the tax has fallen as a consequence of the VAT system itself. It is not a consequence of the VAT system that taxable persons, …, may choose to fund the payment of VAT in a particular way, or may elect that the burden should be borne or shared in a manner specified by private agreement…"

161. Consequently, we confirm that the question of which group company funded and bore the economic cost or burden of VAT paid to HMRC by the representative members concerned in the present appeal is irrelevant.

162. In the exceptional case, where restricting the right to claim overpaid VAT to the representative member would result in non-compliance with the EU law principle of effectiveness, HMRC accept that a *San Giorgio* right to claim will arise in favour of a person other than the representative member. As Judge Berner observed, at para 114, such a right is likely to arise only where a group has ceased to exist, or a company has left the group and a claim by the representative member of the continuing group fails to provide an effective remedy. In the instant case, neither of those situations arises; there is nothing before us to suggest that the representative member of any of the extant VAT groups is insolvent, or for some other relevant reason unable to make a claim. Consequently, we conclude that it is unnecessary for us to consider whether a *San Giorgio* claim should be entertained in the present appeal. We hold that the single taxable person fiction explained by Judge Berner applies; GLL has no *San Giorgio* right to bring a claim.

163. We then turn to deal with the question of which company has the right to make a Section 80 claim where a company ceases to be a member of a group, i.e. in the Departure Scenario. As Judge Berner concluded at para 109, the effect of Section 43 is to create the single taxable person, and that the representative member does not represent individual members of the group, but rather represents or embodies the single taxable person. Further, a change in the composition of a VAT group, whether in the Departure Scenario or the Disbandment Scenario, has no effect on the entitlement of a representative member to make VAT repayment claims for VAT paid by the single taxable person during the currency of the group registration; the entitlements that arise to the single taxable person remain as such, i.e. the representative member has that entitlement (see para 110 of *Standard Chartered*).

164. It will be recalled that Mr Mantle informed the tribunal that following consideration of the *Standard Chartered* decision, as endorsed by the UT in *Taylor Clark*, HMRC changed their position when the relevant group had ceased to exist. Whereas previously they maintained that the former representative member no longer had the right to make a Section 80 claim in relation to overpayments of VAT, they now accept, in general, that the representative member of a group immediately before

its group registration came to an end is entitled to make a Section 80 claim. In our judgment, the change in policy correctly reflects the position to be adopted in the Disbandment Scenario. The change does nothing to assist GLL; it merely corrects what we consider to have been an error on HMRC's part.

165. We are unwilling to accept GLL's argument that since the burden of the tax fell on it as generating member, on its leaving the VAT group it took with it an entitlement to recover any overpaid tax. As Judge Berner relevantly observed at para 113, albeit in the slightly different context of the availability of an effective remedy for recovery of overpaid tax in certain given circumstances, "Questions of internal funding, whether they are general intra-group funding arrangements or arrangements for the contribution of a group member's share of the VAT to the representative member, are not relevant in identifying the person with the right to claim."

166. It will be recalled that earlier in our decision we included a number of submissions of Mr Mantle in which he made various criticisms of the decision of Judge Mosedale in *Rover*. The first of them was that she did not properly understand the EU law concept of the single taxable person; her EU and UK analysis of the law was flawed and, in certain respects, inconsistent. We need not repeat the basis on which Mr Mantle made his submissions. Suffice it to say, that we accept his contention that Judge Mosedale's holding that the single taxable person concept, and its economic justification, is to be disregarded from the moment a generating member leaves a VAT group is unsustainable. Our reasons for so doing are those he advanced, and need no elaboration.

167. We further agree with Mr Mantle that when a company leaves a VAT group it does not retrospectively affect the economic reality of the intra-group relationships that existed throughout its membership; the single taxable person concept cannot be downgraded to an administrative simplification measure with one person required to represent the group, but only until a member leaves, as Judge Mosedale appeared to do. As Judger Berner observed at para 69 of *Standard Chartered*, "… whilst the objective of the single taxable person as a fiction may be administrative convenience and simplicity, its effect is not so limited. It is a concept that should not be construed restrictively."

168. In agreeing with that statement, we reject Mr Peacock's submission that it is illogical that the representative member has all right and responsibility for its VAT group throughout its future existence, even after the single taxable person is no more. We are unable to accept that the effect of the existence of the single taxable person as identified by Judge Berner constitutes a breach of fiscal neutrality for in all but the exceptional cases the representative member may do so, and in the exceptional cases the generating member may do so.

169. Judge Berner observed at para 113 of *the Standard Chartered* decision that if it is impossible or excessively difficult for the representative member to obtain reimbursement from HMRC, a *San Giorgio* right to claim repayment of overpaid tax will arise in favour of another person. Mr Mantle accepted, as do we, that insolvency of the representative member might be such a circumstance and require a direct remedy be given to a generating member. The existence of such a remedy, again in our judgment, provides adequate reason for our finding that the deeming provision in

Section 43 does not produce the "unjust, anomalous or absurd" results found by Judge Mosedale in *Rover*.

170. In *Rover* it was common ground that the VAT that the company sought to reclaim was accounted for by the representative member of a VAT group of which it and certain other companies were members at the time the associated supplies were made. The decision indicates at para 17 that Judge Mosedale proceeded on the assumption that the generating member "bore the economic burden of the overpayment of tax." We regard that assumption as possibly having led the judge into error further in assuming that the generating member, having borne the economic burden of the tax, was subsequently entitled to recover it on the overpayment being discovered.

171. We also accept Mr Mantle's claim that Judge Mosedale's approach in Rover offended against basic notions of legal certainty and non-retroactivity. We agree that the judge identified no basis in EU or UK law for annulling the past effects of VAT grouping, or treating them as void from the start.

172. Lest it be thought that in reaching our conclusion we have failed to take account of all the submissions of Mr Peacock, we proceed to deal with those with which we have not already dealt.

173. At the heart of Mr Peacock's claim that the representative member's right to recover any overpaid VAT should come to an end on a generating member leaving its VAT group is that that member bore the burden of the tax paid. As we have already said, we do not accept as fact that the generating member bore the burden; the companies within the group were free to make whatever arrangements they chose to make intra-group for the provision of the tax in point. In those circumstances, we are satisfied that the economic burden was neutralised, and the person who "ought" to have recovered was the representative member, irrespective of the length of time elapsed between the relevant supplies being made and the recovery claim being made. We are unable to recognise the anomalies and absurdities to which Mr Peacock referred.

174. It follows that we do not agree with Mr Peacock's submission that the decision in *Rover* is to be preferred to that in *Standard Chartered*; the latter correctly deals with the inter-action of Section 43 and Section 80.

175. In relation to the question of whether the instant case falls within the exception identified by Judge Berner in *Standard Chartered*, we are unable to accept that only if HMRC are prepared to meet a claim for overpaid tax by the generating member following its departure from a VAT group will an EU compliant construction be given to the domestic legislation. We see no reason why to be EU compliant Section 80 should be so construed.

176. We dismiss the appeal in its entirety.

177. 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.

178. As we earlier said, HMRC accepted that in the event of our dismissing the appeal, GLL should be permitted to appeal the decision to the UT. We give that permission and express the hope that arrangements can be made for any appeal to be dealt with by the UT along with the appeals of *Standard Chartered* and *Rover*.

JUDGE DEMACK

TRIBUNAL JUDGE

RELEASE DATE: 14 July 2015