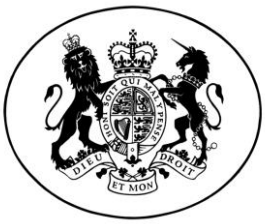
[2019] UKFTT 234 (TC)



TC07081

Appeal number: TC/2017/03179
TC/2017/03180

VALUE ADDED TAX – interest assessments under section 76 VATA – construction of section 74 VATA – whether interest due to HMRC when late paid VAT held by Home Office – appeals dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

G4S CORPORATE SERVICES LIMITED **Appellants**
G4S INVESTIGATIONS SOLUTIONS (UK) LIMITED

- and -

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

TRIBUNAL: JUDGE VICTORIA NICHOLL
MS REBECCA NEWNS

Sitting in public at Taylor House, London on 21 November 2018

Zizhen Yang, Counsel, instructed by Ernst & Young, for the Appellants

Brendan McGurk, Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. These appeals are against the following notices of assessments of interest issued by the Respondents ("HMRC") to the Appellants:

Date of assessment	Pursuant to	Amount	Reduced amount as advised 29.09.16
11.08.16	Section 76 VATA	£19,355.16	£15,914.24
04.10.16	Section 76 VATA	£1,257,708.56	n/a

Background

The following facts of this case are not in dispute:

2. Each Appellant is the representative member of a separate VAT group to which G4S Care and Justice Services (UK) Limited ("G4S") belonged at various times during the relevant periods. The first Appellant is the representative member of a VAT group of which G4S has been a member since January 2016. Prior to that, G4S was a member of a different VAT group which, until January 2016, had as its representative member G4S Regional Management (UK & I) Limited. From January 2016, the second Appellant was left as the only trading company in that VAT group, and its representative member by default. The Appellants are therefore the "deemed suppliers" of the services the subject of these appeals pursuant to section 43(1) (b) Value Added Tax Act 1994 ("VATA").

3. In 2012, G4S entered into two contracts with Secretary of State for the Home Department ("the Home Secretary"), acting through the part of the Home Office then known as the UKBA (now UK Visas and Immigration, UK Border Force and Immigration Enforcement). The contracts were for the supply of various services to asylum seekers. The contracts are known as "COMPASS contracts", standing for "Commercial and Operations Managers Procuring Asylum Support Services". The two contracts concerned supplies to be made in two different geographical regions within the UK.

4. The Home Secretary entered into four more COMPASS contracts in 2012 in relation to four further geographical regions within the UK with two other suppliers, Serco Limited and Clearel Limited.

5. The services supplied by G4S under the COMPASS contracts included the following: (a) initial accommodation to asylum seekers; (b) "dispersal accommodation" provided to asylum seekers determined as being eligible for support; (c) transport services used to move asylum seekers from the port of entry to the initial accommodation and, subsequently, to the dispersal accommodation, as well as to and from appointments; and (d) "management services", including various support

services for asylum seekers, management of behaviour within the provided accommodation, and reporting and IT management for the UKBA.

6. Clause 5 and Schedule 5 of the COMPASS contracts provide for the Home Secretary to pay service charges for supplies made under the contracts. Paragraph 1.1.5(f) of Schedule 5 provides that the invoice must clearly state the VAT applicable. The Home Secretary, acting through the Home Office, has promptly settled all invoices rendered by G4S under the contracts, including all amounts referable to VAT.

7. Between December 2012 and March 2016, G4S carried on correspondence with, variously, HMRC, the Home Office and Serco in relation to the VAT status of supplies made under the COMPASS contracts. Mistakenly, both G4S and the UKBA believed the supplies of dispersal accommodation to be exempt from VAT.

8. On 30 March 2016, HMRC issued a decision that G4S were making five separate supplies under the COMPASS contracts and that they should not be treated as a single overarching supply of asylum seeker management/processing services. HMRC determined that the dispersal accommodation was a standard rated supply of a services rather than an interest in or licence to occupy land. G4S had therefore under-declared output tax on supplies of dispersal accommodation since 2012. In April 2016, G4S invoiced the Home Secretary for the outstanding VAT due on COMPASS services supplied between September 2012 and 31 March 2016. These invoices were paid in full on 11 and 13 July 2016.

9. On 15 June 2016 HMRC raised assessments under section 73 VATA to recover the unpaid VAT on the COMPASS supplies. The Appellants have not appealed against the assessments and the VAT due has been paid.

10. On 11 August 2016 HMRC raised an interest assessment on the first Appellant in the sum of £19,355.16 (later reduced to £15,914.24 as noted in paragraph 1 above). On 4 October 2016, HMRC raised an interest assessment in the sum of £1,257,708.56 on the second Appellant. Each interest assessment related to amount of VAT assessed on the relevant Appellant under section 73 VATA.

11. The Appellants asked for a statutory review of the interest assessments in an email received by HMRC on 2 November 2016. HMRC responded that as a decision to charge a penalty is not an appealable matter, there is no legal basis on which to perform a review. However, Neil Price, the HMRC officer who made the decisions, responded to the points raised in his letter of 15 March 2017.

12. The Appellants appealed to the Tribunal on 13 April 2017.

13. The witness statements of Andrew Nigel Charles Grey for the Appellants and Neil Price for HMRC were not challenged, but they are only accepted as evidence of the facts and not as regards the opinions expressed.

Preliminary issue 1 – jurisdiction and late appeals

14. The process for making an appeal in relation to VAT is set out in section 83G VATA. This provides that any appeal to the Tribunal under section 83VATA must be made before the end of the period of 30 days beginning with the date of the document notifying the decision to which the appeal relates. However, where HMRC are required to undertake a review under section 83C VATA, an appeal is to be made within the period of 30 days beginning with the date of conclusion of the review.

15. As noted in paragraph 11 above, HMRC determined that there is no statutory basis for a review in relation to an interest assessment under section 76 VATA because section 83A VATA only requires HMRC to offer a review of a decision if an appeal lies under section 83 in respect of the decision. As the only right of appeal in relation to section 76 VATA is against the amount of the assessment, as opposed to the decision, HMRC refused to review the decisions.

16. HMRC have not sought to argue that the appeals to the Tribunal are out of time as they were made more than 30 days after the section 76 assessments were notified. They were made within 30 days of Mr Price's response letter dated 15 March 2017 but this was not the conclusion of a review. For the avoidance of doubt in these circumstances, and taking account of the fact that HMRC were aware that the Appellants wished to challenge the interest assessments and that part of the delay arose while HMRC determined whether reviews would be undertaken, we give permission for the late appeals to the Tribunal.

17. The Appellants' appeal to the Tribunal is under section 83(1)(q) VATA. Section 83(1)(q) VATA gives the taxpayer a right of appeal to the Tribunal in respect of the amount of any interest specified in an assessment that HMRC has made under section 76 VATA, but there is no right of appeal to the Tribunal in relation to HMRC's decision to raise an assessment under section 76 VATA.

18. HMRC questioned whether the Appellants' grounds of appeal come within their appeal rights in section 83(1)(q) VATA. We also noted that although this point was not raised by the parties, parallel considerations apply to the Tribunal's jurisdiction. It is for the Tribunal to consider the extent of its jurisdiction in each case. The Appellants' appeal rights and our jurisdiction in this case are both limited to consideration of an appeal against the amount of the interest specified in the assessments under section 76 VATA. While this might have been an issue on the grounds initially pleaded by the Appellants as outlined in Preliminary issue 2 below, we consider that the only ground of appeal now pursued by the Appellants raises arguments that relate to the amount of the interest specified in the assessment.

Preliminary issue 2 – grounds of appeals

19. The Appellants' grounds of appeal were set out under three headings. These were "The time the VAT should have been paid" (based on the date on which HMRC issued its ruling on the proper VAT treatment of the supplies), "Commercial Restitution" and "The principles of equivalence and neutrality" (based on the

treatment of other providers supplying services under the COMPASS contracts). The Appellants have dropped the first and third grounds of appeal and only wish to pursue the arguments under the heading of "Commercial Restitution". This included the statements that "default interest is intended to provide commercial restitution", that "the Exchequer has not been deprived of any amount for any time" and that charging interest would be "wholly contrary to the Commissioners' stated policy and to the EU law principle of proportionality."

20. HMRC's Statement of Case addressed the grounds of appeal raised under the heading "Commercial Restitution". HMRC's witness, Mr Price, included a number of assertions in his Witness Statement which the Appellants submit are new issues that were not contained in the Statement of Case. The Appellants cite the authority of *Allpay Limited v HMRC* [2018] UKFTT 273 (TC) ("*Allpay*") in support of its argument that HMRC should not be allowed to raise new issues without permission. HMRC have not sought to argue the legal points that were raised in Mr Price's Witness Statement and highlighted as new by the Appellants.

21. However, HMRC argue that the Appellants should have made an application to amend their grounds of appeal to include arguments as to the purpose of section 74 VATA and the alleged requirement, as a matter of EU law, that interest could only be charged if loss has been suffered. Mr McGurk submits that the Appellants had to add the argument that the Tribunal should construe section 74 "so that, in calculating the amount of interest, account is taken of the sum assessed under section 73 only to the extent that that sum was not available to the Crown" in order to claim that the amount of interest payable is zero. He submits that the Tribunal's permission is required to raise this new argument.

22. We do not consider that the decision in *Allpay* suggests that the Appellants should have sought permission to raise the arguments that have been identified as new by HMRC. *Allpay* concerned HMRC's obligation under rule 25 of The Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ("the Tribunal Rules") to "set out the respondent's position in relation to the case." The taxpayer had raised two grounds of appeal and the statement of case only addressed one, even though the other had been raised in HMRC's decision. The only reasonable reading was, by implication, that HMRC had conceded the second point and the proposed amendment was not allowed as it did not explain their position.

23. In contrast, the points raised by the Appellants in this case are the development of the arguments raised in the grounds of appeal. Rule 20 of the Tribunal Rules requires an appellant to include the grounds of appeal in its notice of appeal, but in practice they are expressed as concisely as possible. The arguments raised by the Appellants in their Skeleton three weeks before the hearing do not raise new facts to be proved or disputed. They were addressed in HMRC's Skeleton a week later and in Mr McGurk's submissions and so there is limited prejudice to HMRC. We conclude that we are able to consider the expanded arguments made by the Appellants as they are the development of the ground raised in the notice of appeal. Indeed, even if a new argument can be said to have been raised in the Skeleton, we give permission because the limited prejudice to HMRC is outweighed by the interests of hearing the case

fairly and justly, which includes hearing the expanded arguments on the statements made under the second ground of appeal (see paragraph 19 above).

Preliminary issue 3 – evidence produced at hearing

24. Ms Yang produced a number of documents during the course of the hearing to support the Appellants' interpretation of phrases such as "the Crown", "Exchequer" and "Consolidated Fund". Mr McGurk did not object to the admission of these documents until the final document was produced after he had closed for HMRC. We agree with Mr McGurk that it was not appropriate to produce this new piece of evidence after the Respondents had closed. We do not consider that offering HMRC the right to make further submissions on the evidence after close of the hearing would be appropriate or cost efficient in the context of a newspaper article alleging facts that HMRC may wish to challenge. We therefore refused to admit the article as evidence.

Submissions

25. As noted in paragraph 19 above, the Appellants have pursued only one of the three grounds of appeal raised in their notice of appeal, Commercial Restitution. The Appellants' case is that where, as in this case, there is a late payment of VAT to one part of the Crown (HMRC), but for the entire period of the delay the same amount of money is retained by another part of the Crown (the Home Office) because the taxpayer omits to charge it (notwithstanding being entitled to do so), the deprivation to the Crown as a whole is nil. It is submitted that, on applying the interest charge to the late payment of VAT by the Appellants in this case, the amount of interest payable should also be nil because there was no deprivation to the Crown as the same amount of money was retained by the Home Office for the entire period of the delay.

26. Ms Yang's submissions to support the Appellants' case are set out in the discussion below under the headings of the three propositions that she put forward to support her conclusion that the amount of interest should be zero.

27. HMRC submissions are set out in the context of and in response to the Appellants' propositions below.

Relevant law

28. The **Council Directive 2006/112/EC** on the Common System of Value Added Tax ("the **PVD**") provides the basis for the United Kingdom's relevant VAT legislation as follows:

> **Article 2**
> **"**1. The following transactions shall be subject to VAT:
>
> (a) the supply of goods for consideration within the territory of a Member State by a taxable person acting as such;
> (b) […]
> (c) the supply of services for consideration within the territory of a Member State by a taxable person acting as such; [ ]"

Article 9
"Taxable person" shall mean any person who, independently, carries out in any place any economic activity, whatever the purpose or results of that activity."

Article 13
"1. States, regional and local government authorities and other bodies governed by public law shall not be regarded as taxable persons in respect of the activities or transactions in which they engage as public authorities, even where they collect dues, fees, contributions or payments in connection with those activities or transactions.

However, when they engage in such activities or transactions, they shall be regarded as taxable persons in respect of those activities or transactions where their treatment as non-taxable persons would lead to significant distortions of competition.

In any event, bodies governed by public law shall be regarded as taxable persons in respect of the activities listed in Annex I, provided that those activities are not carried out on such a small scale as to be negligible."

Article 273
"Member States may impose other obligations which they deem necessary to ensure the correct collection of VAT and to prevent evasion, subject to the requirement of equal treatment as between domestic transactions and transactions carried out between Member States by taxable persons and provided that such obligations do not, in trade between Member States, give rise to formalities connected with the crossing of frontiers."

29. The relevant provisions of the **Value Added Tax Act 1994** ("**VATA**") provide as follows:

Section 73(1) – Failure to make returns etc
"Where a person has failed to make any returns required under this Act (or under any provision repealed by this Act) or to keep any documents and afford the facilities necessary to verify such returns or where it appears to the Commissioners that such returns are incomplete or incorrect, they may assess the amount of VAT due from him to the best of their judgment and notify it to him."

Section 74—Interest on VAT recovered or recoverable by assessment
"(1) Subject to section 76(8) [*not relevant*], where an assessment is made under any provision of section 73 and, in the case of an assessment under section 73(1) [*assessment where there has been a failure to make returns or to keep documents or where incomplete or incorrect returns made*] at least one of the following conditions is fulfilled, namely—
(a) the assessment relates to a prescribed accounting period in respect of which either—
(i) a return has previously been made, or
(ii) […]

the whole of the amount assessed shall, subject to subsection (3) below, carry interest at the rate applicable under section 197 of the Finance Act 1996 from the reckonable date until payment. […]"

Section 76—Assessment of amounts due by way of penalty, interest or surcharge

"(1) Where any person is liable—
[…]
(c) for interest under section 74, or
(d) […]
the Commissioners may, subject to subsection (2) below, assess the amount due by way of penalty, interest or surcharge, as the case may be, and notify it to him accordingly; […]. […]
(3) In the case of the penalties, interest and surcharge referred to in the following paragraphs, the assessment under this section shall be of an amount due in respect of the prescribed accounting period which in the paragraph concerned is referred to as "the relevant period"— […]
(e) in the case of interest under section 74, the relevant period is the prescribed accounting period in respect of which the VAT (or amount assessed as VAT) was due; and
(f) […]
(7) In the case of an amount due by way of penalty under section 66 or 69 or interest under section 74—
(a) a notice of assessment under this section shall specify a date, being not later than the date of the notice, to which the aggregate amount of the penalty which is assessed or, as the case may be, the amount of interest is calculated; and
(b) if the penalty or interest continues to accrue after that date, a further assessment or assessments may be made under this section in respect of amounts which so accrue. […]
(9) If an amount is assessed and notified to any person under this section, then unless, or except to the extent that, the assessment is withdrawn or reduced, that amount shall be recoverable as if it were VAT due from him. […]"

Section 83 (1)(q) - Appeals

"Subject to sections 83G and 84 [*time limits and other preconditions for appeal*], an appeal shall lie to the tribunal with respect to any of the following matters—

(q) the amount of any penalty, interest or surcharge specified in an assessment under section 76 […]"

Section 84(6) VATA provides that the Tribunal has no power to vary an assessment by way of interest.

Schedule 11 VATA – Administration, Collection and Enforcement

Paragraph (1) "The Commissioners for Her Majesty's Revenue and Customs shall be responsible for the collection and management of VAT."

Paragraph 5(1) "VAT due from any person shall be recoverable as a debt due to the Crown."

Section 41 VATA – Application to the Crown
"This Act shall apply in relation to taxable supplies by the Crown as it applies in relation to taxable supplies by taxable persons."

Burden of proof

30. The parties have agreed the assessments that HMRC issued to the Appellants under section 73 VATA in relation to supplies under the COMPASS contracts. As a result of an assessment being made under section 73, a liability for interest is calculated under section 74 VATA and HMRC may assess the interest under section 76 VATA. The only point that is, or indeed can be, the subject of this appeal pursuant to section 83(1)(q) VATA is the amount of the interest specified in the assessment under section 76 VATA. The Appellants have the burden of proof to show why the amount of interest should be zero as they submit.

Discussion

31. The facts of this case are agreed by the parties. The only issue for determination by the Tribunal is whether the three propositions put forward by Ms Yang create a successful ground of appeal against the amount of the section 76 interest assessments listed in paragraph 1.

32. The liability to the interest charge arises under section 74 VATA which provides that where an assessment is made under section 73 VATA in respect of an accounting period for which a return has previously been made, "the whole of the amount assessed…shall carry interest" from the reckonable date until payment. Section 76 VATA then gives HMRC a discretion whether to assess this liability as it provides that where any person is liable for interest under section 74 VATA, the Commissioners "may" assess the amount due by way of penalty, interest or surcharge, as the case may be, and notify it to him accordingly.

33. As we noted in paragraph 17 above, the right of appeal and jurisdiction of the Tribunal is limited by section 83(1)(q) VATA to the amount of interest specified in the section 76 assessment. The exercise of HMRC's discretion to assess the interest can only be challenged by judicial review proceedings. We have therefore considered the Appellants' appeal in the context of the three propositions that Ms Yang submits lead to the conclusion that the calculation of the interest should result in the amount of interest being zero. In summary these are:

(1) Tax is imposed for the benefit of the government and VAT is a debt due to the Crown

(2) The government retained the use of the VAT that was paid late by G4S and so it was not deprived of its VAT because of the default by G4S

(3) Construction of section 74 VATA: Interest is compensation for a creditor being deprived of its money

Conclusion: The interest calculation should be applied to an amount of zero

(1) Tax is imposed for the benefit of the government and VAT is a debt due to the Crown

34. The Appellants have referred us to the following passage in *R v Barger* (1908) 6 CLR 41 at 68 (*per* Griffiths CJ and Barton and O'Connor JJ):

> "The primary meaning of 'taxation' is raising money for the purposes of government by mean of contributions from individual person".

35. Paragraph 5(1) of Schedule 11 VATA provides confirmation that VAT due from any person shall be recoverable as a debt due to the Crown. Ms Yang submits that Parliament clearly intended to refer to 'the Crown', as opposed to the Commissioners for Her Majesty's Revenue and Customs who are, for example, stated in paragraph 1 of Schedule 11 to be "responsible for the collection and management of VAT".

36. Ms Yang submits that the 'government' is referred to by the English public law term of art as "the Crown" and continues her argument on the basis that the terms are interchangeable. We were referred to the decision of Lord Diplock in *Town Investments Ltd v Department of the Environment* [1978] AC 359 ("*Town Investments*"). The case concerned leases of premises for use by civil servants working in various government departments. Lord Diplock stated:

> "In my opinion, the tenant was the government acting through its appropriate member or, expressed in the term of art in public law, the tenant was the Crown."

37. HMRC accept the proposition that the Commissioners collect VAT on behalf of the Crown and that the Commissioners have no beneficial interest in the VAT collected. However, HMRC submit that the government includes, but extends beyond the Exchequer and the Crown, and it disputes that the Home Secretary's obligations are those of the Crown. Mr McGurk submits that *Town Investments* does not assist the Appellants as it concerns a lease that was entered into by the Minister for Works for and on behalf of Her Majesty and successor departments to whom functions could be assigned. In this case the agreement was entered into by the Home Office for itself alone, and HMRC's functions are non-transferable (section 5A(3) of the Commissioners for Revenue and Customs Act 2005).

38. We accept the first proposition as expressed in (1) above. The remaining points are developed by the parties and considered in relation to proposition (2).

(2) The government retained the use of the VAT that was paid late by G4S and so it was not deprived of its VAT because of the default by G4S

39. Ms Yang submits that it follows from the proposition at (1) above that where tax is paid late it is the government that is potentially left out of pocket, but that this must be considered on the facts of each case and in this case the government was not left out of pocket.

40. Ms Yang's submission is that as the Home Secretary entered into the COMPASS contracts with G4S on behalf of the government, the government was liable to pay G4S for the supplies and the VAT thereon. While G4S mistakenly failed to invoice the Home Secretary for VAT on the supplies of dispersal accommodation, the Home Office was able to keep an amount equal to the VAT that G4S should have paid to another part of the government. When the VAT was assessed, the same amount was recovered from the Home Secretary. There was therefore no period of time during which the government did not have use of funds in an amount equal to the late paid VAT. Ms Yang concludes that on the facts of this case the Crown (being the government) was not deprived of the late paid VAT as it was held by the Crown throughout the period of delay.

41. Mr McGurk agrees with Ms Yang that the Crown and HMRC have no separate legal personality but he submits that this does not make the Crown an indivisible person for VAT. Statute provides for its functions to be carried out by Ministers of the Crown. Government departments may be distinct taxable persons for VAT. Article 13 of the PVD expressly envisages that public authorities may be distinct taxable persons in order to prevent significant distortions of competition. If a public authority can be a separate entity for the purposes of making a supply, it can be a separate entity for the purposes of receiving a supply. In this case invoices were not raised and sent to 'the Crown' but rather to the Home Office and it has the obligation to use its budget for the purposes of paying for the taxable supply.

42. HMRC submit that only the Home Office has the use of money retained by it. When HMRC had not collected it, it could not make it available to the Consolidated Fund. By contrast, monies in the Consolidated Fund are available for government use in the wider sense.

43. We do not need to decide whether money held by Home Office can be treated as held by the Crown so that the Exchequer has not been deprived of the VAT because we do not accept proposition 3 below. However we note that the Home Office retained the use of an amount equal to the unpaid VAT until it was invoiced by G4S, but that it has not been established where or how it held these funds. We also note that when the liability for the VAT arose it was due to the Crown and, in particular, to the Exchequer as it holds the receipts from taxes. Finally, we note that section 41 VATA makes clear that the VATA should apply "in relation to taxable supplies by the Crown as it applies in relation to taxable supplies by taxable persons". This supports the argument that a government department making (and by analogy receiving) a supply is distinct from the Exchequer for VATA purposes, including section 74 VATA.

(3) Construction of section 74 VATA: Interest is compensation for the creditor being deprived of its money

44. The Appellants' third proposition is that section 74 VATA should be interpreted purposively by the Tribunal to mean that interest should be calculated by reference to the amount of loss caused to the Crown by the default of the taxpayer.

45. Ms Yang submits that this proposition is correct because it reflects the common law interpretation of interest as compensation for being deprived of money and this should be applied in the absence of guidance in relation to VAT. We were referred to commercial law cases as authority for the statement that no interest is payable where there has been no relevant loss of the use of money. For example, in *Riches v Westminster Bank Ltd* [1947] AC 390 at 400 Lord Wright held that:

"The essence of interest is that it is a payment which becomes due because the creditor has not had his money at the due date. It may be regarded either as representing the profit he might have made if he had had use of the money, or conversely, the loss he suffered because he had not that use. The general idea is that he is entitled to compensation for the deprivation."

46. Ms Yang continued that as interest is compensation for the creditor being deprived of its money, the Tribunal should adopt the Appellants' purposive interpretation of section 74 VATA that interest should only be charged to the extent that the Crown has been deprived of its money. We were referred to a number of cases that support purposive construction of legislation, including the following guidance provided by Lewison LJ in *Pollen Estate Trustee Co Ltd v HMRC* [2013] EWCA Civ 753 ("*Pollen Estate*"):

"The modern approach to statutory construction is to have regard to the purpose of a particular provision and interpret its language, so far as possible, in a way which best gives effect to that purpose."

47. Ms Yang then suggested that the Tribunal should, if necessary to discharge its interpretive function, insert additional words into section 74 VATA to give effect to its purpose. She submits that it would be unreasonable or unjust not to adopt this purposive interpretation in these circumstances, despite the fact that the wording of the section is clear on its face. We were referred to the decision of Lord Nicholls in *Inco Europe Ltd v First Choice Distribution* [2000] 1 WLR 586 at 592, *Marleasing SA v La Comercial Internacional de Alimentacion SA* (case C-106/89) and the Court of Appeal in *Pollen Estate* in this context. The Appellants' suggestion is that the end of section 74 VATA could be construed to include the following underlined words:

"[ ] …the whole of the amount assessed shall, subject to subsection (3) below and to the extent not available to the Crown, carry interest at the rate applicable…"

48. Ms Yang submits that the only the Appellants' construction of section 74 VATA is compliant with the European concept of proportionality. She suggests that it would not be proportionate to allow interest to be charged where there has been no loss to the Member State. We were referred in this context to the European Community cases of *EMS-Bulgaria Transport OOD* v *Direktor na Direktsia 'Obzhalvane i upravlenie na izpalnenieto' Plovdiv* (case C-284/11) (**"***EMS-Bulgaria***"**), *Equoland Soc. Coop. arl* v *Agenzia delle Dogane – Ufficio delle Dogane di Livorno* (case C-272/13) (**"***Equoland***"**) and the CJEU's judgment in *Senatex GmbH* v *Finanzamt Hannover-Nord* (case C-518/14)("*Senatex*").

49. Finally, Ms Yang submits that the Appellants' purposive construction of section 74 VATA is consistent with HMRC's (non-binding) published guidance. She referred us to the following extracts from published passages:

> (1) Press Notice No. 34/94 ("Interest on VAT assessments")
>
> "In general Customs will not in future seek to assess interest where it does not represent commercial restitution. […] advice recently issued to local VAT offices will emphasise the role of interest as commercial restitution.
>
> The change of emphasis is the first result of an ongoing internal review into the way the interest regime operates in practice. The change addresses concerns that interest should not be charged when there is no overall loss to the exchequer, and reflects Customs' wider commitment to keep burdens on business to a minimum.
>
> […] Although commercial restitution has always been the principal rationale for interest, the VAT mechanism means that in some cases interest has been charged where there is no overall loss to the exchequer. This might happen for example when one company fails to charge VAT but, had it done so, another company would have been able to claim that VAT as input tax."
>
> (2) VAT Notice 700/43/10 ("Default interest")
>
> "1.2 What is default interest?
>
> "Default interest is intended to provide commercial restitution for the loss of understated or overclaimed VAT and should not be considered a penalty. What we mean by 'commercial restitution' is explained in section 2.2. […]
>
> "2.2 What is commercial restitution?
>
> "By 'commercial restitution' we mean compensation for the loss of use of any undeclared or overclaimed VAT.
>
> "We will normally only charge you interest if we have been deprived of this VAT for a period of time. We would not, for instance, generally charge you interest if you have underdeclared an amount of VAT which would have been immediately reclaimable as input tax by a third party, as this would not represent commercial restitution."
>
> (3) HMRC's VAT Default Interest Manual (VDIM3010)
>
> "Commercial restitution: General principles
>
> "Commercial restitution is the compensation required when the Exchequer has been deprived of an amount of VAT for a period of time.
>
> The compensation is charged as interest for loss of use of the money. But if a taxpayer has under declared an amount of VAT which would have been reclaimed as input tax by a third party, there has been no loss to the exchequer.

> By restricting interest charges to those cases in which commercial restitution is appropriate, HMRC are exercising their discretion under care and management powers. However such action does not change the statutory basis for interest."

50. HMRC submit that there is nothing on the face of section 74 VATA that requires HMRC to show that it has or would suffer a loss or deprivation: that is because, unlike in private law claims, HMRC is not complaining about being kept out of "its" money; rather, it has not been able to collect the amount of VAT due at the time when it was due. The charge ensures that the right amount of VAT is collected taking account of the time value of money.

51. Turning to the addition of an interpretive limitation to section 74, Mr McGurk submits that there is no 'insufficiency' in the drafting of section 74, and that the Appellants' submission comes "perilously close" to a contention that section 74 is, on its face, in breach of EU law. Mr McGurk submits that rather than supporting the Appellants' case, the focus of the European cases is fiscal neutrality to ensure that taxpayers pay the right amount of tax. He also noted that there would be distortion in the application of VAT if the interest charge were to be affected by the fact that the amount of VAT is owed by a government department.

52. Finally, commenting on HMRC's published statements, Mr McGurk submits that the "loss" and "deprivation" are references to the balancing of tax due and tax reclaimable and that the guidance is thus focused on the correct amount of tax that may be retained by HMRC. A late payment of tax will, given the time value of money, lead to an underpayment of tax to the state. The use of interest assessments allows HMRC to collect the correct amount.

53. We have concluded that interpretation of the provisions in sections 74 and 76 VATA must start with the premise that they provide for the assessment of VAT default interest, as opposed to charging of commercial interest. It is default interest because the liability arises automatically where there has been a VAT default and it is calculated by reference to the amount of VAT assessed and to be collected under section 73 VATA. If the interest charge is viewed from this starting point, the interpretation of the provisions, the application of EU principles of proportionality and consistency with HMRC's published guidance fall into place.

54. Looking first at HMRC's published guidance, we find that it is consistent with this explanation of its purpose. The guidance explains that in exercising their discretion under section 76 VATA HMRC consider whether they will retain the amount of VAT owed or whether the default is such that the VAT owed can immediately be recovered, so that HMRC will not retain the amount owed. The decision whether to assess is therefore driven by the collection of what will be retained by HMRC, the VAT receipt to be added to its tax receipts, rather than by the recovery of commercial late payment interest.

55. This interpretation is consistent with the EU principle of proportionality and fiscal neutrality. Article 273 permits Member States to enact provisions such as section 74 VATA to ensure collection of the correct amount of tax. In *EMS-Bulgaria* the ECJ

considered that the principle of fiscal neutrality precluded a penalty that consisted of a refusal of the right to deduct VAT, but it confirmed that payment of default interest may constitute an adequate penalty provided that it is proportionate to obtain the objective that tax is collected correctly.

56. In *Senatex* the ECJ applied the principle of VAT neutrality in deciding that the deduction of input VAT should be allowed if the substantive requirements were met, and noted that the interest charge should reflect the ultimate VAT revenue as a result of this correction. This supports the argument that if the amount of VAT owed is subject to a right of repayment, it is proportionate to charge interest on the net sum owed as this is the tax that is to be collected and retained. The interest charge ensures that all taxpayers pay the VAT due on time, without favour for government departments or suppliers to the Crown. It is not commercial interest to be charged because a creditor has not had his money.

Conclusion: The interest calculation should be applied to an amount of zero

57. The Appellants have raised some very interesting arguments and conclude that, applying a purposive construction to section 74 VATA, the rate of interest applicable is applied to an amount of zero because the government did not lose the use of the sums owed at any stage, resulting in no interest being payable. HMRC have challenged these arguments and pointed to the distortion in the market if the payment of VAT could be delayed where the government makes or receives supplies.

58. We have concluded that there is no basis for the addition of an interpretive limitation to section 74 VATA and that the status of the Appellants' client, the Home Office, is irrelevant to the calculation of the interest charge. The amount of interest specified in the section 76 VATA assessments was correctly calculated in accordance with the provisions of section 74 VATA by reference to the amount of VAT assessed under section 73 VATA. The authority for and purpose of sections 74 and 76 VATA are for the collection of VAT due and to be retained, in contrast to commercial interest which seeks to compensate for the deprivation of a sum owed.

Decision

59. For the reasons set out above, the appeals are dismissed.

60. 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.

VICTORIA NICHOLL
TRIBUNAL JUDGE

RELEASE DATE: 9 APRIL 2019