[2021] UKFTT 0459 (TC)

TC 08343V

Corporation Tax – Portfolio holdings – UK statutory provisions in breach of EU law – Tax paid under those provisions – Whether repayment claims valid – Application of s 806(2) Income and Corporation Taxes Act 1988 – Issues concerning amendments to returns – Issues concerning Management expenses – Whether amendments to returns on time

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2019/02400 & Others
TC/2020/02367 & Others

BETWEEN

THE APPLICANTS IN THE POST PRUDENTIAL CLOSURE NOTICE APPLICATIONS GROUP LITIGATION

-and-

THE APPELLANTS IN THE POST PRUDENTIAL CLOSURE NOTICE APPEALS GROUP LITIGATION **Appellants**

-and-

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

TRIBUNAL: JUDGE JOHN BROOKS

The hearing took place on 14 – 18 June 2021 with further written submissions received from the Appellants on 10 September 2021, 1 October 2021 and 30 November 2021 and from the Respondents on 24 September 2021 and 1 December 2021. With the consent of the parties, the form of the hearing was video using the Tribunal video platform. A face to face hearing was not held because of the restrictions imposed as a result of the coronavirus pandemic that were in place at the time of the hearing.

Prior notice of the hearing had been published on the gov.uk website, with information about how representatives of the media or members of the public could apply to join the hearing remotely in order to observe the proceedings. As such, the hearing was held in public.

Jonathan Bremner QC, instructed by Joseph Hage Aaronson LLP for the Appellants

David Ewart QC, Barbara Belgrano and Laura Ruxandu, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

INTRODUCTION

1. This case concerns the validity of statutory claims for the repayment of tax paid in accordance with United Kingdom ("UK") legislation, as applied by the Respondents, HM Revenue and Customs ("HMRC")[1], on the grounds that the tax was imposed in breach of European Union ("EU") law. The substantive EU law issue was resolved by the Supreme Court which held in *Prudential Assurance Co Limited v HMRC* [2019] AC 929 ("*Prudential (SC)*") that the UK statutory provisions breached EU law by failing, in particular, to give credit for the foreign nominal rate ("FNR") of tax.

2. The following eight test cases have been selected from 129 closure notice applications and 177 appeals (with all others being stayed pending the outcome of this litigation) to resolve a series of issues in relation to claims concerning tax on dividend income which relate, almost exclusively, to holdings under 10% ("portfolio holdings") by investment funds:

Closure Notice Applications

(1) Schroder Asian Income Fund ("Schroder Asian") for the accounting periods ending 31 January 1991 and 15 January 2009;

(2) Avon Insurance plc ("Avon") for the accounting periods ending 31 December 1997 to 31 December 2003 inclusive; and

(3) Baillie Gifford American Fund ("Baillie Gifford") for accounting period ending 30 April 2005.

Appeals

(4) SLMM European Equity Fund ("SLMM") for the accounting periods ending 31 March 2004, 31 March 2005 and 31 March 2006

(5) Schroder European Fund ("Schroder European") for the accounting period ending 15 January 2003;

(6) Schroder Institutional Growth Fund ("Schroder Institutional Growth") for the accounting period ending 30 June 2004;

(7) Fidelity UK Index Fund ("Fidelity UK Index Fund") for the account periods ending 28 February 2007 to 28 February 2010 inclusive; and

(8) Henderson Emerging Markets Fund ("Henderson") for the accounting periods ending 31 October 2006 and 31 October 2007.

3. Jonathan Bremner QC appeared for the Appellants. HMRC were represented by David Ewart QC, Barbara Belgrano and Laura Ruxandu. I am most grateful for their thorough and helpful submissions, both written and oral. However, although carefully considered, I have not found it necessary to refer to every argument advanced or authority cited in reaching my conclusions.

PROCEDURAL BACKGROUND

4. Although the hearing in this case concluded on 18 June 2021 there has been an inevitable and unavoidable delay in releasing this decision. This is because it was anticipated at the hearing, correctly as it transpired, that the decision of the Supreme Court in *FII Group Test Claimants v HMRC*, which it had heard between 7 and 10 December 2020, would provide

[1] Although throughout the decision I have referred to the Respondents as HMRC, this should be read where appropriate (ie for periods before the implementation of the Commissioners for Revenue and Customs Act 2005) as a reference to the Inland Revenue.

further assistance on several issues arising in this case. It was therefore agreed that the parties would be granted an opportunity to make further submissions as appropriate.

5. In addition, following a discussion with the parties during the hearing, it was agreed that I would provide them with a draft decision setting out the Tribunal's conclusions in relation to the issues in these applications and appeals (the "Draft Decision") for them to provide an agreed joint statement, or in the absence of agreement their respective submissions, in relation to the impact and consequences of the Draft Decision on the Applicants/Appellants in the eight test cases.

6. Therefore, following the handing down of the judgment in *FII Group Test Claimants v HMRC* [2021] 1 WLR 4354 ("*FII SC 3*") on 23 July 2021, I directed the Appellants to provide their written submissions on the effect of the Supreme Court's decision on the present case by 10 September 2021, HMRC to provide written submissions in response by 24 September 2021 and the Appellants to reply by 1 October 2021. Having considered these submissions the Draft Decision was provided to the parties on 26 October 2021. Further submissions were received from the Appellants and HMRC, on 30 November and 1 December 2021 respectively, in relation to the outcome of each of the applications and appeals as described below under the heading *Resolution of Closure Notice Applications and Appeals*.

ISSUES

7. Although there is some disagreement as to the precise formulation (which does not have any impact on my decision), the parties produced the following Agreed Statement of Issues, to which I have added, in brackets, the lead case(s) in relation to each of them:

A – Issues Concerning the Validity of Claims

Issue 1: Non- resident dividend income returned as exempt

Appellants' wording:	Can tax paid on dividend income in excess of that due upon the proper application of EU law be recovered in circumstances where the dividend income was returned as exempt?
Respondents' wording:	Where non-UK dividends have been treated as exempt in a return, does that amount to a valid claim for full double tax relief ("DTR")?

(Lead cases: Schroder Institutional Growth for the accounting period ending 30 June 2004 and Henderson for the accounting period ending 31 October 2006. Issue 1 also arises in Henderson for the accounting period ending 31 October 2007 and Fidelity UK Index Fund for the accounting periods ending 28 February 2007, 2008, 2009 and 2010.)

Issue 2: Paragraph 51 of Schedule 18 to the Finance Act 1998 ("Paragraph 51")

Appellants' wording:	Is a claim under Paragraph 51 a valid means to recover tax paid on dividend income in excess of that due upon the proper application of EU law? Alternatively, is a Paragraph 51 claim to be treated as a claim for double tax relief for underlying tax?
Respondents' wording:	2.1 Have valid Paragraph 51 claims been made? 2.2 Is a Paragraph 51 claim to be treated as a claim for DTR (underlying tax ("ULT"))? 2.3 Even if valid Paragraph 51 claims have been made, is relief due in respect of those claims? 2.4 Should HMRC give effect to claims made pursuant to Paragraph 51 on the basis that non-UK dividends were returned

as taxable where credit at the FNR was not claimed and not given?

(Lead cases: SLMM for accounting periods ending 31 March 2004-06 and Schroder European for accounting period ending 15 January 2003. Issue 2 also arises in Henderson for the accounting periods ending 28 February 2009 and 2010.)

Issue 3: Non-resident dividend income returned as taxable

Agreed wording: Where the return claims DTR for withholding tax ("WHT") and an enquiry was opened into the return should HMRC have allowed DTR for ULT at the FNR when closing the enquiry?

(Lead cases: Schroder Institutional Growth for the accounting period ending 30 June 2004 and Henderson for the accounting period ending 31 October 2007. Issue 3 also arises in Fidelity UK Index Fund for accounting periods ending 28 February 2007-2010.)

Issue 4 Schedule 1A to the Taxes Management Act 1970 ("TMA")

Agreed wording: In the alternative, do paragraphs 54, 55, 57 and 59 of Schedule 18 to Finance Act 1998 and Schedule 1A TMA create a separate legal claim (the purported Schedule 1A TMA claims)?

(Lead cases: SLMM for the accounting periods ending 31 March 2004-06 and Henderson for the accounting periods ending 31 October 2006 and 2007. As Issue 4 represents the Appellants' default position it arises in every test case to the extent that the taxpayer is not otherwise found to have a valid claim for an accounting period.)

Issue 5: "Out of time" amendments

Agreed wording: Concerning amendments to returns to show income as exempt which had previously been returned as taxable, is the amendment if made beyond the anniversary of the filing date but within the period in s 806(1) of the Income and Corporation Taxes Act 1988 to be treated as equivalent to an in-time claim for full DTR or as claims made pursuant to Paragraph 51?

(Lead case: Fidelity UK Index Fund for the accounting periods ending 28 February 2007, 29 February 2008, 28 February 2009 and 28 February 2010. Issue 5 also arises in SLMM, Schroder European and Henderson.)

B – Issues Concerning s 806(2) Income and Corporation Taxes Act 1988 ("ICTA")

Issue 6: s 806(2) ICTA

Agreed wording: When does s 806(2) ICTA apply?

(Lead cases: Schroder Asian and Avon, although it appears that Avon was not in receipt of any Schedule D Case V income. It also arises in all other test cases.)

Issue 7: Non-resident dividend income returned as exempt in part

Agreed wording: If the closure notice brings into account income previously returned as exempt, and as a result s 806(2) ICTA is engaged, can DTR only be claimed on the income previously returned as exempt?

(Lead case: Schroder Institutional Growth in respect of accounting period ending 30 June 2004. This issue also arises for Fidelity UK Index Fund and Henderson.)

Issue 8: Eligible Unrelieved Foreign Tax ("EUFT")

Agreed wording: Where s 806(2) ICTA is engaged, can EUFT be generated and claimed? Can EUFT be generated by ULT at the FNR?

(Lead cases: Schroder Institutional Growth and also arises in Fidelity UK Index Fund.)

C – Issues Concerning amendments to returns

Issue 9: "in time" amendments following an enquiry notice

Agreed wording: In what circumstances can HMRC refuse to give effect (in whole or part) to an amendment to a return made before the anniversary of the filing date on the grounds that an enquiry into the return had already been opened?

(Lead case: Henderson in respect of accounting period ending 31 October 2007.)

D – Issues Concerning management expenses

Issue 10: s 75 ICTA 1998

Agreed wording: Do the statutory provisions when read compatibly with EU law, prohibit the application of management expenses if the effect is to prevent the full utilisation of the DTR available? Alternatively, can DTR which cannot be fully utilised by reason of management expenses be carried forward and generally applied?

(Lead case: Fidelity UK Index Fund.)

Issue 11: Management expenses and s 806(2) ICTA

Agreed wording: Will s 806(2) ICTA be engaged where a closure notice brings dividend income returned as exempt into account but then offsets that income with management expenses? If the answer to this question is yes, in respect of which accounting period is s 806(2) ICTA engaged?

(Lead case: Fidelity UK Index Fund.)

Issue 12: Non-resident dividend income taxed under Case 1 of Schedule D

Appellants' wording: How are reliefs to be taken into account if non-resident dividend income is taxed under Case I rather than Case V of Schedule D?

Respondents' wording: How does the fact that non-resident dividend income is taxed under Case I rather than Case V of Schedule D affect the resolution of the above issues?

(Lead case: Avon)

Issue 13: s 811 ICTA

Respondents' wording: Subject to issue 11 above, in closing enquiries to bring income returned as exempt into account without double tax relief, must withholding tax incurred be deducted pursuant to s 811 ICTA?

(Lead case: Fidelity UK Index Fund.)

E – Factual Disputes

Issue 14: Baillie Gifford

Appellants' wording: Were returns for the accounting periods ending 30 April 2005 of five Baillie Gifford funds amended within the period for doing so in paragraph 15 Schedule 18 to the Finance Act 1998?

(Lead case: Baillie Gifford)

JURISDICTION

8. Shortly before the commencement of the hearing HMRC raised the additional issue of whether the Tribunal has the jurisdiction to determine Issues 12 and 14.

9. Having heard argument on this on the first day of the hearing I postponed my decision to enable me to hear argument, and where applicable evidence, on all issues to enable me reach conclusions that would, in the event of an appeal, (hopefully) eliminate the need for either Issue 12 or more particularly Issue 14, which concerns a factual dispute, to be remitted back for further findings as might have been the case if, because I concluded these did not fall within the Tribunal's jurisdiction, they had not been considered.

10. Issue 12, for which the closure notice application of Avon is the lead case, concerns the treatment of non-resident dividend income and whether there is any difference if it is taxed under s 18 Schedule D Case V ICTA ("Case DV") or s 18 Schedule D Case I ICTA. HMRC first raised the issue of the Tribunal's jurisdiction in relation to this issue in correspondence with the appellant's solicitors on 17 May 2021, four weeks before the hearing was due to commence, notwithstanding the prior inclusion of this issue in the Agreed Statement of Issues.

11. Issue 14, the Baillie Gifford Issue, was added as an issue for determination at the substantive hearing in accordance with directions made on 7 May 2021 following the successful application by Baillie Gifford to lift a stay which had been in place. This enabled its closure notice application to proceed as a test case to determine whether its return for the accounting period ending 30 April 2005 ("APE 2005") was amended within time in accordance with paragraph 15 of schedule 18 to the Finance Act 1998. Although HMRC opposed the application it did not do so on grounds of jurisdiction and only questioned the Tribunal's jurisdiction to hear this issue after the application had been determined in Baillie Gifford's favour.

12. Mr Bremner contends that it is an abuse of process for HMRC to raise the issue of the Tribunal's jurisdiction at such a late stage in the proceedings. In relation to Issue 12 he says that it cannot be right for a litigant in proceedings to agree that an issue is to be determined at a hearing, agree a statement of facts and file and serve its evidence only to, at the last minute, object to the Tribunal's jurisdiction. As for Issue 14, Mr Bremner submits that HMRC should have appealed against the 7 May 2021 directions if it was dissatisfied with the outcome of Baillie Gifford's application rather than subsequently make what he described as a "spurious objection" to the jurisdiction of the Tribunal.

13. I agree with Mr Bremner that HMRC could, and should, have raised its objection to the Tribunal's jurisdiction at an earlier stage of these proceedings. This is particularly so in relation to Issue 14 in which HMRC's submissions opposing Baillie Gifford's application did not include any argument whatever in respect of the jurisdiction issue and only appears to have arisen as an afterthought having been unsuccessful in its opposition to the application. However, the Tribunal is a statutory creation and its jurisdiction, which cannot be extended either on its own initiative or by or with the agreement of the parties, is limited by legislation.

14. Accordingly, it is necessary to consider whether the Tribunal has jurisdiction in relation to Issues 12 and 14 especially as it is required, by Rule 8 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009, to strike out the whole or part of proceedings if it does not have jurisdiction in relation to them.

15. The jurisdiction of the Tribunal in relation to these issues, both of which are closure notice applications, is derived from paragraph 33 of schedule 18 to the Finance Act 1998 ("Paragraph 33"). This provides that a company may apply to the Tribunal for a direction that

HMRC "give a closure notice within a specified period". The Tribunal must make such a direction unless it is satisfied that HMRC have reasonable grounds for not giving a closure notice (Paragraph 33(3)).

16. In essence, Mr Ewart contends that, under Paragraph 33, the jurisdiction of the Tribunal is limited to determining whether there are valid open enquiries which should be closed and does not extend either to the determination of Issues 12 and 14 or to direct HMRC how it should close an enquiry.

17. Mr Bremner submits, relying on *HMRC v Vodafone 2* [2006] STC 1530 ("*Vodafone 2*"), that, in the context of a closure notice application, the Tribunal not only has the jurisdiction to decide incidental questions of law and/or fact to enable it to decide whether or not to direct HMRC to give a closure notice within a specified time but should exercise its discretion to determine these issues so that it can rule on the closure notice applications.

18. In *Vodafone 2*, having observed, at [2], that the Special Commissioners had the jurisdiction under Paragraph 33 to determine points of law and make a reference to the Court of Justice of the European Union ("CJEU")[2], Arden LJ (as she then was), with whom Mummery and Moore-Bick LJJ agreed, said:

> "21. Paragraph 33 on its face, however, would seem to confer on the Commissioners a power to do anything that the Commissioners reasonably consider necessary to enable them to be satisfied as to the matters required by that paragraph. That interpretation also promotes the effectiveness of para 33, which it may be presumed Parliament wished to achieve. On that basis it is legitimate to put the question in the following way, that is to ask whether there is anything in the wording of para 33 to suggest that it does not confer jurisdiction to decide incidental points of law, that is points of law that need to be resolved in order to decide whether there are reasonable grounds for not giving a closure notice. If it was a point of law which the Commissioners could decide for themselves, that would not attract the same attention as a point of Community law which may take many years to determine and where there may need to be more than one reference, but the difference is one of scale and not of principle. Once it is concluded that the Commissioners have jurisdiction under para 33 to determine an incidental point of law, no distinction can be drawn between different types of point of law.
>
> 22. It is, however, relevant to ask whether the conclusion thus far that para 33 confers jurisdiction on the Commissioners to decide incidental points of law is in some way inconsistent with the statutory scheme in the provisions of Sch 18 which I have set out above. If it is inconsistent, that may indicate that the conclusion thus far is wrong and that some other interpretation should be adopted. However, I do not consider that the statutory scheme mandates a different conclusion. On the contrary, it is difficult to see why Parliament should wish to limit the protection given to taxpayers by para 33 to situations where the Revenue is pursuing enquiries into the facts which it can be shown are unfounded as a matter of fact, and not wish to extend the same protection to cases where the Revenue is proceeding on the basis of a particular view of the law, to which the taxpayer raises a serious challenge which the Commissioners can conveniently deal with at that stage. It would mean that the taxpayer would have to resort to judicial review if he wished to challenge the Revenue's decision to refuse to give a closure notice. The taxpayer would then have to show it was perverse or irrational for the Revenue to continue with their enquiries. But, more significantly, it would be anomalous for

[2] Although throughout the decision I have referred to the CJEU, this should be read where appropriate as a reference to the Court of Justice of the European Communities ("ECJ").

> Parliament to have provided a dedicated remedy in para 33 in respect of some only of the grounds on which a taxpayer may seek a direction to the Revenue to issue a closure notice, and leave the taxpayer to pursue a judicial review remedy in respect of other grounds. Moreover, in the former case the application would be to the Commissioners and in the latter case the application would be to the High Court, making the Revenue's proposed interpretation of para 33 yet more unlikely."

19. It is therefore clear from *Vodafone 2* that the Tribunal does have the jurisdiction to consider Issues 12 and 14. The question is, however, whether it is appropriate to exercise that jurisdiction. The answer can be found in the recent decision in *HMRC v Eastern Power Networks and Others* [2021] STC 568 ("*Eastern Power*") in which the Court of Appeal considered Paragraph 33 and *Vodafone 2*. Rose LJ (as she then was), with whom David Richards and Dingemans LJJ agreed, noted, at [54], that unlike *Eastern Power*, *Vodafone 2*:

> "… was a very particular instance where the legal issue was not simply one among many issues that was raised by the construction of anti-avoidance legislation. It was, as Arden LJ said, a point that was so fundamental as to be capable of bringing the enquiry to a halt if decided in a particular way: [26]. In my judgment, the jurisdiction to decide an incidental point of law in an application for a closure notice direction is useful, as the *Vodafone* case shows, but only if the discretion to exercise it is used sparingly. The position that we have found ourselves in this appeal demonstrates why. It will very often be the case that a statutory provision sets a number of cumulative conditions to be satisfied before it applies. Some of those conditions may be relatively straightforward and require little information from the taxpayer and some may require more extensive information. Taxpayers should not be encouraged to pick and choose which information they provide and then ask the tribunal to decide the applicability of one element in the hope that a 'quick win' will bring the rest of the enquiry to a halt. That is a recipe for inefficient, stop/start enquiries and risks wasting a great deal of judicial time."

20. Having observed, at [55], that the issue determined by the application in that case did not resolve the entire dispute between the parties and, at [56], that the approach adopted had required the courts and tribunals to apply the statutory provision in the absence of any clear findings of fact about the scheme as a whole and without any agreed statement of facts, Rose LJ said, at [57], that she would:

> "… firmly discourage the FTT from embarking on the kind of hearing that occurred here. … The jurisdiction conferred on the tribunal to direct HMRC to issue a closure notice is not generally a suitable vehicle for deciding points of law in the course of an enquiry such as the present."

21. That is not the situation in the present case. As in *Vodafone 2*, and in contrast to *Eastern Power* in which even if the appellants had succeeded on the disputed issue there were other points on which HMRC could rely making the whole exercise, as Rose LJ said, "pointless", the resolution of Issue 14 will be determinative and bring any enquiry to a halt. As such, I consider that it is appropriate for the Tribunal to exercise its jurisdiction in relation to Issue 14. However, although I consider that the Tribunal does have the jurisdiction to determine Issue 12, as I explain below in relation to that issue, it is not necessary to do so.

LAW

22. I will adopt the approach taken by Mr Bremner and followed by Mr Ewart and consider the law under four general headings: the nature of the breach of EU law, the conforming interpretation, the way in which claims have been given effect and the overriding EU principles, particularly effective judicial protection, effectiveness and legal certainty.

Nature of the breach of EU law,

23. The decision of the CJEU in *FII Group Test Claimants v Inland Revenue Commissioners* [2012] 2 AC 436 ("*FII CJEU 1*") established, for the first time, the incompatibility of the UK taxation of portfolio dividends, under Case DV, with EU law.

24. Under s 790 ICTA, as originally enacted, while credit was given for WHT for portfolio holdings they were expressly excluded, by s 790(4) – (6) ICTA, from credit for foreign tax paid on the profits from which the dividend derived. In contrast, s 208 ICTA provided that domestic source dividends received by a UK resident company, both in respect of portfolio and non-portfolio holdings, were exempt.

25. The question referred to the CJEU by the High Court in *FII CJEU 1*, recorded at [33] of the CJEU's decision, was:

> "… whether Articles 43 EC [freedom of establishment] and 56 EC [free movement of capital] preclude legislation of a Member State which makes dividends received by a resident company from a company which is also resident in that State ('nationally-sourced dividends') exempt from corporation tax, when it imposes that tax on dividends, received by a resident company from a company which is not resident in that State ('foreign-sourced dividends'), while granting relief in the latter case for all withholding tax levied in the State in which the company making the distribution is resident and, where the resident company receiving the dividends holds, directly or indirectly, 10% or more of the voting rights in the company making the distribution, relief against corporation tax paid by the company making the distribution on the profits underlying the dividends."

26. Having noted, at [35], that direct taxation fell within the competence of member states, the CJEU observed that the member states were nevertheless required to exercise that competence in accordance with EU law. As to whether a member state could operate an exemption system for nationally-sourced dividends when it applies an imputation system to foreign-sourced dividends, the Court stated that:

> "47. … it was for each member stated to organise, in compliance with Community Law, its system for taxing distributed profits and, in particular, to define the tax base and the tax rate which apply to the company making the distribution and/or the shareholder receiving them, in so far as they are liable to tax in that member state.
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> 48. Thus, Community law does not, in principle, prohibit a member state from avoiding the imposition of a series of charges to tax on dividends received by a resident company by applying rules which exempt those dividends from tax when they are paid by a resident company, while preventing, through an imputation system, those dividends from being liable to a series of charges to tax when they are paid by a non-resident company."

27. The CJEU held, at [49] and [50] that to comply with EU law it was "necessary" that the foreign sourced dividends were not subject to a higher rate of tax than the rate applicable to nationally-sourced dividends and that the member state "must" give credit for the tax paid. It was, the CJEU noted at [56]:

> "…for the national court to determine whether the tax rates are indeed the same and whether different levels of taxation occur only in certain cases by reason of a change to the tax base as a result of certain exceptional reliefs."

28. At [61] the CJEU noted that with regard to portfolio dividends it was clear from the UK legislation, ss 208 and 790 ICTA, that UK-sourced dividends were exempt from corporation tax, whilst foreign-sourced dividends were not and were subject to tax and entitled to relief

only as regards any withholding tax charged on those dividends in the state in which the company making the distribution was resident. The CJEU continued:

> "62. In that regard, it must be held, first of all, that in the context of a tax rule which seeks to prevent or to mitigate the taxation of distributed profits, the situation of a shareholder company receiving foreign-sourced dividends is comparable to that of a shareholder company receiving nationally-sourced dividends in so far as, in each case, the profits made are, in principle, liable to be subject to a series of charges to tax.
>
> 63. While, in the case of a resident company receiving dividends from another resident company, the exemption system that applies eliminates the risk of the distributed profits being subject to a series of charges to tax, the same is not true for profits distributed by non-resident companies. If, in the latter case, the state in which the company receiving the distributed profits is resident grants relief on withholding tax levied in the state in which the company making the distribution is resident, such relief does no more than eliminate a double legal charge to tax in the hands of the company receiving those profits. Conversely, that relief does not extinguish the series of charges to tax which arises when distributed profits are subject to tax, first of all, in the form of corporation tax for which the company making the distribution is liable in the state in which it is resident and, subsequently, in the form of corporation tax for which the company receiving the distribution is liable."

29. The CJEU considered, at [64], that such a difference in treatment not only discouraged UK-resident companies from investing capital in companies established in another member state but also had a restrictive effect of creating an obstacle for those companies raising capital in the UK. Accordingly, the CJEU held at [65], it followed that the difference in treatment constituted a restriction on the free movement of capital. It observed, at [69], that the "mere fact" it was for a member state to determine whether and to what extent a charge to tax on distributed profits was to be avoided did not mean that it could operate a system under which foreign-sourced dividends and nationally-sourced dividends are not treated in the same way.

30. At [71] the CJEU concluded that the legislation in issue, s 790(4) – (6) ICTA, was contrary to the free movement of capital (Article 56 EC) and stated that the answer to the question which had been referred (see paragraph 25, above):

> "72. … must therefore be that arts 43 EC and 56 EC must be interpreted as meaning that, where a member state has a system for preventing or mitigating the imposition of a series of charges to tax or economic double taxation as regards dividends paid to residents by resident companies, it must treat dividends paid to residents by non-resident companies in the same way.
>
> …
>
> 74. Article 56 EC precludes legislation of a member state which exempts from corporation tax dividends which a resident company receives from another resident company, where that state levies corporation tax on dividends which a resident company receives from a non-resident company in which it holds less than 10% of the voting rights, without granting the company receiving the dividends a tax credit for the tax actually paid by the company making the distribution in the state in which the latter is resident."

31. Further guidance on the nature and extent of the breach of EU law was given by the CJEU in *FII Group Test Claimants v HMRC* [2013] STC 612 ("*FII CJEU 2*").

32. The question posed by the High Court in the reference to the CJEU in that case was whether the references to "tax rates" and "different levels of taxation" at [56] of the judgment

in *FII CJEU 1* (see paragraph 27, above) referred (a) solely to statutory or nominal rates of tax; (b) effective rates of tax paid as well as the statutory or nominal rates: or (c) did the phrases have some different meaning and if so what.

33. The question was reformulated by the CJEU at [36]:

> "By its first question, the referring court asks, in essence, whether arts 49 TFEU [freedom of establishment] and 63 TFEU [free movement of capital] must be interpreted as precluding legislation of a member state which applies the exemption method to nationally-sourced dividends and the imputation method to foreign-sourced dividends when, in that member state, the effective level of taxation of company profits is generally lower than the nominal rate of tax."

At [49] the CJEU explained that:

> "… the determination which the referring court was called upon to make by the court, in para 56 of its judgment in *Test Claimants in the FII Group Litigation* [*FII CJEU 1*], relates both to the applicable nominal rates of tax and to the effective levels of taxation. The 'tax rates' to which para 56 refers relate to the nominal rate of tax and the 'different levels of taxation … by reason of a change to the tax base' relate to the effective levels of taxation. The effective level of taxation may be lower than the nominal rate of tax by reason, in particular, of reliefs reducing the tax base."

34. Having noted, at [54] – [60] that the UK legislation constituted a restriction on freedom of establishment and movement of capital and that such a restriction was only permissible if justified by an "overriding reason" in the public interest and proportionate, the CJEU stated:

> "61. The tax exemption to which a resident company receiving nationally-sourced dividends is entitled is granted irrespective of the effective level of taxation to which the profits out of which the dividends have been paid were subject. That exemption, in so far as it is intended to avoid economic double taxation of distributed profits, is thus based on the assumption that those profits were taxed at the nominal rate of tax in the hands of the company paying dividends. It thus resembles grant of a tax credit calculated by reference to that nominal rate of tax.
>
> 62. For the purpose of ensuring the cohesion of the tax system in question, national rules which took account in particular, also under the imputation method, of the nominal rate of tax to which the profits underlying the dividends paid have been subject would be appropriate for preventing the economic double taxation of the distributed profits and for ensuring the internal cohesion of the tax system while being less prejudicial to freedom of establishment and the free movement of capital."

35. The CJEU recognised, [at 64], that a calculation, applying the imputation method, of a tax credit on the basis of the nominal rate of tax to which the profits underlying the dividends paid have been subject might lead to a less favourable tax treatment of foreign-sourced dividends. However, it held that this was the result of the exercise in parallel by different member states of their fiscal sovereignty which was compatible with EU law.

36. At [65], it answered the (reformulated) question stating:

> "65. In light of the foregoing, the answer to the first question is that arts 49 TFEU and 63 TFEU must be interpreted as precluding legislation of a member state which applies the exemption method to nationally-sourced dividends and the imputation method to foreign-sourced dividends if it is established, first, that the tax credit to which the company receiving the dividends is entitled

> under the imputation method is equivalent to the amount of tax actually paid on the profits underlying the distributed dividends and, second, that the effective level of taxation of company profits in the member state concerned is generally lower than the prescribed nominal rate of tax."

37. The concept of the FNR had originated in the submissions of the Commission when addressing the third element of the question asked by the High Court (ie did the phrases "tax rates" and "different levels of taxation", at [56] of the judgment in *FII CJEU 1*, have some different meaning from statutory tax rates or effective tax rates and if so what) in *FII CJEU 2*.

38. In his Opinion Advocate General Jääskinen, observed:

> "39. Only the Commission's proposal adopts this approach. The Commission suggests that the answer to Question 1 should be that the member state 'must ensure that the tax credit is equivalent to the relief granted in respect of [nationally-sourced] dividends, by calculating the credit on the basis of the nominal rate of tax applicable in the state from which the dividends originate'.
>
> 40. According to the Commission, this proposal seeks to ensure formal equality of treatment and ease of application, while achieving a fair result. On the one hand, this is achieved without systematic favouring of foreign-sourced dividends originating from source states with low tax rates. On the other hand, there would be no need for systematic re-calculation of the tax position of a foreign company making the dividend distribution, simulating the tax it would have paid were it resident in the United Kingdom. This method would, according to the Commission, correspond more faithfully to exemption of nationally-sourced dividends."

39. Although the Advocate General, at [41] of his Opinion, recognised the "simplicity of the proposal" of granting credit at the FNR, he did not believe that such an approach should be adopted by the CJEU describing it, at [44] of his Opinion, as economically coming close to an to "an obligation to give so-called tax sparing credit, used in double-taxation treaties between industrialised and developing countries, as it also seeks to pass on the reliefs and tax incentives of the source state to the taxation in the residence country". At [45] of his Opinion he described the approach as "intellectually incoherent".

40. However, the CJEU did not agree with the Advocate General and, as can be seen from [61] of its judgment (see paragraph 34, above), did adopt the FNR as a solution.

41. In *Prudential Assurance Co Ltd v HMRC* [2013] EWHC 3249 (Ch) ("*Prudential (Ch)*") Henderson J (as he then was) observed, at [92], that:

> "… The request for clarification in the second FII reference has produced a fuller and more nuanced analysis by the court of the problems associated with the Case V charge on foreign dividends. A crucial part of this analysis is the theoretical assumption that the exemption from tax of a dividend is to be regarded as equivalent to the grant of a tax credit at the nominal rate, and the concomitant principle that a state of residence which grants exemption to domestic dividends must, at least, grant credit for the nominal rate of tax paid in the source state, although it remains free to charge a higher nominal rate itself (and thus to top up the charge by the difference between the domestic and foreign nominal rates). This analysis, in my judgment, flows from and forms part of the court's general elucidation of the overriding need to treat foreign and domestic dividends equivalently, and is as applicable to portfolio dividends as it is to non-portfolio dividends."

Conforming Interpretation

42. In *Vodafone 2 v HMRC (No 2)* [2009] STC 1480 ("*Vodafone 2 (No 2)"*) at [37], having referred to the parties' submissions and authorities on the principles to be observed in seeking a conforming interpretation, Sir Andrew Morritt C said:

> "The principles which those cases established or illustrated were helpfully summarised by counsel for HMRC in terms from which counsel for V2 did not dissent. Such principles are that:
>
> > 'In summary, the obligation on the English courts to construe domestic legislation consistently with Community law obligations is both broad and far-reaching. In particular:
> >
> > > (a) It is not constrained by conventional rules of construction (see *Pickstone* [1988] 2 All ER 803 at 817, [1989] AC 66 at 126 per Lord Oliver);
> > >
> > > (b) It does not require ambiguity in the legislative language (*Pickstone* [1988] 2 All ER 803 at 817, [1989] AC 66 at 126 per Lord Oliver; *Ghaidan* [2004] 3 All ER 411 at [32], [2004] 2 AC 557 at [32] per Lord Nicholls);
> > >
> > > (c) It is not an exercise in semantics or linguistics (see *Ghaidan* [2004] 3 All ER 411 at [31] and [35], [2004] 2 AC 557 at [31] and [35] per Lord Nicholls; per Lord Steyn at [48]–[49]; and Lord Rodger at [110]–[115]);
> > >
> > > (d) It permits departure from the strict and literal application of the words which the legislature has elected to use (*Litster* [1989] 1 All ER 1134 at 1138, [1990] 1 AC 546 at 577 per Lord Oliver; Ghaidan [2004] 3 All ER 411 at [31], [2004] 2 AC 557 at [31] per Lord Nicholls);
> > >
> > > (e) It permits the implication of words necessary to comply with Community law obligations (see *Pickstone* [1988] 2 All ER 803 at 814–815, [1989] AC 66 at 120–121 per Lord Templeman; *Litster* [1990] 1 AC 546 at 577, [1989] 1 All ER 1134 at 1138 per Lord Oliver); and
> > >
> > > (f) The precise form of the words to be implied does not matter (*Pickstone* [1988] 2 All ER 803 at 807, [1989] AC 66 at 112 per Lord Keith; *Ghaidan* [2004] 3 All ER 411 at [122], [2004] 2 AC 557 at [122] per Lord Rodger; and *IDT Card Services Ireland Ltd* [2006] STC 1252 at [114] per Arden LJ).'"

He continued:

> "38. Counsel for HMRC went on to point out, again without dissent from counsel for V2, that:
>
> > 'The only constraints on the broad and far-reaching nature of the interpretative obligation are that:
> >
> > > (a) The meaning should "go with the grain of the legislation" and be "compatible with the underlying thrust of the legislation being construed." (*Ghaidan* [2004] 3 All ER 411 at [33], [2004] 2 AC 557 at [33] per Lord Nicholls; Dyson LJ in *EB Central Services* [2008] STC 2209 at [81]). An interpretation should not be adopted which is inconsistent with a fundamental or cardinal feature of the legislation since this would cross the boundary between interpretation and amendment; (See *Ghaidan* at [33]

> and [110]–[113] per Lord Nicholls and Lord Rodger respectively; Arden LJ in *IDT Card Services* at [82] and [113]) and
>
> (b) The exercise of the interpretative obligation cannot require the courts to make decisions for which they are not equipped or give rise to important practical repercussions which the court is not equipped to evaluate. (See *Ghaidan* per Lord Nicholls at [33]; Lord Rodger at [115]; Arden LJ in *IDT Card Services* at [113].)'

> 39. Without in any way suggesting that it is incumbent on he who contends for a conforming interpretation to spell out exactly what it is, for that would be to gainsay the proposition set out at [37](f) above, it undoubtedly assists in the consideration of whether or not it is a permissible interpretation to see on paper how it is suggested that it would be effected, whether by interpolation, deletion, rewording or otherwise. Counsel for HMRC disclaimed any intention or requirement to produce any precise formulation. He contended that the 'grain' or 'thrust' of the legislation was to cast the initial net wide as in s 747(3) and then narrow it by the overlapping exceptions set out in s 748(1)(a) to (e) and (3). In that context, he submits, all that is required is to introduce an additional exception in respect of a controlled foreign company: 'if it is, in that accounting period, actually established in another member state of the EEA and carries on genuine economic activities there.' Such an exception could be an additional lettered paragraph in s 748(1) or an additional alternative in s 748(3) as suggested by Mr Walters [sitting as a Special Commissioner with Mr Wallace]. The effect of such an amendment would be to remove from the CFC legislation the 'hindrance' or 'restriction' with which the Advocate General and the ECJ were concerned in Cadbury Schweppes. In that event there would be no need for the case by case consideration which was considered to be necessary if the CFC legislation was to be justified as it stood. Were it considered desirable it would be simple to provide for an exception to the exception in relation to 'wholly artificial transactions.'
>
> 40. These submissions are opposed by counsel for V2. He makes three basic submissions: (1) such an interpretation would not conform with the scheme and essentials of the CFC legislation; (2) such an interpretation would create two regimes, one for CFCs established within the EEA and another for those established elsewhere contrary to the decision of the House of Lords in *Industrial Chemicals Industries plc v Colmer (Inspector of Taxes)* [1999] STC 1089, [1999] 1 WLR 2035; and (3) any such interpretation would be retrospective in its operation, involve legal or economic policy decisions and would fail to satisfy the test of legal certainty."

43. In relation to the retrospective effect of a conforming interpretation and whether it would fail the test of legal certainty, the Chancellor observed:

> "56. … First, it is inevitable that a conforming interpretation will be retrospective in its operation. Unless and until it is averred that the legislation is inconsistent with some enforceable Community right there is no occasion to consider a conforming interpretation. The fact that the effect of such an interpretation is felt retrospectively is no more an objection in the field of conforming interpretation than it is in the case of domestic statutory construction.
>
> 57. Second, it is not a requirement of a conforming interpretation that it should be capable of precise formulation. That is precisely the point summarised in sub-para (f) at [37] above. The dicta there referred to were made in such

> widely diverse situations as equal pay, right to succession of a protected tenancy and the imposition of a liability to VAT. It is inevitable that the conforming interpretation will lack the crispness to be expected of properly considered legislation; but that cannot be a sufficient objection.
>
> 58. Third, the conforming interpretation advanced by counsel for HMRC reflects and excepts from the operation of the CFC legislation precisely that element of it which the ECJ held to constitute the hindrance to freedom of establishment. That is, by definition, sufficiently certain for a conforming interpretation whether or not the exclusion from the exception of wholly artificial transactions is included. There can be no objection to such an exclusion for the like reason. It follows precisely the formulation of the justification for the hindrance which the ECJ found to be acceptable."

44. Having considered the nature of the breach of EU law Henderson J noted at [84] in *Prudential (Ch),* that it had been established that the Case DV charge on portfolio dividends infringed Article 63 TFEU rights where the dividend was paid by a company resident in the EU or European Economic Area ("EEA"). He continued:

> "84. … Thus the basic question which I am now considering is how, as a matter of domestic English law, that infringement of EU law is to be remedied. It is common ground that the claims to recover the unlawfully levied tax are properly to be characterised as *San Giorgio* claims, and that the EU principle of effectiveness requires the UK to provide a remedy for those claims which does not make the test claimants' art 63 TFEU rights either virtually impossible or excessively difficult to exercise.
>
> 85. In order to answer this question, it is first necessary to understand in precisely what relevant respects the UK legislation infringed art 63 TFEU. This enquiry has both a negative and a positive aspect. Negatively, what were the defects in the legislation? Positively, what would have been required to eliminate them? On the negative side, it is abundantly clear from the authorities which I have reviewed that the infringement lay, at least, in the failure of the UK system to provide a tax credit for the actual underlying tax paid on the distributed profits in the source state, when the UK had chosen to counter economic double taxation of domestic dividends by the exemption in s 208. This is a recurrent theme from its first emergence in December 2006 in [*FII CJEU 1*] ([2007] STC 326, [2006] ECR I-11753, notably paras 50, 63–64 and 74) to its latest iteration in November 2012 in [*FII CJEU 2*] ([2013] STC 612, [2013] Ch 431, paras 37 to 39), citing *FII (ECJ) I*, *Haribo*, *Accor*, and the reasoned order.
>
> 86. According to the Revenue, that is the only defect in the UK legislation which needs to be remedied. The claimants disagree, however, and submit that it is apparent from the fuller and more sophisticated analysis of the problem by the Grand Chamber of the ECJ in [*FII CJEU 2*] that there was a further defect in the domestic system. The nature of this defect is revealed, they say, by the focus in [*FII CJEU 2*] on nominal (as well as effective) rates of tax, and the theory espoused by the court that, in the context of relieving economic double taxation, the grant of an exemption from tax (as in s 208) is equivalent to the grant of a tax credit at the full nominal rate of tax applicable to the company paying the dividend: see in particular the discussion at paras 43 to 49 and 60 to 65. Where domestic dividends are relieved from economic double taxation by exemption, the application of an imputation system to foreign dividends requires account to be taken of the nominal rate of tax to which the underlying profits have been subject in the source state. Not only is this explicitly stated in para 62, submit the claimants, but the same paragraph makes it clear, positively, that national rules which satisfied this condition

> 'would be appropriate for preventing the economic double taxation of the distributed profits and for ensuring the internal cohesion of the tax system'."

45. The approach advanced by the claimants as the "right way" to take account of the nominal rate of tax in the source state, the FNR, was described by Henderson J, at [87] as the grant of a tax credit for the FNR in addition to a credit for the actual ULT paid in respect of the dividend up to a ceiling (in each case) of the full amount of the actual charge to corporation tax under Case DV. He continued, also at [87]:

> "The credits for the nominal rate of tax and the actual underlying tax are cumulative, but in combination they cannot do more than extinguish the Case V charge (as reduced by any withholding tax for which relief is already provided either under double taxation arrangements or under s 790). Thus there is no question of any windfall for the claimants, because any excess of the credits over the actual charge would not generate any right to payment of the excess from HMRC. And if the end result in virtually every case will be to extinguish the charge, that is neither surprising nor a cause for concern. On the contrary, it will merely illustrate how the exemption and imputation methods of relieving economic double taxation are operating in an equivalent manner, that being the fundamental principle which underpins the ECJ's jurisprudence in this area."

Henderson J agreed with the approach of the claimants and concluded, at [96]:

> "… the UK legislation would have been compliant with EU law if it had provided for the grant of such a 'dual' credit for portfolio dividends. The grant of the further credit for withholding tax is not, in itself, a requirement of EU law, as the decision of the ECJ in Salinen makes clear: see at [54] above. But there can be no doubt, in my judgment, that a credit for withholding tax must also be granted, as a matter of domestic law. I heard no detailed argument about the order in which the credits should be applied, and for the sake of simplicity (but without prejudice to the resolution of any issues which may emerge at a future date) I have treated the withholding tax as the first of the credits to be set against the Case V charge, thereby reducing (and placing a cap on) the amount of the charge available to be set off by the foreign tax credit."

He continued saying:

> "102. The principle of conforming construction is often referred to as the Marleasing principle, named after the ECJ case in which it was first clearly enunciated (*Marleasing SA v La Comercial Internacional de Alimentacion SA* (Case C-106/89) [1990] ECR I-4135, [1992] 1 CMLR 305). In *FII (SC)* Lord Sumption [2012] STC 1362 at [176], [2012] 2 AC 337 at [176]) described the principle, as it has been applied in England, as 'authority for a highly muscular approach to the construction of national legislation so as to bring it into conformity with the directly effective Treaty obligations of the United Kingdom'. He added that, however strained a conforming construction may be, and however unlikely it is to have occurred to a reasonable person reading the statute at the time, 'a later judicial decision to adopt a conforming construction will be deemed to declare the law retrospectively in the same way as any other judicial decision'.
>
> 103. Applying these principles, I consider that it falls well within the scope of conforming interpretation to construe s 790 of ICTA 1988 as providing for the grant of a tax credit for foreign dividends to the extent necessary to secure compliance with EU law. Since s 790 already provides for the grant of tax credits, in the case of both portfolio and non-portfolio dividends, the grant of

> a further tax credit for portfolio dividends would not in my judgment go against the grain of the UK tax legislation. Nor would it require the court to make policy decisions for which it is not equipped, because the sole purpose of the tax credit would be to secure compliance with the judgments of the ECJ in which the UK tax system has been held to infringe art 63 TFEU.
>
> 104. In reaching this conclusion, I am accepting the Revenue's submission that a conforming interpretation is possible, and that it is therefore unnecessary for the Case V charge on portfolio dividends to be disapplied in cases where it infringes art 63 TFEU. The Revenue's submission was, of course, advanced on the basis that the additional credit would be confined to the actual underlying tax paid on the distributed profits in the source country. However, I can see no reason why the same principles should not apply if the credit is of the more complex dual nature which I have held to be appropriate. The underlying purpose is still exactly the same, and the machinery of the grant of a credit still goes with the grain of the legislation."

46. In *FII Group Test Claimants v HMRC* [2015] STC 1471("*FII HC 2*") Henderson J observed, at [54]:

> "… The question of the unlawfulness of the Case V charge does not arise in a legislative vacuum. It has to be considered in the context of the actual tax system operated by the UK, which was binding as a matter of domestic law and has to be applied by the English court subject only to any disapplication or conforming construction which may be needed in order to make it compliant with EU law. The introduction of a credit for tax at the FNR should therefore be implemented in a way which, as far as reasonably possible, reflects and goes with the grain of the existing UK legislative scheme. It seems to me that the claimants' approach respects this principle more closely than the Revenue's, because it adapts and builds on the existing machinery for giving credit for underlying tax. It is not an objection to this approach, in my judgment, that the grant of relief from juridical double taxation of cross-border dividends, of which the s 801 machinery forms part, is not itself required by EU law. The point is, rather, that the machinery formed an integral part of the UK's existing system for taxation of cross-border dividends which has to be made compliant with EU law."

This approach was subsequently endorsed by the Court of Appeal in *FII Group Test Claimants v HMRC* [2017] STC 696 at [87] ("*FII CA 2016*").

Claims

47. The starting point for any claim is the recognition that, without a conforming interpretation, the UK provisions were unlawful. Mr Ewart contends that this was because of the denial of a DTR credit and, as such, a claim for DTR under s 790 ICTA is necessary. However, I agree with Mr Bremner that while making such a DTR claim is one method of giving effect to EU law rights it is not the only way of doing so. This is consistent with the decision in *Prudential (Ch)* in which Henderson J who was considering common law restitution/unjust enrichment claims, observed at [163(c)] that it was not disputed that:

> "[T]he tax was in fact paid under an operative mistake, the mistake being that it was lawfully due and payable."

48. Henderson J had taken a similar approach in *FII Group Test Claimants v HMRC* [2009] STC 254 ("*FII HC 1*") who, in relation to ACT claims, said, at [267]:

> "The unlawful payments of ACT made from 1973 to 1999, and the unlawful payments of ACT made under the FID regime from 1994 to 1999, were in my view plainly made under a mistake about the lawfulness of the tax regimes

> under which they were paid. I am satisfied from the evidence, both written and oral, that this was not obvious to anybody within the BAT group at the time, since everybody proceeded on the footing that the tax in question was lawfully due and payable. There was no question of paying the tax under protest, as in *Woolwich*. It is only now, in the light of the decision of the ECJ, that a mistake can be seen to have been made."

He continued, at [275], by saying, in relation to Case V corporation tax claims:

> "If I am right in my approach to the ACT claims, the position with regard to the Case V claims is similar. The claims for unlawfully paid tax, by the water's edge UK companies which received the foreign dividends, are in my view plainly good restitutionary claims. The same applies if, as a result of success on the relevant corporate tree points, the unlawful charge is held to extend to corporation tax on dividends received from foreign subsidiaries which had not themselves paid foreign corporation tax, although foreign tax was paid further back down the chain. In each case, it will still be the recipient UK company which is liable to the unlawful charge."

49. The nature of a mistake in such a claim was considered by the House of Lords in *Deutsche Morgan Grenfell Group plc v Inland Revenue Commissioners* [2007] 1 AC 558, [2007] STC 1 ("*DMG*"). Although the decision in *DMG* was reversed by the Supreme Court in *FII Group Test Claimants v HMRC* [2020] STC 2387 ("*FII SC 2*") in relation to the limitation point, there was no criticism of the decision of the House of Lords in relation to mistake and it is common ground that this part of the decision in *DMG* remains good law.

50. At [23] Lord Hoffman considered:

> "…whether DMG made a mistake, against the consequences of which the action seeks relief. The first point to make is that the alleged mistake was one of a very special kind. If DMG had known for certain what the Court of Justice was going to say in *Metalgesellschaft* on 8 March 2001, it is very unlikely that it would have paid ACT. But it had no means of knowing that. It was only in retrospect that it became clear that the ACT could not lawfully have been exacted. Professor Birks said that this was not a mistake at all. It was merely an inability to predict what the Court of Justice was going to say, just as one cannot predict with certainty what the weather is going to be like. And Sir Jack Beatson, writing extra-judicially in the volume to be published in memory of Professor Birks (*Unlawful Statutes and Mistake of Law: Is there a Smile on the Face of Schrödinger's Cat?* in *Mapping the Law* (ed Burrows and Rodger) at pp 163-180) describes the majority decision in *Kleinwort Benson* to treat a similar failure of prediction as a mistake as an "emphatic endorsement…of the declaratory theory of judicial decision-making" and "abstract juridical correctitude". This seems to me, with respect, to muddle two different questions. One is whether judges change the law or merely declare what it has always been. The answer to this question is clear enough. To say that they never change the law is a fiction and to base any practical decision upon such a fiction would indeed be abstract juridical correctitude. But the other question is whether a judicial decision changes the law retrospectively and here the answer is equally clear. It does. It has the immediate practical consequence that the unsuccessful party loses, notwithstanding that, in the nature of things, the relevant events occurred before the court had changed the law: see *In re Spectrum Plus Ltd* [2005] UKHL 41; [2005] 2 AC 680. There is nothing abstract about this rule. So the main question in the *Kleinwort Benson* case was whether a person whose understanding of the law (however reasonable and widely shared at the time) is falsified by a subsequent decision of the courts should, for the purposes of the law of unjust enrichment, be treated as

having made a mistake. The majority view in *Kleinwort Benson* was that he should. The effect of the later judgment is that, contrary to his opinion at the time, the money was not owing. It is therefore fair that he should recover it. It may be that this involves extending the concept of a mistake to compensate for the absence of a more general *condictio indebiti* and perhaps it would make objectors feel better if one said that because the law was now deemed to have been different at the relevant date, he was *deemed* to have made a mistake. But the reasoning is based upon practical considerations of fairness and not abstract juridical correctitude."

51. Lord Hope having held, at [56], that the general right to recover payments made under a mistake of law on the *Kleinwort Benson* principle did extend to the payment of taxes on the mistaken belief that they were due and payable went on to say, at [57] that this would be "no help" to DMG unless it could show that it had paid ACT under a mistake. He continued:

> "58. There is no doubt that the only way that a company resident in the United Kingdom could avoid liability under section 14(1) of ICTA 1988 to ACT on qualifying distributions made to its shareholders was by making an election jointly with the receiving company under section 247(1) of the Act, a group income election, that section 247(1) was to apply to the dividends received from the paying company. So long as a group income election was in force the election dividends, as section 247(1) described them, were excluded from section 14(1). But if no group income election was in force ACT was due and payable. So, if the correct approach is to look only at the system laid down by the statute, it is plain that because there was no election there was no mistake.
>
> 59. But this approach overlooks the principle on which the claim for restitution that was recognised in *Kleinwort Benson* is founded, which is unjust enrichment. As Lord Goff put it at [1999] 2 AC 349, 385, it is unjust for the defendant to retain the money paid under a mistake. The essence of the principle is that it is unjust for a person to retain a benefit which he has received at the expense of another which that person did not intend him to receive because it was made under a mistake that it was due. The claimant must prove that he acted under a mistake. But the stage when he made his mistake does not matter, so long as it can be said that if he had known of the true state of the facts or of the law at the time of the payment he would not have made it. A wrong turning half way along the journey is just as capable of being treated as a relevant mistake as one that is made on the doorstep at the point of arrival.
>
> 60. Robert Goff J said in *Barclays Bank Ltd v W J Simms Son & Cooke (Southern) Ltd* [1980] QB 677, 694, after a careful review of the leading authorities about payments made under a mistake of fact, that it is sufficient to ground recovery that the claimant's mistake should have caused him to pay the money to the payee. As Professor Burrows, *The Law of Restitution*, 2nd ed (2002), p 136 puts it, the type of mistake does not matter. It is purely its effect on the payer that counts. In *Kleinwort Benson* at p 379 Lord Goff said that it was plain that the money in that case was paid over under a mistake:
>
> > 'The payer believed, when he paid the money, that he was bound in law to pay it. He is now told that, on the law as held to be applicable at the date of the payment, he was not bound to pay it. Plainly, therefore, he paid the money under a mistake of law, and accordingly, subject to any applicable defences, he is entitled to recover it.'
>
> 61. Mr Peter Thomason, DMG's Head of Taxation in London, gave evidence about his state of mind at the time when the payments of ACT were made. He

made it clear in his witness statement that the ACT was paid because the relevant provisions of ICTA 1988 required it to be paid and because he believed that the UK statute denying the ability to make a group income election was the law and that he was bound to act in accordance with it. As Park J records in his judgment at para 27, he was cross-examined on his witness statement. But the judge did not believe that this passage in his evidence was challenged or affected by his answers on other points. In his opinion the mistake that DMG made when the ACT was paid was that it did not realise that it could have made a valid group election with the non-resident companies. In para 29 he repeated a point that he made in para 11 when he was summarising the evidence. He said that he had no doubt that if DMG had submitted elections the Revenue would have pointed to the clear terms of the statute and rejected them, and that DMG would have been liable to pay the ACT and would have paid it.

62. Park J acknowledged in para 25 of his judgment that DMG's mistake was not directly a mistake about whether there was a liability to pay ACT. As he put it, it was directly a mistake about whether group income elections could be made. The liabilities to pay ACT arose as secondary consequences of that primary mistake. In the Court of Appeal Jonathan Parker LJ said that he could not agree with this analysis and that DMG's mistake lay not in its belief that a group election was not available but rather in its belief that the ACT was payable when, on the true state of the law, it was not: paras 231-232. I think, with respect, that Park J's analysis was the correct way of looking at what happened in this case. It was the mistaken belief that group relief could not be claimed that led inevitably to the liability to pay ACT which, absent a valid claim to group relief, DMG was not in a position to dispute. That was where the mistake was made, of which the payment of ACT was a secondary consequence. But, as Park J was right to recognise, if the mistake about the availability of group income relief had not existed, the ACT would not have been paid. There was an unbroken causative link between the mistake and the payment. It follows that the payments were made under a mistake. The mistake was, of course, a mistake of law. But under the *Kleinwort Benson* principle a cause of action at common law for their recovery is available."

52. In relation to the "mistake issue" Lord Walker said, at [143]:

"I can set out my views on this issue more briefly. I agree with the judge's conclusions, and I largely agree with his reasoning, though I respectfully think that he was rather over-analytical in his approach. I agree with the observation of Neuberger J in *Nurdin & Peacock plc v D D B Ramsden & Co Ltd* [1999]1 WLR 1249, 1272:

> 'For the issue of recoverability to turn upon a nice analysis as to the precise nature of the mistake of law appears to me to be almost as undesirable as it is for recoverability to turn upon whether the mistake made by the payer was one of fact or law.'

The straightforward test of causation put forward by Robert Goff J, after a full survey of authority, in *Barclays Bank Limited v W J Simms Son & Cook (Southern) Limited* [1980] QB 677, has stood the test of time. DMG paid the ACT because it mistakenly thought that it had to. The fact that there was a procedural requirement for a GIE [Group Income Election] does not alter the substance of its mistake, since (as Park J expressly found, para 11) any attempt at making a GIE would undoubtedly have been rejected in this case."

53. In *FII Group Test Claimants v HMRC* [2012] 2 AC 337, ("*FII SC 1*") Lord Sumption observed, at [176]:

> "*Marleasing*, at any rate as it has been applied in England, is authority for a highly muscular approach to the construction of national legislation so as to bring it into conformity with the directly effective Treaty obligations of the United Kingdom. It is no doubt correct that, however strained a conforming construction may be, and however unlikely it is to have occurred to a reasonable person reading the statute at the time, a later judicial decision to adopt a conforming construction will be deemed to declare the law retrospectively in the same way as any other judicial decision. But it does not follow that there was not, at the time, an unlawful requirement to pay the tax. It simply means that the unlawfulness consists in the exaction of the tax by the Inland Revenue, in accordance with a non-conforming interpretation of what must (on this hypothesis) be deemed to be a conforming statute. This is so, notwithstanding that the tax may have been paid without anything in the nature of a formal demand by the Inland Revenue. The rule as the House of Lords formulated it in *Woolwich Equitable* is in large measure a response to realities of the relationship between the state and the citizen in the area of tax. The fact that as a matter of strict legal doctrine a statute turns out always to have meant something different from what it appeared to say is irrelevant to the realities of power if it was plain at the relevant time that the tax authorities would enforce the law as it then appeared to be. Strictly speaking, in *Woolwich Equitable* itself there were no unlawful regulations, because, being ultra vires the enabling Act, they were and always had been a nullity. But that did not stop the Woolwich from recovering."

54. Many of the Appellants/Applicants in the present case were also parties in *Test Claimants in Class 8 of the CFC and Dividend Group litigation v HMRC* [2019] 1 WLR 5097, [2019] STC 828 ("*Class 8*"), in which the Chancellor recorded, at [9], that there were four agreed preliminary issues between the parties of which the first, "the paragraph 51(6) issue", is relevant to the present proceedings. This concerns whether "the claimants' common law claims in unjust enrichment under *Woolwich* and mistake and in damages, including claims for compound interest, issued after March 2010, [were] ousted by paragraph 51(6) of schedule 18 to the Finance Act 1998 ("paragraph 51(6)"), or [by] that provision read with the statutory provisions relating to interest?"

55. The Chancellor noted that this issue took most of the time available in argument and explained, at [10], that this:

> "… was because the bulk of the class 8 claims were issued in 2012 and 2014, as opposed to Prudential's claims that were all or mostly issued before 2010. That meant that the class 8 claims, but not Prudential's claims, were at first sight precluded by the express terms of paragraph 51(6), which came into force on 1st April 2010. Paragraph 51(6) provided that HMRC were "not liable to give relief in respect of" these cases except as specifically provided for by specified tax legislation. The class 8 claims, primarily in mistake, were of course all common law claims brought outside the provisions of tax legislation. They would, therefore, be ousted by paragraph 51(6) unless that provision is held to be incompatible with (primarily) the EU law principle of effectiveness."

56. Having summarised the parties' submissions and considered the relevant authorities in some detail, the Chancellor said:

> "74. As already indicated, the parties' arguments on the paragraph 51(6) issue passed like ships in the night. The basic question is, of course, whether

paragraph 51(6) operates so as to oust the claimants' common law claims. It will operate in that way unless it falls foul of the EU law principle of effectiveness. The issue, therefore, becomes whether paragraph 51(6) makes it impossible in practice or excessively difficult for the claimants to exercise their *San Giorgio* right to recover overpaid tax and interest thereon.

75. The solution to this issue breaks down into the following sub-issues, most of which represent arguments advanced by the claimants to rebut HMRC's contention that sections 790 and 826 of ICTA provided an effective remedy for the recovery of the claimants' overpaid tax and interest:-

(i) Do the principles to be derived from *Autologic* mean that, even where there is an exclusive regime for the vindication of a statutory claim, common law rights are not altogether excluded?

(ii) Did Henderson J misunderstand *Haribo* in *Portfolio Dividends HC 1*, [ie *Prudential (Ch)*]when he said at paragraphs 52-53 that it had decided that it was an intrinsic part of an imputation system to require taxpayers to provide details of the foreign tax actually paid on the distributed profits, even in the case of portfolio dividends, so that such a system did not impose an excessive administrative burden or practical impossibility on taxpayers, even where they could not find out how much tax the foreign company had paid, because the foreign company must have that information?

(iii) Is the relief allowed by section 790 prevented from being an effective remedy because it only applies to portfolio dividends as a result of the application of the *Marleasing* principle so as to make it conform with the principles of EU law established in *FII CJEU 1* and *FII CJEU 2*?

(iv) Is the relief allowed by section 790 prevented from being an effective remedy because in some cases the claimants can show that they did not *actually know* that they had such a remedy before the abbreviated limitation periods meant that their remedy had become statute barred?

(v) Is the relief allowed by section 790 prevented from being an effective remedy because the taxpayers could not have been certain how much to claim under paragraph 54?

(vi) Are HMRC estopped from contending that section 790 provides a statutory remedy for the claimants in this case, when they had conceded the point in [*Prudential (Ch)*] as recorded in paragraph 263 of the judgment?

(vii) Is the practice generally prevailing defence in paragraph 51A(8) to be read as excluded by the *Marleasing* principle so as to mean that the claimants here did have an effective claim under section 790?

(viii) Did the reduction of the limitation periods provided for by schedule 18 in some other way mean that the claimants had no effective remedy under section 790?

(ix) Can the allegedly obstructive conduct of HMRC in making it more difficult for the claimants to make their claims affect what would otherwise be the legal position?"

57. Sub-issue (i) is not relevant to the present case. However in relation to sub-issue (ii) the Chancellor said that counsel for the taxpayer:

"81. Mr Aaronson sought to draw a number of the most subtle possible distinctions in relation to the CJEU's decision in *Haribo* [2011] STC 917. Mr Aaronson complained that Henderson J [2014] STC 1236 had misunderstood *Haribo* because he had applied the answer given by the CJEU

> to question 2 in that case to a situation where there was no statutory right to a tax credit, only a right to be implied in order to give effect to the EU law principle of effectiveness. This, as I see it, is a distinction without a difference. In *Haribo*, the CJEU was dealing with a number of different situations that were thrown up as a result of the Austrian legislation, but the principle is clear from the CJEU's answer to question 2, and from paragraph 58 of Advocate General Kokott's opinion and paragraph 98 of the CJEU's judgment. The principle was that, where a statutory claim for recovery of overpaid tax on foreign dividends required the taxpayer to state the amount of corporation tax paid by the foreign company, the EU law principle of effectiveness was not violated merely because "the shareholder is not in a position … to obtain that information". It is not the Member State's responsibility if investors cannot obtain sufficient information to make a claim to recover foreign tax paid by a company in which they have invested. The rationale of this decision was not affected by the issue whether there was a true statutory right to recover the overpaid tax or simply a right implied by the *Marleasing* principle in order to give effect to the EU law principle of effectiveness. The CJEU made clear (at paragraphs 144-147) that there was no difference between the situation where the tax in question was paid by a company in another Member State and where the tax was paid by a company in a state outside the EU.

Accordingly, he concluded that Henderson J had not misunderstood *Haribo* in *Prudential (Ch)* and had been right to hold that the principle of effectiveness was not violated when, in order to make a claim to recover overpaid tax, a taxpayer had to state how much tax the foreign company had paid, but could not in fact find out.

58. With regard to sub-issue (iii), the Chancellor noted, at [83], that it had been clear since *FII CJEU 1* in 2006 that a conforming interpretation of s 790 ICTA was necessary for it to comply with EU law and apply to portfolio dividends. Having referred to Lord Sumption's observation regarding the retrospective effect of later conforming interpretations (see paragraph 53, above), he concluded, at [84], that the relief allowed by s 790 ICTA did not prevent it from being an effective remedy for the recovery of overpaid tax because it only applies to portfolio dividends.

59. On sub-issue (iv) the Chancellor concluded, at [97], that s 790 ICTA could provide an effective remedy even where the claimants can show that they did not actually know that they had such a remedy before it had become statute barred.

60. In relation to sub-issue (v) the Chancellor said, at [100], that it was clear that the taxpayer could have had an effective remedy for the available reliefs by claiming under s 790 ICTA for any quantified amount, even if it did not know at the time of claiming whether the correct claim was for the foreign tax actually paid on the dividends or the tax that would have been paid at the FNR. He continued saying that:

> "The lack of knowledge of the precise rate at which the claim should be made may make it harder to make an effective claim, but it does not make it impossible in practice, as is required for the EU law principle of effectiveness to be violated."

61. The Chancellor, at [102], considered sub-issue (vi) to be "easily resolved" and concluded, at [103], that HMRC were not estopped by the concession at [263] in *Prudential (Ch)* from relying on s 790 as an exclusive statutory remedy for the claimants in that case.

62. Sub-issue (vii) is not applicable to the present case.

63. In relation to sub-issue (viii) the Chancellor said:

> "109. The eighth sub-issue concerns the suggestion that the reduction of the limitation periods provided for by schedule 18 deprived the claimants of an effective remedy under section 790. It is clear from the authorities that I have already mentioned that it is open to a Member State to abbreviate limitation periods, provided that reasonable notice of at least 6 months is given of the change. In this case, none of the changes made to abbreviate the right to claim under paragraph 51 or section 790 were made on less than 6 months' notice. The relevant amendments to paragraph 51 (namely the introduction of paragraph 51(6) providing that HMRC was not liable to give relief in respect of overpaid tax outside the legislation, and the introduction of paragraph 51B reducing the limitation period from 6 to 4 years) had been included in the Finance Act 2009, which received Royal Assent on 21st July 2009, and only took effect some 8 months later on 1st April 2010.
>
> 100. Accordingly, the reduction of the limitation periods provided for by schedule 18 did not deprive the claimants of an effective remedy under section 790."

64. Sub-issue (ix) concerned alleged obstructive conduct by HMRC which the Chancellor considered, at [113], could be "simply answered". Although, at [114], he did not rule out that a factual case in fraud or misfeasance could be advanced this was not what before the court. As such he concluded, at [115], that the alleged conduct of HMRC "did not, therefore, affect the legal position as set out above."

65. Having dealt with these sub-issues the Chancellor went on to hold, at [119], that while paragraph 51(6) did "indeed operate to oust the claimants' common law claims" such an outcome did not contravene the EU law principle of effectiveness.

66. Mr Ewart contends that *Class 8* answers a number of the Appellants' EU law points in the present proceedings. Although he accepts that it did not deal with questions of domestic construction of the legislation he submits it was decided on the basis that s 790 ICTA was the exclusive statutory remedy, the argument in that case was that it was the only remedy and because it was not effective there had to be a common law remedy and the provision that ousted the common law remedy, Paragraph 51, had to be displaced.

67. Mr Bremner, with whom I agree, contends that *Class 8* cannot assist HMRC as the Chancellor, who was not directly concerned with claims for DTR and the construction of the legislation but with common law unjust enrichment, did not address the scope of what counted as a valid statutory claim or indeed whether there were other statutory mechanisms by which the claimants EU law rights could be vindicated.

Overriding EU principles

68. Much of this section is derived from Mr Bremner's helpful summary of the principles of EU law in his skeleton argument from which I did not understand Mr Ewart to dissent.

69. It is clear from *FII Group Test Claimants v HMRC* [2014] AC 1161 ("*FII CJEU 3*") at [30] that the right to a refund of taxes imposed in a member state in breach of EU law is the consequence and complement of the rights conferred on taxpayers by provisions of EU law as interpreted by the CJEU and that, as such, a member state is, in principle, required to repay taxes levied in breach of EU law. It is also clear from *FII CJEU 3* at [31] that, in the absence of EU rules on the recovery of national taxes, it is for the domestic legal system of each member state, in accordance with the principle of the procedural autonomy of the member states, to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions at law for safeguarding the rights which taxpayers derive from EU law. The principle of national procedural autonomy which is itself qualified by requirements of

effectiveness, equivalence and by requirements relating to legal certainty and effective judicial protection.

70. The principle of effective judicial protection is recognised both in the Treaty on European Union and in the Charter on Fundamental Rights of the European Union. Although these principles are now expressly recognised in these written instruments, they originate in the general principles of EU law.

71. Article 19(1) of the Treaty on European Union provides:

> 1. The Court of Justice of the European Union shall include the Court of Justice, the General Court and specialised courts. It shall ensure that in the interpretation and application of the Treaties the law is observed.
>
> Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law.

72. The fundamental rights protected in EU law were brought together in a single document, the Charter of the Charter of Fundamental Rights of the European Union (the "Charter"), which reaffirmed the existing EU rights and principles.

73. Material Articles of the Charter provide:

> *Article 47*
>
> **Right to an effective remedy and to a fair trial**
>
> Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.
>
> Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented.
>
> …
>
> *Article 52*
>
> **Scope and interpretation of rights and principles**
>
> 1. …
>
> 2. …
>
> 3. In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.
>
> *Article 53*
>
> **Level of protection**
>
> Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law and international law and by international agreements to which the Union or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States' constitutions.

74. However, the principle of effective judicial protection did not originate with the Charter but was implemented through the general principles of EU law (eg *Johnston v Chief Constable of the Royal Ulster Constabulary* (Case 222/84) [1986] ECR 1651, where the CJEU recognised

at [19] "the right to obtain an effective remedy in a competent court" as a general principle of EU law). As the CJEU recognised in *Unibet (London) Ltd v Justitiekanslern* (C-432/05) [2007] ECR I-2271 ("*Unibet*") at [37]:

> "37. It is to be noted at the outset that, according to settled case-law, the principle of effective judicial protection is a general principle of Community law stemming from the constitutional traditions common to the Member States, which has been enshrined in Articles 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms … and which has also been reaffirmed by Article 47 of the Charter of fundamental rights of the European Union, proclaimed on 7 December 2000 in Nice (OJ 2000 C 364, p. 1)."

75. The principles of effectiveness and effective judicial protection in EU law have also been informed by the European Convention on Human Rights ("ECHR") and the case law of the European Court of Human Rights ("ECtHR") but are of broader application in EU law, applying not only to civil but also to administrative and tax proceedings.

76. As Article 52(3) of the Charter makes clear, although the meaning and scope of rights under the Charter have the same meaning and scope as under the ECHR and therefore at least equal to the protection under the ECHR, it does not limit EU law from providing more extensive protection. For example, Article 47 of the Charter may be relied upon by individuals alleging a violation of any rights conferred on them by EU law. However, under Article 13 ECHR, on which Article 47(1) is based (see *Explanations: Relating to the Charter of Fundamental Rights* (OJ 2007 C 303/02) – the "*Explanations*") an individual may only rely on the rights guaranteed by the ECHR. As stated in the 'Explanations' (in relation to the right to a fair hearing, Article 47(1) of the Charter and Article 6 ECHR):

> "In Union law, the right to a fair hearing is not confined to disputes relating to civil law rights and obligations. That is one of the consequences of the fact that the Union is a community based on the rule of law as stated by the Court in Case 294/83, *'Les Verts' v European Parliament* (judgment of 23 April 1986, [1986] ECR 1339). Nevertheless, in all respects other than their scope, the guarantees afforded by the ECHR apply in a similar way to the Union."

77. In *Unibet* the CJEU noted, at [39], that in the absence of Community rules governing the matter, it was for the domestic legal system of each member state to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from Community law.

78. The CJEU continued:

> "42. Thus, while it is, in principle, for national law to determine an individual's standing and legal interest in bringing proceedings, Community law nevertheless requires that the national legislation does not undermine the right to effective judicial protection (see, inter alia, Joined Cases C-87/90 to C-89/90 *Verholen and Others* [1991] ECR I-3757, paragraph 24, and *Safalero*, paragraph 50). It is for the Member States to establish a system of legal remedies and procedures which ensure respect for that right (*Union de Pequeños Agricultores v Council*, paragraph 41).
>
> 43. In that regard, the detailed procedural rules governing actions for safeguarding an individual's rights under Community law must be no less favourable than those governing similar domestic actions (principle of equivalence) and must not render practically impossible or excessively difficult the exercise of rights conferred by Community law (principle of effectiveness) (see, inter alia, Case 33/76 *Rewe*, paragraph 5; *Comet*,

> paragraphs 13 to 16; *Peterbroeck*, paragraph 12; *Courage and Crehan*, paragraph 29; *Eribrand*, paragraph 62; and *Safalero*, paragraph 49).
>
> 44 Moreover, it is for the national courts to interpret the procedural rules governing actions brought before them, such as the requirement for there to be a specific legal relationship between the applicant and the State, in such a way as to enable those rules, wherever possible, to be implemented in such a manner as to contribute to the attainment of the objective, referred to at paragraph 37 above, of ensuring effective judicial protection of an individual's rights under Community law."

79. It was accepted by Jacob LJ, with whom Sir William Aldous and Tuckey LJ agreed, in *T-Mobile (UK) Ltd and another v Office of Communications* [2009] 1 WLR 1565 at [22], that *Unibet* at [44]:

> "… demonstrated an obligation on a national court to adapt its procedures as far as possible to ensure Community rights are protected"

80. The recent case of *Banco de Portugal v VR* (Case C-504/19) concerned proceedings, arising out of the 2008 financial crisis, involving a Spanish branch of a Portuguese bank, BES Spain, from which VR purchased preference shares in an Icelandic credit institution for approximately €166,000. On 3 August 2014 the assets and liabilities of BES were, because of its serious financial difficulties, transferred to a 'bridge bank', Novo Banco, established by the Banco de Portugal. On 29 December 2015 the assets and liabilities were transferred back to BES with retroactive effect (ie that the assets and liabilities had been transferred back on 3 August 2014). However, between the transfer to Novo Banco and the transfer back to BES, on 4 February 2015, VR brought an action against Novo Banco in Spain for a declaration that the Share Sale Agreement was null and void, due to a lack of consent, and for the repayment of the amount invested. Novo Banco contended that, by the effect of the transfer and re-transfer, it was not liable in Spain.

81. The Supreme Court of Spain, which considered that the transfer of 29 December 2015 amended the August 2014 re-transfer with retroactive effect and that the liability to VR arising out of the Share Sale Agreement had been re-transferred to BES with retroactive effect on 3 August 2014, referred the following question to the CJEU:

> "Is an interpretation of Article 3(2) of Directive [2001/24] under which, in legal proceedings pending in other Member States, the courts must, without any further formalities, recognise the effects of a decision by the competent administrative authority of the home Member State that is intended retrospectively to change the legal framework that existed at the time the proceedings were commenced and that renders ineffective any judgments that do not accord with the provisions of the new decision, compatible with the fundamental right to an effective remedy in Article 47 of the [Charter], the principle of the rule of law in Article 2 [TEU] and the general principle of legal certainty?'"

82. The CJEU observed, at [51], with regard to the principle of legal certainty that:

> "… it must be recalled that, according to the Court's settled case-law, that principle requires, on the one hand, that the rules of law be clear and precise and, on the other, that their application be foreseeable for those subject to the law, in particular, where they may have adverse consequences for individuals and undertakings. Specifically, in order to meet the requirements of that principle, legislation must enable those concerned to know precisely the extent of the obligations imposed on them, and those persons must be able to ascertain unequivocally their rights and obligations and take steps accordingly (see judgment of 11 July 2019, *Agrenergy and Fusignano Due*, C-180/18,

C-286/18 and C-287/18, EU:C:2019:605, paragraphs 29 and 30 and the case-law cited).

Having noted that, although at the time she brought her action against Novo Banco Spain on 4 February 2015, VR had:

> "53. … all the information necessary to make a fully informed decision as to whether to bring such an action, as well as to identify with certainty the person against whom the action was to be directed and, in particular, the fact that a retransfer of liability from Novo Banco to BES under the Share Sale Agreement could still be made and have retroactive effect, the fact remains that, VR was not in a position, once her action had been brought but before a final decision had been adopted, to anticipate the implementation of the latter option and to make arrangements accordingly.
>
> 54. Thus, the recognition, in the main proceedings, of the effects of the decisions of 29 December 2015 in so far as it is capable of calling into question the judicial decisions already taken in favour of VR, which are still the subject of a pending lawsuit, and which has the result, with retroactive effect, that the defendant can no longer be sued for the purposes of the action brought by the applicant, is incompatible with the principle of legal certainty."

The CJEU continued:

> "57 It follows from the case-law of the Court that the effectiveness of the judicial review guaranteed by the first paragraph of Article 47 of the Charter requires, inter alia, that the person concerned is able to defend his or her rights in the best possible conditions and to decide, in full knowledge of the facts, whether it would be useful to bring an action against a given entity before the competent court (see, to that effect, judgment of 8 May 2019, *PI*, C-230/18, EU:C:2019:383, paragraph 78 and the case-law cited).
>
> …
>
> 63. To accept that reorganisation measures taken by the competent authority of the home Member State subsequent to the bringing of such an action and such a judgment, which have the effect of modifying, with retroactive effect, the legal framework relevant to the resolution of the dispute which gave rise to that action, or even directly to the legal situation which is the subject matter of that dispute, might lead the court seised to reject that action, would constitute a restriction on the right to an effective remedy within the meaning of the first paragraph of Article 47 of the Charter, even if such measures are not in themselves contrary to Directive 2001/24, as set out in paragraph 61 of the present judgment.
>
> 64. Furthermore, that conclusion cannot be invalidated by the fact that the dispute in the main proceedings had not yet been concluded with a final judgment at the time the decisions of 29 December 2015 were taken, nor by the fact, pointed out by the Portuguese Government in its response to the Court's written questions and at the hearing, that VR had the right to challenge those decisions before the Portuguese courts within a period of three months from their publication on the Banco de Portugal website."

83. I was also referred to the decisions of the ECtHR *Gil Sanjuan v Spain* [2020] ECHR 342, *Dos Santos Calado and others v Portugal* [2020] ECHR 275, and *Bellet v France* [1995] ECHR 53.

84. In *Gil Sanjuan* the applicant attempted to bring an appeal before the Spanish Supreme Court. However, the Court held that the appeal was inadmissible for failure to comply with necessary formal requirements. The applicant complained that this constituted a breach of her

right to a fair trial on the basis that it had applied retroactively a new interpretation of a procedural requirement not provided for by law but developed in case law after she had submitted her appeal and without her having been given the opportunity to remedy any possible deficiencies which might have arisen as a result of the new criteria. Her complaint was dismissed by the Spanish Supreme Court and the Spanish Constitutional Court.

85. The ECtHR, however, upheld the applicant's complaint, observing, at [31]:

> "It is well enshrined in the Court's case-law that "excessive formalism" can run counter to the requirement of securing a practical and effective right of access to a court under Article 6 § 1 of the Convention. This usually occurs in cases involving a particularly strict construction of a procedural rule, preventing an applicant's action being examined on the merits, with the attendant risk that his or her right to the effective protection of the courts would be infringed (ibid, § 97). An assessment of a complaint of excessive formalism in the decisions of the domestic courts will usually be the result of an examination of the case taken as a whole, having regard to the particular circumstances of that case (ibid, § 98). In making that assessment, the Court has often stressed the issues of "legal certainty" and "proper administration of justice" as two central elements for drawing a distinction between excessive formalism and an acceptable application of procedural formalities. In particular, it has held that the right of access to a court is impaired when the rules cease to serve the aims of legal certainty and the proper administration of justice and form a sort of barrier preventing the litigant from having his or her case determined on the merits by the competent court (see, for instance, *Zubac*, cited above, § 98; *Kart v Turkey* [GC], no. 8917/05, § 79, 3 December 2009; and *Arrozpide Sarasola and Others*, cited above, § 93)."

It went on to hold, at [44]:

> "… that the unforeseeability of the procedural requirement applied retroactively in the applicant's pending case, without her having been given the opportunity to remedy any newly arising deficiency in her notice of appeal on points of law, restricted her access to a court to such an extent that the very essence of that right was impaired."

86. As the report of *Dos Santos Calado* was only available in French I have, in the absence of any issue arising as a result of doing so, referred to its accompanying English language press release. This case concerned a complaint by Portuguese nationals whose appeals to the Portuguese Constitutional Court had been declared inadmissible because of reliance on the incorrect sub-section of the relevant national provision. The ECtHR considered whether the inadmissibility decision, which was based on a drafting error, was proportionate and concluded that "the approach taken by the [Portuguese] Constitutional Court had been excessively formalistic, having deprived the applicant of a remedy afforded by domestic law in respect of the matter at issue."

87. *Bellet v France* concerned French procedural rules and whether these deprived an individual of his right of access to a court. Having noted, at [36], that, for "the right of access to be effective, an individual must have a clear, practical opportunity to challenge an act that is an interference with his rights" the ECtHR concluded, at [38], that the applicant did not have a practical, effective right of access to the courts in the proceedings, having found, at [37] that:

> "37. … the system was not sufficiently clear or sufficiently attended by safeguards to prevent a misunderstanding as to the procedures for making use of the available remedies and the restrictions stemming from the simultaneous use of them."

88. In *Raffaello Visciano v Istituto nazionale della previdenza sociale* (C-69/08) [2009] ECR I-674 ("Visciano") the claimant (Mr Visciano) was an employee whose employer went into liquidation. He submitted an application for compensation by an Italian guarantee fund for his unpaid wages. The fund paid him a lesser amount than was due. Following judgments of the CJEU, Mr Visciano applied to the Italian court to ask that the court uphold his right to review the difference between the amount he had been paid and the amount which was due to him. The fund objected on the basis that a one-year limitation period applied to Mr Visciano's claim and that that claim was "an independent and separate social security obligation distinct from that made against the employer".

89. The CJEU having noted, at [39], that member States "are in principle free to lay down in their national law provisions establishing a limitation period" for such claims stated:

> "46. However, it is also apparent from Case C-62/00 *Marks & Spencer* [2002] ECR I-6325, paragraph 39, that in order to serve their purpose of ensuring legal certainty, limitation periods must be fixed in advance. A situation marked by significant legal uncertainty may involve a breach of the principle of effectiveness, because reparation of the loss or damage caused to individuals by breaches of Community law for which a Member State can be held responsible could be rendered excessively difficult in practice if the individuals were unable to determine the applicable limitation period with a reasonable degree of certainty (Case C-445/06 *Danske Slagterier* [2009] ECR I-2119, paragraph 33, and the case-law cited).
>
> 47. In the main proceedings, it must be observed that, first, according to the referring court, legislative decree No 80/92 fixes a limitation period but does not determine when it starts to run.
>
> 48 Second, that court observes that the first approach of the Corte di Cassazione was to classify benefits from the Fund as being in the nature of pay, just like salaries paid by an employer, with the consequence that the limitation periods and the rules for their suspension applied in the context of an insolvency procedure were also applied to such benefits. Subsequently, the Corte di Cassazione considered that the obligation incumbent on the Fund concerned a social security benefit, independent of the employer's obligation to pay a salary, with the result inter alia that the rules on the suspension of those limitation periods were not applicable.
>
> 49. Those two findings are liable to give rise to legal uncertainty which might constitute a breach of the principle of effectiveness, if it is found, and it is for the national court to make any such finding, that such legal uncertainty may explain the late lodging of Mr Visciano's application before it."

FACTS

90. The background to this case is set out in the following 'Agreed Statement of Facts' provided by the parties (incorporating some minor changes for subsequent developments):

> **AGREED STATEMENT OF FACTS AND ISSUES**
>
> **Introduction and Background**
>
> (1) This is an agreed Statement of Facts and Issues in relation to the applications and appeals chosen as Lead Cases in the Post Prudential Closure Notice Application Group Litigation and the Post Prudential Appeals Group Litigation. This document does not comprise all the facts the parties intend to rely upon at trial. In particular excluded from this document are facts upon which the Appellants intend to rely but which the Respondents consider are not relevant.

(2) The Post Prudential Closure Notice Application Group Litigation involved [203] applications for closure notices by [188] taxpayers, the majority of which were individual funds of a variety of investment houses, which provide (among other business lines) investment management and advice to a variety of different investment vehicles. Those applications were largely made in four batches, in April, June and September 2019 and January 2020. By directions of the Tribunal made on 18 February 2020, the following were chosen as Lead Cases in the Post Prudential Closure Notice Application Group Litigation.

(a) SLMM for the accounting periods ending 31 March 2004, 31 March 2005 and 31 March 2006;

(b) Schroder Asian for the accounting periods ending 31 January 1991 and 15 January 2009;

(c) Schroder European for the accounting period ending 15 January 2003; and

(d) Avon for the accounting periods ending 31 December 1997 to 31 December 2003 inclusive.

(A number of other funds were chosen as Lead Cases in those directions, but those applications are no longer pursued.)

(3) Statements of Case were exchanged between December 2019 and April 2020 and lists of documents were exchanged between 7 May 2020 and 26 June 2020. The Appellants served their witness evidence on 15 May 2020.

(4) Since March 2020 HMRC has issued closure notices in relation to around [190] of the applications in the Post Prudential Closure Notice Application Group Litigation. Those closure notices raised a number of issues which were disputed by the Appellants, resulting in appeals being made against the closure notices. Of the original appeals made, around [177] are now proceeding in the Post Prudential Appeals Group Litigation. By directions of the Tribunal made on 3 November 2020, the following were chosen as Lead Appeals in the Post Prudential Appeals Group Litigation:

(a) Schroder Institutional Growth for the accounting period ending 30 June 2004;

(b) Fidelity UK Index Fund for the account periods ending 28 February [2007] to 28 February 2010 inclusive; and

(c) Henderson for the accounting periods ending 31 October 2006 and 31 October 2007.

(5) The taxpayers in the Lead Cases and Lead Appeals are and were all collective investment vehicles (with the exception of Avon, as to which see below). They were entities resident in the United Kingdom which as part of their investment business at all times relevant to their respective claims held portfolio interests (ie investments below a 10% shareholding) in numerous companies resident in Member States of the EU or the EEA besides the UK and/or in numerous companies resident in other states beyond the EU or EEA Member States, and received dividends from these companies in the ordinary course of their investment business ("non–UK dividends") which were subject to tax under Case DV.

(6) The closure notice applications and appeals concern purported claims for tax unduly levied in breach of EU law.

(7) For UK taxation purposes each fund is recognised as a separate taxpayer. It has its own tax reference number and submits its own tax return.

LEAD CASES

SLMM: Lead Case in the Closure Notice Application

(8) Following the Case Management Hearing on 10 February 2020, the Tribunal has directed that SLMM be appointed a Lead Case in the Post Prudential Closure Notice Applications Group Litigation in relation to its accounting periods ending 31 March 2004 ("APE 2004"), 31 March 2005 ("APE 2005") and 31 March 2006 ("APE 2006"), (together, the "SLMM Accounting Periods").

(9) In the SLMM Accounting Periods, SLMM received dividend income from non-resident investments in holdings below 10% ("portfolio dividends") and filed its original corporation tax returns on the basis that that income was taxable under Case DV, claiming credit for withholding tax only. The returns were submitted on time and no notice of enquiry was issued.

(10) On 15 December 2009, SLMM purported to make claims under Paragraph 51. SLMM have located only an electronic copy of what purports to be the cover letter. That letter claims mistake relief on the grounds that:

> "The mistake relates to the erroneous inclusion, within the taxable profits computation, of overseas source dividend receipts shown in the final return as Schedule D Case V income. We consider that the correct application of section 208 ICTA 1988, read in compliance with EU law, (specifically Articles 43 EC and 56 EC dealing with the freedom of establishment and free movement of capital and payments), provides that all overseas source dividends should not be chargeable to UK corporation tax.
>
> The attached appendix identifies the dividend receipts relevant to this claim and the resulting excessive tax paid."

(11) HMRC's reply of 22 January 2010 states:

> "… I also acknowledge receipt of the mistake relief claims for the periods 20 February 2004 to 31 March 2004, 1 April 2004 to 31 March 2005 and 1 April 2005 to 31 March 2006. These claims will be subject to enquiry. …"

(12) On 7 November 2018 SLMM wrote to HMRC in the following terms ("the 7 November 2018 Letter"):

> "… Adjustment to claim for credit for foreign tax for accounting periods ending 31 March 2004 to accounting period ended 31 March 2009 SLMM European Equity ("the Fund") Tax Reference number …
>
> **Section 79 Taxation (International and Other Provisions) Act 2010 ("TIOPA")**
>
> These are claims made by the claimant taxpayer identified above for double taxation relief in each of the accounting periods stated above. The claims concern dividend income from overseas holdings of less than 10% …
>
> By reason of claims for the recovery of withholding tax in other jurisdictions the amount of credit given in the returns has been reduced under s 34 TIOPA.
>
> In addition, the amount of credit given under the double taxation or unilateral relief arrangements has become insufficient in that the credit given did not include credit for the foreign nominal rate of corporation tax (see [*Prudential (SC)* and C-35/11 *Test Claimants in the Franked Investment Income Group Litigation* ECLI:EU:C:2012:707). That insufficiency is by reason of an

adjustment of the amount of tax payable either in the UK or another territory in that:

1. The inclusion of credit at the foreign nominal rate of corporation tax has increased the amount of double tax relief available. The amount of double tax relief "available against corporation tax chargeable" is part of the calculation of tax payable (step 2 of paragraph 8 of Schedule 18 of the Finance Act 1998). Accordingly increasing the amount of double tax relief available has adjusted the amount of tax payable in the UK; and

2. The inclusion of credit at the foreign nominal rate of corporation tax increases the income taxable under Case DV in that the dividend must be grossed up by the foreign nominal rate to calculate the taxable amount. This increase in the amount of taxable income under Case DV correspondingly increases the tax payable in the UK.

These claims have been made within the period in s79(1)(c) TIOPA, the material determination being no earlier than the earliest date of the judgments referred to above.

(13) It is common ground that nothing turns on the reference in the correspondence to s 79 of the Taxation (International and Other Provisions) Act 2010 instead of s 806(2) ICTA, and that references to the former should be read as references to the latter.

(14) On 10 December 2019, HMRC replied to the 7 November 2018 Letter in the following terms:

"…

Thank you for your letter dated 8th November 2018 by which you intend to make claims under s 79 TIOPA 2010 for the accounting periods ended 31 [M]arch 2004 to 31 March 2009.

…

We do not admit that any of what you state are claims have been validly made and are in fact claims. However, if and to the extent that the claims are in time and valid, HMRC hereby gives notice of their intention to enquire into the claims.

[…]"

(15) On 12 April 2019 SLMM applied for a direction that HMRC issue a closure notice in relation to the purported claims for DTR made in respect of the SLMM Accounting Periods.

(16) HMRC rejected SLMM's purported Paragraph 51 Claims on 21 April 2020 and those rejections were appealed on 20 May 2020. The appeals form part of the Post Prudential Appeals Group Litigation.

Schroder Asian: Lead Case in the Closure Notice Applications

(17) Following the Case Management Hearing on 10 February 2020, the Tribunal directed that Schroder Asian be appointed a Lead Case in the Post Prudential Closure Notice Applications Group Litigation in relation to its accounting periods ending 31 January 1991 ("APE 1991") and 15 January 2009 ("APE 2009") (together, the "Schroder Asian Accounting Periods").

(18) In the Schroder Asian Accounting Periods, Schroder Asian received portfolio dividends. Schroder Asian included the income from portfolio dividends in its

computation of taxable profits and claimed credit for withholding tax only in respect of these dividends. Schroder Asian's CT return for APE 2009 was submitted on time and no notice of enquiry was issued.

(19) On 15 January 2014 Schroder Asian issued a High Court claim seeking restitution for tax on foreign dividend income incurred and paid under Case DV which was enrolled in the CFC & Dividend Group Litigation ("the GLO"). The case of *The Prudential Assurance Company Ltd* ("*Prudential*") was selected as the test case in the GLO to represent the claims in the GLO, including that of Schroder Asian and other participants.

(20) On 14 January 2015, following the High Court's judgment in *Prudential* ([2013] EWHC 3249 (Ch), [2014] STC 1236 [262] ("*Prudential (Ch)*"), Schroder Asian wrote to HMRC ("the 14 January 2015 Letter") purporting to make a claim to adjust its DTR on the basis that EU law required a tax credit in respect of overseas dividends to be set by reference to the FNR. The 14 January 2015 Letter refers to section 79 TIOPA.

(21) It is common ground that nothing turns on the reference in the correspondence to s 79 of TIOPA instead of s 806(2) ICTA, and that references to the former should be read as references to the latter.

(22) On 10 June 2015 HMRC replied to the 14 January 2015 Letter as follows:

> "…
>
> Thank you for your letter dated 14 January 2015. I am writing to you in accordance with the provisions of paragraph 5 of Schedule 1A of the Taxes Management Act 1970 to provide written notice of our intention to enquire into the purported claims made by s18(2) TIOPA 2010 and set out in your letter of 26 February 2015 [sic] and the appendices enclosed with that letter.
>
> The notice is given as a protective measure and it is neither an admission nor an agreement that any valid claims exist. Indeed it is our current view that the normal statutory time limits for claims for these periods have now expired and they are not capable of being extended.
>
> There may however be very limited circumstances in which claims time limits may be extended and if those circumstances are, in future, found to be applicable to these claims then this notice preserves our right to enquire into those claims that are held to be valid."

(23) On 11 April 2019 Schroder Asian applied pursuant to paragraph 7 Schedule 1A TMA for a direction that HMRC issue a closure notice in relation to Schroder Asian's purported claims for DTR made in respect of the Accounting Periods.

Schroder European: Lead Case in the Closure Notice Applications Litigation

(24) Following the Case Management Hearing on 10 February 2020, the Tribunal has directed that Schroder European be appointed a Lead Case in the Post Prudential Closure Notice Applications Group Litigation in relation to its accounting period ending 15 January 2003 (the "Schroder European Accounting Period").

(25) In the Schroder European Accounting Period, Schroder European received dividend income from non-resident investments in holdings below 10% and filed its corporation tax return on the basis that that income was taxable under Case DV, claiming credit for withholding tax only. The return was submitted on time and no notice of enquiry was issued.

(26) On 6 December 2005, Schroder European submitted a letter to HMRC in the following terms ("the 6 December 2005 Letter"):

> " … We hereby claim relief under FA 1988 Schedule 18 paragraph 51 in respect of the year ended 15 January 2003 as follows:
>
> | [year ended] | [Amendment] | [Repayment Claimed] |
> | --- | --- | --- |
> | 15/01/03 | EU dividends treated as non-taxable
Creation of EUFT
EMEs b/f and c/f EUFT b/f and c/f
Corporation tax reclaimed | £174,053 |
>
> Relief is claimed on the basis that the return for this accounting period erroneously included as taxable amounts dividends which should not have been treated as taxable under EU law and that, as a result, the assessment for this period was excessive."

(27) HMRC did not respond to or acknowledge the 6 December 2005 Letter.[3]

(28) On 15 January 2014 Schroder European issued a High Court claim ("the Schroder European High Court Claim") seeking restitution for tax on foreign dividend income incurred and paid under the Case DV, which was enrolled in the GLO.

(29) On 29 January 2015, Schroder European wrote to HMRC in the following terms ("the 29 January 2015 Letter"):

> "Please treat this letter as an amendment to the claims for exemption of foreign dividends from tax in the UK, as set out below (copies enclosed), to treat those claims in the alternative as being claims for double taxation relief. Such claims for the above accounting periods under s18(2) of TIOPA 2010 to include relief from ULT on foreign dividend income received in the period, as well as for WHT suffered on the dividends received. ULT to be calculated by reference to the nominal rate of tax in the overseas territory from which the dividends are sourced."

(30) It is common ground that nothing turns on the reference in the correspondence to s 79 of the TIOPA instead of s 806(2) ICTA, and that references to the former should be read as references to the latter.

(31) On 10 June 2015, HMRC replied to the 29 January 2015 Letter in the following terms:

> "I am writing in accordance with the provisions of paragraph 5 of Schedule 1A of the Taxes Management Act 1970 to provide written notice of our intention to enquire into the purported claims made by S18(2) and set out in your letter of 26 February 2015 and the appendices enclosed with that letter. The notice is given as a protective measure and it is neither an admission nor an agreement that any valid claims exist. Indeed it is our current view that the normal statutory time limits for claims for these periods have now expired and they are not capable of being extended
>
> […]"

[3] HMRC rejected Schroder European's purported Paragraph 51 Claim on 21 April 2020 and that rejection was appealed on 14 May 2020. The appeals form part of the Post Prudential Appeals Group Litigation.

(32) On 11 April 2019 Schroder European applied for a direction that HMRC issue a closure notice in relation to the purported claims for DTR made in respect of the Schroder European Accounting Period.

Avon: Lead Case in the Closure Notice Applications Litigation

(33) Avon is a UK based general insurance company and forms part of the NFU Mutual Group, the ultimate parent company of which is The National Farmers Union Mutual Insurance Society Limited ("NFUMISL"). Avon's principal activity is the transaction of Personal Accident insurance business.

(34) Following the Case Management Hearing on 10 February 2020, the Tribunal has directed that Avon be appointed a Lead Case in the Post Prudential Closure Notice Applications Group Litigation in respect of the accounting periods ending 31 December 1997 to 31 December 2003 inclusive (referred to in this section as "APE 1997", "APE 1998", etc. and together as "the Avon Accounting Periods").

(35) In the Avon Accounting Periods, Avon received dividend income from non-resident investments in holdings below 10% ("portfolio dividends"). Avon included the income from portfolio dividends in its computation of taxable profits and claimed credit for withholding tax only in respect of these dividends. Avon's CT Computations for APE 1997 and APE 1998 ("the pre-CTSA APs") were submitted on time. Avon's CT returns for APE 1999 to APE 2003 ("the CTSA APs") were submitted on time and no notice of enquiry was issued.

(36) On 30 September 2004, NFU Mutual issued a High Court claim and joined the GLO. Avon was one of the Claimants, as was NFUMISL (together with a number of other members of the NFU Mutual group).

(37) On 8 November 2018, following the Supreme Court's judgment in *Prudential (SC)*, Avon wrote to HMRC ("the 8 November 2018 Letter") purporting to make a claim to adjust its DTR on the basis that EU law required a tax credit in respect of overseas dividends to be set by reference to the FNR:

> "…
>
> These therefore are claims made by the DV Companies identified above for double taxation relief in the accounting periods stated above. The claims concern dividend income from overseas holdings of less than 10% taxed under Schedule D Case V of section 18 of the Income and Corporation Taxes Act 1988 …"

(38) It is now common ground between the parties that Avon did not receive any dividends taxed under Case DV but rather the portfolio dividends received by Avon were taxed under Case I.

(39) The 8 November 2018 Letter refers to section 79 TIOPA. It is common ground that nothing turns on the reference in the correspondence to s 79 of TIOPA instead of s 806(2) ICTA, and that references to the former should be read as references to the latter.

(40) On 14 February 2019 HMRC replied to the 8 November 2018 Letter as follows:

> "… We therefore consider the claims to be out of time so that no valid enquiries can be opened into them. However, if and to the extent that the claims are in time and valid, HMRC hereby give notice of their intention to enquire into the claims."

(41) On 9 April 2019 Avon applied pursuant to paragraph 7 Schedule 1A TMA for a direction that HMRC issue a closure notice in relation to Avon's purported claims for DTR made in respect of the Avon Accounting Periods.

LEAD APPEALS

Schroder Institutional Growth: Lead Appeal in the Appeals Group Litigation

(42) Schroder Institutional Growth has been appointed a Lead Appeal in respect of its appeal dated 27 April 2020 against a Closure Notice and amendment issued by HMRC on 27 March 2020 in respect of accounting period ending 30 June 2004 ("APE 2004" or "the Schroder Institutional Growth Accounting Period").

(43) In APE 2004, Schroder Institutional Growth received portfolio dividends and filed its corporation tax return on the basis that all that non-resident dividend income was taxable under Case DV, claiming credit for withholding tax only. It paid tax on that basis.

(44) By letter of 24 May 2005 Schroder Investment Management Ltd, the investment manager of Schroder, on behalf of Schroder and other named funds notified HMRC of its intention to:

> "[submit] returns on the basis that the taxation of overseas dividends received from EU companies is contrary to EU law and that such dividends should therefore, following the principles established in the Manninen case, be treated as non-taxable".

The letter confirmed that the Appellant and the other funds would continue:

> "… to make tax payments on the basis that the dividends are taxable, given that, until reversed, that remains the position under UK law. Your offer to arrange to block the repayments that would otherwise be generated automatically by submission of the returns on a different basis is appreciated."

(45) On 12 December 2005 the return for APE 2004 was amended to return dividend income from EU countries as exempt. The return was amended within time, that is within twelve months of the filing date (paragraph 15(4)(A) of Schedule 18 to the Finance Act 98). Accordingly, the amendment took effect on that date.

(46) By letter of 15 February 2006 HMRC gave notice of their intention to enquire into the return.

(47) By letter of 24 March 2015 and accompanying computations Schroder made a claim ("the purported s 806(2) Claim") (1) to adjust its DTR for the Accounting Period in respect of non-EEA dividends to claim a tax credit in respect of overseas dividends set by reference to the FNR on all dividend income and (2) to treat the "claims" for exemption in respect of EEA dividends in the alternative as being claims for DTR (for ULT and WHT).

(48) On 17 April 2015 HMRC gave notice of a compliance check under paragraph 5 Schedule 1A to the Taxes Management Act 1970 into the amended DTR claims made by the purported s 806(2) Claim.

(49) On 11 April 2019, Schroder Institutional Growth applied for a direction that HMRC issue a closure notice in respect of APE 2004.

(50) Schroder Institutional Growth's application was then listed to be managed as part of a group of Closure Notice Applications by order of 5 August 2019. As part of the management of that litigation HMRC undertook to issue closure notices to Schroder Institutional Growth by 31 March 2020.

(51) On 27 March 2020, HMRC issued a Closure Notice and amendment in respect of APE 2004 ("the Closure Notice").

(52) The Closure Notice amended the return to bring the EU/EEA dividend income of £11,102 into account for tax under Case DV. The total tax due for this period was determined by the Closure Notice to be £285,014.

(53) However, by a separate letter of the same date HMRC explained that in their view Schroder Institutional Growth is entitled to make s 806(2) claims in respect of the EU/EEA dividend income following the amendment made by the Closure Notice.

(54) Schroder Institutional Growth appealed the Closure Notice by letter dated 27 April 2020. As part of the appeal letter of 27 April 2020 ("the Appeal Letter of 27 April 2020") Schroder also "re-made" the s 806(2) Claim in the following terms:

> "While reserving our position upon this appeal, please take this renewed claim as a claim for DTR in the accounting periods identified above, in accordance with the computations that will be provided shortly showing the credit for underlying tax at the relevant foreign nominal rates of tax, together with any withholding tax. It is our view that by our earlier letter we had already made such a claim but we understand nothing to turn on that point of timing.
>
> Please confirm that this is a valid claim made within time pursuant to s806(2) ICTA for the accounting periods concerned. Alternatively, please identify such further corrections or further steps as you consider necessary.
>
> This claim will include renewed claims for DTR upon income not returned as exempt. This appeal will be maintained to the extent that the assessment is not amended to allow the DTR claimed. Alternatively, if DTR is permitted in respect of only some income then s806(2) will equally permit EUFT generated by that income to be claimed against non-resident dividend income in respect of which DTR is disallowed. Please confirm whether HMRC will accept computations on that alternative basis and we will provide them, which should produce a like result to this claim.
>
> …"

(55) Further to its Appeal Letter of 27 April 2020, Schroder Institutional Growth provided updated computations on 14 May 2020 ("the Letter of 14 May 2020").

(56) By letter dated 1 July 2020 ("the 1 July 2020 Letter") Schroder Institutional Growth claimed double tax relief on the alternative basis referred to in the Appeal Letter of 27 April and the letter of 14 May 2020. Referring back to the appeal of 27 April Schroder made an alternative claim for double tax relief in the following terms:

> "While reserving our position upon this appeal and subject to the taxpayer's position that the previous S806(2) Claims are valid and take precedence, the taxpayer alternatively claims DTR in accordance with the attached computations for the accounting period ending 30 June 2004. These computations limit DTR to income originally returned as exempt, and compute and apply eligible unrelieved foreign tax arising and apply management expenses accordingly. We note HMRC has rejected the S806(2) claims which is part of this appeal. Subject to this appeal, please confirm that these alternative claims can be agreed as validly made within the time limits in s806 of the Income and Corporation Taxes Act 1988 or identify such further corrections or further steps as you consider necessary."

Fidelity: Lead Appeal in the Appeals Group Litigation

(57) The Fidelity fund management group provides, among other business lines, investment management or advisory services to a variety of different investment vehicles including investment companies with variable capital ("ICVCs"), open ended investment companies ("OEICs"), unit trusts and investment trusts.

(58) One fund managed by Fidelity, the Fidelity UK Index Fund, has been appointed a Lead Appeal in respect of its appeal dated 27 July 2020 against Closure Notices and amendments issued by HMRC on 22 April 2020 in respect of accounting periods ending 28 February 2007 ("APE 2007"), 29 February 2008 ("APE 2008"), 28 February 2009 ("APE 2009") and 28 February 2010 ("APE 2010"). (together, the "Fidelity Accounting Periods").

(59) In the Fidelity Accounting Periods, Fidelity UK Index Fund received dividend income from non-resident investments in holdings below 10% and filed its corporation tax returns on the following basis:

(a) The tax return recorded the amounts of the dividends, the jurisdiction of the source of the dividend, the withholding tax, any reliefs utilised and the final liability. The dividend income was divided into two sections:

(i) The first section, comprising dividends from countries outside the Member States of the European Union or European Economic Area ("non EU/EEA"), recorded those dividends and returned them as income taxable (under Case DV) and claimed credit for withholding tax ("WHT") (pursuant to section 790 ICTA);

(ii) The second section comprised dividends from countries that were Member States of the European Union or European Economic Area plus Gibraltar ("EU/EEA"). While the same details were provided the tax computations indicated that exemption was claimed under s 208 ICTA and referred to certain judgments of the CJEU and pending litigation in the High Court.

(b) The basis on which tax was paid is not agreed.

(60) The returns were submitted and enquiries were opened into the returns:

APE 2007 – return submitted 15 February 2008
– enquiry opened 26 February 2008

APE 2008 – return submitted 11 February 2009
– enquiry opened on 27 February 2009

APE 2009 – return submitted 26 February 2010
– enquiry opened 26 March 2010

APE 2010 – return submitted 16 November 2010
– enquiry opened 26 November 2010

(61) By letter dated 31 March 2010 in relation to the Fidelity Accounting Periods, Fidelity UK Index Fund claimed credit for both withholding tax and tax on the underlying profits of that dividend income in the following terms:

> "As you are aware, the sub-funds of the above OEICs and the Investment Trusts (listed in the appendix) [which included the Appellant], where applicable have filed their tax returns, since 2005, on the basis that EU and EEA company dividends are not taxable. Please accept this letter as a protective claim that, should it be found that these dividends are subject to UK corporation tax, each sub-fund will claim the full amount of credit relief

> available to it in relation to WHT and, in addition, should it be available, underlying tax suffered on such dividends. The countries of source, amounts of dividend and WHT have been included in the corporation tax computation for each sub-fund and investment trust."

APE 2009 and APE 2010

(62) On 25 February 2013 Fidelity sought to amend the returns for the 2009 and 2010 accounting periods to "exempt third country dividends" ("the Amendments of 25 February 2013"). On 18 March 2013 HMRC replied as follows:

> "I acknowledge receipt of your amended figures for accounting periods ended 28 February 2009 and 28 February 2010. As these periods are already subject to compliance check, your amendments will be held until the assessments for the periods can be finalised."

(63) On 9 March 2015 Fidelity UK Index Fund made a claim (1) to adjust the "claims for double tax relief" made in respect of non-EU/EEA dividends for APE 2009 and 2010 to include a claim for ULT set at the FNR and, (2) to treat the claims for exemption of EEA dividends as (in the alternative) DTR claims for relief for ULT and WHT. The claim was expressed as being under section 79 TIOPA ("the purported S79 Claim"). It is however common ground that the applicable statutory provision was s 806(2) ICTA (the predecessor to s 79 TIOPA).

The Fidelity Accounting Periods

(64) On 7 December 2012 various entities managed by Fidelity which included Fidelity UK Index Fund issued a High Court claim seeking restitution for tax on foreign dividend income incurred and paid under Case DV, which was enrolled in the GLO.

(65) On 12 April 2019 Fidelity UK Index Fund applied for a direction that HMRC issue closure notices in relation to the enquiries into APEs 2009 and 2010.

The Closure Notices

APE 2007 and APE 2008

(66) For APE 2007 and APE 2008 the Closure Notices amended the returns to bring the EU/EEA income into account for tax under Case DV. Management expenses were then applied to that income gross of the withholding tax. This produced no tax to pay but reduced the management expenses carried forward by £508,742 in 2007 and a further £589,143 in 2008. In so doing the closure notices did not give credit for WHT and/or ULT upon EU/EEA income requested by the 31 March 2010 Letter and the purported S79 Claim.

APE 2009 and APE 2010

(67) For APE 2009 and APE 2010 the Closure Notices bring the EU/EEA income into account and acknowledge that valid double tax relief claims were made for the full relief available by the claim of 31 March 2010 in relation to that EU/EEA income which is allowed. DTR of £271,828.24 was allowed in relation to APE 2009 and DTR of £105,172.07 was allowed in relation to APE 2010. Due to the reduction of management expenses brought forward from earlier periods the closure notices produce more tax to pay for those accounting periods.

The appeals

(68) Fidelity UK Index Fund appealed the Closure Notices by letter dated 19 May 2020. As part of the appeal letter of 19 May 2020 ("the Appeal Letter of 19 May 2020") Fidelity UK Index Fund also did the following:

(a) It 're-made' the purported S79 Claims for APE 2009 and APE 2010 and indicated that it would shortly be making further S79 Claims for the APE 2006, APE 2007 and APE 2008 which claimed DTR for withholding tax and underlying tax at the FNR on worldwide income;

(b) For the Accounting Periods and APE 2006 it made a further DTR claim in the alternative to and subject to all other claims in priority which claimed additional DTR for withholding tax and underlying tax at the FNR only for the EU/EEA income and claimed the EUFT generated on that income against the non- EU/EEA income which did not attract additional claims for DTR invoking s806(2) ICTA.

(69) By letter dated 16 June 2020 ("the Letter of 16 June 2020") Fidelity UK Index Fund made purported DTR claims for withholding tax and underlying tax at the FNR on worldwide income for the 2006-8 accounting periods pursuant to s806(2) ICTA as anticipated in the appeal letter of 19 May 2020.

Henderson: Lead Appeal in the Appeals Group Litigation

(70) Janus Henderson is an investment management house providing fund management services and investment advice to a variety of different types of investment funds.

(71) The Janus Henderson Funds are administered by BNP Paribas Securities Services ("BNPP").

(72) One of the funds managed by Janus Henderson, Henderson, has been appointed a Lead Appeal in the Appeals Group Litigation in respect of its appeal dated 27 July 2020 against Closure Notices and amendments issued by HMRC on 15 April 2020 in respect of accounting periods ending 31 October 2006 ("APE 2006") and 31 October 2007 ("APE 2007"), (together, the "Henderson Accounting Periods").

(73) The history of Henderson is as follows: it was originally called Henderson Emerging Markets Fund. It changed name to Henderson Institutional Emerging Markets Fund on 24 September 2012. Subsequently, on 11 February 2016 it merged into Henderson Emerging Markets Opportunities Fund, which involved transferring all of its assets and liabilities into that entity in exchange for the issue of new shares to the investors in Emerging Markets Fund. Henderson remains in existence however for the purposes of these claims.

(74) In the Henderson Accounting Periods, Henderson received dividend income from non-resident investments in holdings below 10% ("portfolio dividends") and filed its corporation tax returns on the following basis.

APE 2006

(75) In respect of APE 2006 Henderson filed its company tax return, in time, on the basis that the income from the portfolio dividends was taxable under Case DV, with a credit available for withholding tax only. Tax was paid on that basis.

(76) On 8 October 2008, and therefore within the time limit set out in Paragraph 15(4), of Schedule 18 to the Finance Act 1998 Henderson amended its tax return to treat dividend income from portfolio dividends received from non-resident companies within the EU/EEA as exempt, whilst continuing to treat portfolio dividends received from companies outside the EU/EEA ("non EU/EEA") as taxable Case DV income and claimed credit for withholding taxes (the "APE 2006 EU Exemption Amendment").

(77) On 14 November 2008, HMRC opened an enquiry into the amended return for APE 2006.

(78) By letter dated 28 September 2009, Henderson made a claim for relief pursuant to paragraph 51, Schedule 18 to the Finance Act 1998 in respect of APE 2006 ("Paragraph 51 Claim"). The Paragraph 51 Claim was expressly made on the basis that Henderson had erroneously included as taxable amounts overseas dividends which should instead have been treated as non taxable (namely the portfolio dividends received from outside the EU/EEA). An amended tax computation and an amended CT600 for APE 2006 were enclosed with the letter.[4]

APE 2007

(79) In respect of APE 2007, Henderson filed its company tax return, in time, recorded the amounts of the dividends, the jurisdiction of the source of the dividend, the withholding tax, any reliefs utilised and the final liability. The dividend income was returned as follows:

> (a) dividends from non EU/EEA countries were returned as income taxable under Case DV, credit was claimed for withholding taxes;
>
> (b) dividends from countries within the EU/EEA were treated as exempt (the "APE 2007 EU Exemption Return").

(80) Tax was paid on the basis that all non-resident dividend income, including that for which exemption was claimed, was subject to tax under Case DV with credit claimed only for withholding taxes.

(81) On 25 July 2008, HMRC opened an enquiry into APE 2007.

(82) By letter dated 28 September 2009, Henderson amended its tax return for APE 2007 (and therefore within the time limit for so doing in paragraph 15(4) of Schedule 18 to the Finance Act 1998 but after an enquiry had been opened into APE 2007), to treat as exempt the dividend income from non EU/EEA portfolio dividends which had previously been treated as taxable (the "APE 2007 Full Exemption Amendment"). An amended tax computation and an amended CT600 for APE 2007 were enclosed with the letter.

(83) By letter dated 9 October 2009, HMRC replied to the Henderson Emerging Markets' letter dated 28 September 2009 as follows:

> "I acknowledge receipt of the amendments for the periods 1 November 2005 to 31 October 2006 and 1 November 2006 to 31 October 2007 and these will be kept until the enquiries already open are concluded."

(84) On 31 March 2010 in respect of (inter alia) APE 2006 and on 23 March 2011 in respect of APE 2007 ("the March 2010/2011 Letters"), Henderson wrote to HMRC in the following identical terms:

> "To protect Henderson Emerging Markets Fund's position, therefore, we hereby claim tax relief in respect of the dividend income and overseas tax set out in the Schedule to this letter. These claims are made in the alternative and without prejudice to our contention that the dividend income is not subject to UK tax. The Schedule sets out, for each relevant period, the amount of overseas dividend income (from each source), the amount of withholding tax suffered and the amount of relief which the company wishes to claim if the dividend income is determined to be taxable. Where amounts are estimated this has been noted in the Schedule."

[4] HMRC rejected Henderson's purported Paragraph 51 Claim on 25 September 2020 and that rejection was appealed on 16 October 2020. The appeals form part of the Post Prudential Appeals Group Litigation.

(85) The claims were quantified by reference to relief for withholding tax and were made within the period prescribed by s806(1) ICTA. HMRC acknowledged and accepted these claims for withholding tax by letters dated 27 April 2010 and 13 April 2011.

(86) On 12 October 2016, BNP Paribas on behalf of Henderson wrote to HMRC in the following terms:

> "Please treat this letter as an amendment to the claims for exemption of foreign dividends from tax in the UK, dated 28/09/2009, to treat those claims in the alternative as being claims for double taxation relief. Such claims for the above accounting periods under s18(2) of TIOPA 2010 to include relief from ULT on foreign dividend income received in the period, as well as for WHT suffered on the dividends received."

(87) On 21 October 2016 HMRC wrote to Henderson on the following terms:

> "I am writing to you in accordance with the provisions of paragraph 5 of Schedule 1A of the Taxes Management Act 1970 to provide written notice of our intention to enquire into the purported claims [sic] S18(2) TIOPA 2010 and S79 TIOPA 2010 as set out in your letter of 12 October 2016. The notice is given as a protective measure and it is neither an admission nor an agreement that any valid claims exist. Indeed it is our current view that the normal statutory time limits for claims for these periods have now expired and they are not capable of being extended.
>
> There may however be very limited circumstances in which claims time limits may be extended and if those circumstances are, in future, found to be applicable to these claims then this notice preserves our right to enquire into those claims that are held to be valid."

(88) On 12 April 2019 Henderson applied for a direction that HMRC issue closure notices in relation to its open enquiries. Henderson's application was then listed to be managed as part of a group of Closure Notice Applications by order of 5 August 2019.

(89) On 15 April 2020 HMRC issued Closure Notices in respect of their enquiries into the tax returns for the Henderson Accounting Periods (the "Henderson Closure Notices").

(90) In respect of APE 2006 the closure notice brought into charge portfolio dividends from Ireland, Poland, Hungary, the Czech Republic and Luxembourg which had been treated as exempt. This led to an increase in tax liability for APE 2006.

(91) In a letter accompanying the closure notice in respect of APE 2006, HMRC explained that Henderson is now entitled to make a claim to DTR for APE 2006 under s 806(2) ICTA 1988 as set out in HMRC's January 2020 Brief.

(92) In respect of APE 2007 the closure notice brought into charge portfolio dividends from Luxembourg, Hungary, Ireland and the Czech Republic which had been treated as exempt. The closure notice also allows Henderson's DTR claim for WHT in the sum of £4,149.66.

(93) In a separate letter which accompanied the closure notice in respect of APE 2007, HMRC expressed their view that Henderson is now entitled to make a claim to DTR for APE 2007 under s.806(2) ICTA 1988 in respect of EU/EEA dividends as set out in HMRC's January 2020 Brief.

(94) Therefore the Closure Notices amended the returns to bring the EU/EEA income into account for tax under Case DV, for APE 2006 without any DTR at all and for APE 2007 allowing DTR only for WHT.

(95) Henderson appealed the Closure Notices by letter dated 22 May 2020. As part of the appeal letter of 22 May 2020 Henderson also indicated that it would shortly be making further revised claims for DTR.

(96) On 6 November 2020, Henderson Emerging Markets re-made DTR claims for APE 2006 and APE 2007 in response to HMRC's letters of 9 April and 15 April 2020 referred to above. These re-made claims were made in the following terms:

> "It is the Taxpayer's view that by the previous claims for double tax relief already made the Taxpayer had already made such claims and the re-making of the claims is unnecessary. These claims are re-made subject to that position.
>
> …
>
> The Taxpayer through its agent, BNP Paribas, had sought to resolve factual errors appearing on the closure notices with HMRC before making those revised claims. Unfortunately HMRC has been unable to respond to those queries. Accordingly the Taxpayer now hereby makes revised double tax relief claims.
>
> In addition to any claims for double tax relief previously made (which are not withdrawn) the Taxpayer hereby makes claims for double tax relief (to include claims for eligible unrelieved foreign tax: ss806A-J ICTA) within the time periods for making such claims as extended by s806(2) ICTA in accordance with the computations enclosed with this letter and for the Accounting Periods. These claims are made without prejudice to any current or future appeals and the taxpayers' positions upon those appeals are fully reserved."

91. As explained in paragraph 11, above, in relation to jurisdiction, although not mentioned on the Agreed Statement of Facts, the stay in the closure notice application of the Baillie Gifford American Fund was lifted on 7 May 2021 to enable that application to be considered as a test case for four other Baillie Gifford funds to determine, as Issue 14, whether the return for its APE 2005 was amended withing the period for doing so in accordance with paragraph 15 of Schedule 18 to the Finance Act 1998.

EVIDENCE AND FURTHER FINDINGS OF FACT

92. In addition to the Agreed Statement of Facts I was provided with a main and supplementary bundles of documents (comprising approximately 5,000 pages in total).

93. With the exception of Issue 14, the Baillie Gifford Issue, there was little if, any dispute, on the facts. In relation to the other issues the following witnesses were called:

(1) Elizabeth Taylor, Head of Product and Operational Tax at FIL Investment Management Limited, who gave evidence on behalf of Fidelity UK Index Fund (Issues 1, 4, 5, 6, 7, 8, 10, 11 and 13);

(2) Lucy Smith, Head of Product Taxes at Schroder Investment Management Limited, part of the Schroders groups ("Schroders"), in relation to the Schroder Asian and Schroder European closure notice applications and Schroder Institutional Growth appeal (Issues 1, 2, 3, 5, 6, 7 and 8);

(3) Simon McIntyre, Global Head of Tax for Standard Life Aberdeen plc in respect of the closure notice application of SLMM (Issues 2, 4, 5 and 6);

(4) Simon Cooke, a Tax Manager in the NFU Mutual group who gave evidence in relation to the closure notice application of Avon whose tax affairs come under his remit (Issues 4, 6 and 12);

(5) Mikael Boman, Head of Product Tax for Janus Henderson Investors whose evidence concerned the Henderson appeal (Issues 1, 2, 3, 4, 5, 6, 7 and 9); and

(6) Michael Anderson, a partner in the Appellants' solicitors (Joseph Hage Aaronson LLP) whose evidence explained the background to the proceedings (essentially replicating in part the evidence he gave in *Class 8*) and the approach adopted in the settlement between HMRC and Prudential.

I found all of these witnesses to be credible, honest and straightforward and accept their evidence, which was not seriously challenged, in full and make the following further findings of fact on the basis of their evidence.

Elizabeth Taylor – Fidelity UK Index Fund

94. Ms Taylor explained that for regulatory and cost considerations, as described by Ms Smith in regard to the Schroder Asian and Schroder European closure notice applications and Schroder Institutional Growth appeal (see paragraph 101, below), the Fidelity UK Index Fund, like the other Fidelity Funds, did not join the litigation under the Group Litigation Orders ("GLOs"). This was because PricewaterhouseCoopers ("PwC"), then retained by the Fidelity UK Index Fund, had advised the Fund that it could preserve its ability to rely on the outcome of the "relevant parts" of that litigation by filing its tax returns on the basis that non-resident dividend income was exempt in the same manner as resident dividend income.

95. PwC's advice was accepted by Fidelity UK Index Fund which filed protective claims in EU jurisdictions, other than the UK, seeking recovery of WHT on dividends paid to the UK and from 2005 (ie for accounting periods ending in 2004) filed UK tax computations on the basis that non-resident EU and EEA income was exempt. Where a 2004 return had been filed on the basis that the EU income was taxable under Case DV it was amended where it had been within time to do so. However, Fidelity UK Index Fund continued to treat non-EU/EEA income as taxable under Case DV.

96. Although aware of the *Business Brief*, issued by HMRC on 3 June 2010, in which it was stated that HMRC would not seek to disallow a claim under Paragraph 51 in relation to tax paid in breach of EU law on the basis that the tax liability was calculated in accordance with the prevailing practice, Ms Taylor explained that she did not think it was relevant to the Fidelity UK Index Fund which had filed its returns on an EU exemption basis. She considered that this protected the Fund's position without the need to issue a High Court claim and join a GLO at that stage.

97. Ms Taylor confirmed, having read the judgment of the CJEU, that by December 2006 she was aware of the significance of *FII CJEU 1*. She explained that Fidelity UK Index Fund had been in ongoing discussions with its tax advisers, PwC, in relation to protective claims and its overall strategy for the UK and other countries in which claims were made for recovery of WHT. Advice had also been sought from Ernst & Young ("EY"), the Fund's tax advisers responsible for filing its tax returns.

98. As stated in the Statement of Agreed Facts (see paragraph 90(62), above) further amendments were made to the returns for APE 2009 and 2010 in 2013 to reflect what Ms Taylor described in evidence as, "the growing understanding that the conclusion of the *FII* strand of litigation could be applied not only to portfolio dividends from EU/EEA countries but also to third countries."

99. She also explained in evidence that while making protective claims had been under discussion, there had been:

> "… differences of opinion between different advisers on the course of action that could be taken. Some advisory firms took the view that the EU law

> principles applied to EU/EEA dividends only. Some took the view that it applied to third countries as well. KPMG was quite strong on that view, and at the time the litigation began I took the view that third country – including third country dividends was too speculative, given the development of the case law at the time. However, by 2013 where there had been developments of the applicable case law not just in the UK but also in other countries with the same point of principle, ie differential treatment between domestic and non-domestic investment funds was being litigated, it had become that the third country arguments had more merit than they had appeared to have eight years earlier. Therefore we were entirely comfortable in adjusting our approach to reflect that."

Lucy Smith – Schroder Asian, Schroder European and Schroder Institutional Growth

100. Ms Smith, who joined Schroders in 2007, explained that authorised investment funds are "open-ended" by which she meant that they have unlimited share capital that can be issued in response to demand. Unlike the share capital of a plc, where price moves according to market sentiment towards the plc, the units are priced in direct relation to their net asset value. This comprises investments held plus income earned less expenses and tax suffered. The price of a single unit is equal to the net asset value divided by the number of units in issue. Unit holders can also redeem their units back to the manager for the bid price at any time. As such, the investor base of any authorised fund is likely to be changing on a daily basis and there may be a significant lack of commonality of investors where there are time delays between incurring a cost and recovering that cost.

101. Ms Smith was aware from discussions with colleagues that by 2007 the potential applicability of the GLOs to fund managers had already been considered by Schroders which had been advised by PwC that if it issued a claim in the High Court Schroders would be required to join one of the GLOs which would create an open ended obligation to pay a share of the costs of that litigation. She explained that management companies, such as Schroders, have to consider carefully whether it would be in the interests of investors to enter into litigation for a prolonged period of time with its inevitable uncertainties and costs.

102. However, like Fidelity UK Index Fund, Schroder were advised by PwC that it would be able to rely on the outcome of the GLO litigation by amending the tax returns for past years which were still under enquiry ("open returns") and filing current returns recording the non-resident income initially from the EU and later the EEA as exempt.

103. Ms Smith gave a further reason why the Schroder Funds had chosen to amend the open returns which was that they had commenced filing claims to recover foreign dividend WHT from a number of European tax authorities, following the judgment of the EFTA court in 2004 in E-1/04 *Fokus Bank*. She explained that where WHT had been suffered, it was available for double tax relief against corporation tax, but in the event of recovery from the foreign authorities such that DTR would not have been available and therefore the funds could anticipate their UK corporation tax liability increasing as a direct result.

Simon McIntyre – SLMM

104. Mr McIntyre stated that by the time he had joined Standard Life in 2007 the issue of the potential unlawfulness of the UK provisions concerning the taxation of foreign dividend income was well-known "in the investment fund world" and various statutory claims had already been made by the Standard Life Funds on the recommendation of their tax advisers. The advice had been that such claims would avoid the significant and unquantifiable cost associated with joining a GLO but would enable them to rely on the outcome of that litigation.

105. Therefore, from around 2006, a number of the Standard Life Funds had filed tax returns on the basis that dividend income from EU/EEA investments was exempt but that dividends

from third countries were taxable. This changed from about 2007, when a number of the Standard Life Funds started to file their tax returns on the basis that dividend income from third countries, as well as that from EU/EEA investments, was exempt. However, when filing the returns, both on the basis that only EU/EEA income was exempt and subsequently on the basis that all such income was exempt, the Funds also paid the tax on the basis of the UK provisions as they stood ("UK basis") to avoid the possibility of interest and penalties if the claims were ultimately unsuccessful.

106. Although he had not been directly involved, Mr McIntyre also confirmed that the Standard Life Funds had, from around 2006 like the Schroder Funds, made *Fokus Bank* claims to recover WHT in other jurisdictions.

Simon Cooke – Avon

107. Mr Cooke, a Chartered Certified Accountant, has been employed by NFU Mutual for over 35 years and has over that time held roles as a Taxation Manager, Taxation Accountant, Financial Accountant and Investment Accountant and has specialised in general and life insurance taxation, indirect taxes, tax risk management and tax compliance matters including taxation of international investments. He described the various claims that Avon had made in 2018 (see Agreed Statement of Facts at paragraph 90(37), above) on the advice of Joseph Hage Aaronson and said that he was "familiar" with how Avon as a mutual company was taxed from 1991 but not aware of any guidance given by HMRC.

Mikael Boman – Henderson

108. Mr Boman, who has been employed by Henderson since 2007, explained that the Henderson Funds are managed by BNP Paribas Securities Services which also made and handled Henderson's claims. Mr Boman confirmed that the various claims made by Henderson, as described in the Agreed Statement of Facts (see paragraphs 90(75) and following, above) were made on the basis of professional advice rather than the result of anything from HMRC.

Michael Anderson – Prudential Settlement

109. Although HMRC had settled directly with Prudential, Mr Anderson was, contrary to Mr Ewart's submission, able to give evidence in relation to the settlement as his firm were involved in the computations of Prudential's claim. This is clear from the correspondence between HMRC and Joseph Hage Aaronson as can be illustrated by a letter, dated 1 September 2016, from HMRC to Joseph Hage Aaronson in response to the firm's letters of 10 June 2016 and 7 July 2016, which states, in relation to the "open years" (a term used in the settlement correspondence for the years 1994 – 2009), which were settled following the 19 April 2016 order of the Court of Appeal:

> "**1994-2007**
>
> We can now confirm that, subject to the outcome of HMRC's appeal to the Supreme Court, we agree the amounts of unlawful schedule D case V tax for the years from 1999 to 2007 (based on the principles established in the case thus far and the amounts of overseas dividends and foreign nominal rates ("FNR") provided in the case). The unlawful schedule D case V tax has, of course, already been agreed for the earlier years.
>
> We suggest HMRC work collaboratively with Prudential's tax team to apply those principles and figures so as to agree the revised computations of the overall tax for each of the relevant years, that take account of the additional case V income and tax credits, along with any other adjustments that have been agreed between HMRC and Prudential in respect of the relevant years.
>
> …

> We look forward to agreeing the years 1994-2007 on a collaborative basis."

110. In relation to the Prudential settlement Mr Anderson explained that Prudential, which was and is the test case for the portfolio dividend claims in the CFC & Dividend GLO, had filed returns on a UK Basis and kept accounting periods open pending its litigation. It also transpired that in 2005, 2007, 2008 and 2012 it had filed what were subsequently described as "omnibus claims" for all accounting periods within the applicable time limits covering all accounting periods from 1999 to 2009 and included claims under Paragraph 51. Mr Anderson explained that the "omnibus claims" were documents "in similar terms completed by claimants and forwarded to their tax inspectors which asserted that whatever HMRC might in future say was the correct statutory claim to have made, these documents were it, and if such claims failed to meet the procedural requirements of HMRC's nominated statutory process, then the principle of effectiveness required that obstacle to be set aside. The claims were expressed to be protective and to take effect if the claimants failed on their primary case that the High Court claims were the correct claims."

111. The 2012 omnibus claim, unlike those of 2005, 2007 and 2008, was made subsequent to the post March 2010 version of Paragraph 51. This introduced a restriction which excluded a claim where "the claimant is or will be able to seek relief by taking other steps under the Corporation Taxes Act" (see paragraph 51A(3) of Schedule 18 to the Finance Act 1998). Mr Anderson explained that this restriction was interpreted by HMRC as meaning that a Paragraph 51 claim was excluded where the accounting period was open (ie under enquiry).

112. As HMRC's letter, dated 7 March 2012 (which should be 2013 as it is in response to the letter of 24 December 2012 from Prudential PLC), states in relation to paragraph 51A:

> "… As you point out "the tax computations for PAC [The Prudential Assurance Company Limited] are open for 2008 and subsequent years.." so an amendment can be made. Because this is another step that can be taken under the Corporation Tax Acts, it would seem that any paragraph 51A claim made is invalid.
>
> The same situation seems to be present for PCHL [Prudential Corporation Holdings Limited] with respect to 2008 and 2009. Notices of enquiry were issued on 19 November 2010 and 23 November 2011 respectively. I do not believe that notices of closure have been issued."

113. Prudential replied by letter, dated 11 June 2013, which explained that:

> "We agree with your analysis of paragraph 51A(3) that since PCHL is open with respect to 2008 and 2009, the tax returns can be amended. The paragraph 51 claim was made on a protective basis in the event that the tax returns were closed following resolution of the open issues. We are content to withdraw the claims but would seek your confirmation that HMRC will not issue closure notices for 2008 and 2009 until we are able to amend the tax returns pending determination of the tax treatment of foreign dividend income by the courts. We would also seek to adjust our group relief claims where necessary as a result."

By letter dated 17 July 2013 HMRC provided the confirmation sought by Prudential which withdrew the Paragraph 51 claim on 21 August 2013. As the only difference between 2009 claim which HMRC sought to reject and the earlier years, when the matter was settled, was the existence of a Paragraph 51 claim Mr Anderson considered that this was the basis on which the earlier claims had been settled.

Other Witnesses

114. I also heard from Colin Fraser, Director of Baillie Gifford's European Funds Operations Department and a Director of Baillie Gifford & Co Limited, and HMRC Officers Keith Forbes and Stuart Scott-Wilson. Their evidence is considered below in relation to the Issue 14, the Baillie Gifford Issue.

THE ISSUES

115. I now turn to the issues.

Issue 1 – Non-resident dividend income returned as exempt

116. Under the Appellants' formulation this issue concerns whether tax paid on dividend income in excess of that due upon the proper application of EU law can be recovered in circumstances where the dividend income was returned as exempt? HMRC ask whether there is a valid claim for full DTR if non-UK dividends have been treated as exempt in a return?

117. However, irrespective of the formulation of the issue, the parties agree that it is not necessary to determine Issue 1 which is academic in the sense that those that treated the non-UK dividends as exempt in a return could bring a claim for DTR under s 806(2) ICTA subsequent to any amendment by HMRC of their self-assessment to impose a tax charge under a closure notice.

Issue 2: Paragraph 51

118. Although the parties do not agree on how the issue should be expressed it is clear that it concerns the interpretation of Paragraph 51, particularly whether there is a claim to recover tax paid under an assessment which was excessive because of some mistake in a return. As such, it is necessary to consider what constitutes a mistake in a return, whether a claim for DTR is required and whether the Appellants are able to rely on s 114 TMA to validate a claim if unsuccessful under Paragraph 51.

119. Paragraph 51 provides:

> (1) A company which believes it has paid tax under an assessment which was excessive by reason of some mistake in a return may make a claim for relief—
>
> (a) by notice in writing,
>
> (b) given to the Board,
>
> (c) not more than six years after the end of the accounting period to which the return relates.
>
> (2) On receiving the claim the Board shall enquire into the matter and give by way of repayment such relief in respect of the mistake as is reasonable and just.
>
> (3) No relief shall be given under this paragraph—
>
> (a) in respect of a mistake as to the basis on which the liability of the claimant ought to have been computed when the return was in fact made on the basis or in accordance with the practice generally prevailing at the time when it was made, or
>
> (b) in respect of a mistake in a claim or election which is included in the return.
>
> (4) In determining a claim under this paragraph the Board shall have regard to all the relevant circumstances of the case.
>
> They shall, in particular, consider whether the granting of relief would result in amounts being excluded from charge to tax.

> For that purpose they may take into consideration the liability of the claimant company, and assessments made on it, for accounting periods other than that to which the claim relates.
>
> (5) On an appeal against the Board's decision on the claim, the tribunal shall determine the claim in accordance with the same principles as apply to the determination by the Board of claims under this paragraph.
>
> (6) Neither the company nor the Board may appeal … against the determination of the tribunal, except on a point of law arising in connection with the computation of—
>
> > (a) the profits of the company for the purposes of corporation tax,
> >
> > (b) any amount assessable under section 419(1) of the Taxes Act 1988 (tax on loan or advance made by close company to a participator), or
> >
> > (c) any amount chargeable under section 747(4)(a) of that Act (tax on profits of controlled foreign company).

120. Mr Bremner contends that the requirements of Paragraph 51 are clearly met. The 'mistake', he says, was, as in the Prudential litigation, the belief that the Case DV provisions were lawful and that the tax was due and payable whereas the provisions were, in fact, contrary to EU law (see *Prudential (Ch)* at [163], paragraph 47, above and *FII HC 1* at [267] and [275], paragraph 48, above). Accordingly, he says, the Paragraph 51 claims should be treated as valid.

121. Mr Ewart argues that such an approach is misconceived as it interprets 'mistake' in the same manner as in the unjust enrichment cases rather than in accordance with Paragraph 51. The question, he says, is not whether a payment was made by reason of a mistake but whether a payment was made under an assessment which was excessive by reason of a mistake in a return. In the absence of any claim for DTR in the return on which the assessment would be based there would, he says, be no mistake. As such, there is no entitlement to relief first, because there is no mistake in the return, and secondly, any relief is precluded by Paragraph 51(3)(b). This approach, he contends, is consistent with EU law as the conforming interpretation is to s 790 ICTA, which requires a claim for DTR, and that conforming interpretation is to be applied to Paragraph 51.

122. Mr Bremner found it "quite remarkable" that HMRC were advancing such an argument having previously contended through the prism of it predecessor (s 33 TMA) in *FII Group Test Claimants v Inland Revenue Commissioners* [2010] EWCA Civ 103 ("*FII CA 1*") that Paragraph 51 was an exclusive remedy that excluded common law mistake claims and not only having issued the 2010 *Business Brief* (see paragraph 96, above) but also allowed Prudential's claims under Paragraph 51.

123. However, it is not necessary for me to consider whether, as Mr Bremner contends, in the light of the position previously taken (eg in *FII CA 1*) HMRC should not be entitled to advance such an argument, as I agree with Mr Bremner that there is no difference between a mistake in a common law unjust enrichment claim and a claim under Paragraph 51. The mistake in the return was that tax was paid on the basis that the statutory provisions were lawful when they were not. This led to an overstatement of tax in the return. As such, a payment was made under an assessment which was excessive by reason of a mistake in a return. It therefore follows that the claims under Paragraph 51 are valid and that a specific claim for DTR is not necessary.

124. In addition, given the observation of Henderson J at [92] in *Prudential (Ch)* that a crucial part of the analysis of *FII CJEU 2*, "is the theoretical assumption that the exemption from tax of a dividend is to be regarded as equivalent to the grant of a tax credit at the nominal rate"

(see paragraph 41, above), I would also agree with Mr Bremner that for EU law purposes credit at the FNR is equivalent to exemption.

125. Had I not come to such a conclusion, I would have found that the claim could be validated in accordance with s 114 TMA.

126. Sections 113 and 114 TMA provide:

> **113 Form of returns and other documents**
>
> (1) Any returns under the Taxes Acts shall be in such form as the Board prescribe, and in prescribing income tax forms under this subsection the Board shall have regard to the desirability of securing, so far as may be possible, that no person shall be required to make more than one return annually of the sources of his income and the amounts derived therefrom.
>
> **114 Want of form or errors not to invalidate assessments, etc**
>
> (1) An assessment or determination, warrant or other proceeding which purports to be made in pursuance of any provision of the Taxes Acts shall not be quashed, or deemed to be void or voidable for want of form, or be affected by reason of a mistake, defect or omission therein, if the same is in substance and effect in conformity with or according to the intent and meaning of the Taxes Acts, and if the person charged or intended to be charged or affected thereby is designated therein according to common intent and understanding.

127. In *McGuiness v HMRC* [2013] UKFTT 88 (TC), the Tribunal, having observed, at [53] that it was "reasonable to infer" that the draftsman was using the expression "other proceedings" as a shorthand for the list of documents set out in s 113 TMA, held, at [54], that:

> "… an SA tax return would be an "other proceeding" as it is a "document required to be used in assessing…tax"

Such an unequivocal finding which was, at least, tacitly approved by the Court of Appeal in *R (Archer) v HMRC* [2018] 1 WLR 5210 cannot, in my judgment, support Mr Ewart's argument that s 114 TMA can only apply to HMRC or "official" documents rather than those of a taxpayer.

Issue 3 – Non-resident dividend income returned as taxable

128. This issue concerns whether, where DTR for WHT is claimed in a return and an enquiry opened into the return, HMRC should have allowed DTR for ULT at the FNR when closing the enquiry.

129. Section 788 ICTA which brings into effect double tax conventions to which the UK is a party provides:

> **788 Relief by agreement with other territories**
>
> (1) If Her Majesty by Order in Council declares that arrangements specified in the Order have been [made in relation to any territory outside the United Kingdom with a view to affording relief from double taxation in relation to—
>
> > (a) income tax,
> >
> > (b) corporation tax in respect of income or chargeable gains, and
> >
> > (c) any taxes of a similar character to those taxes imposed by the laws of that territory,
>
> and that it is expedient that those arrangements should have effect, then those arrangements shall have effect in accordance with subsection (3) below.
>
> (2) …

(3) Subject to the provisions of this Part, the arrangements shall, notwithstanding anything in any enactment, have effect in relation to income tax and corporation tax in so far as they provide—

(a) for relief from income tax, or from corporation tax in respect of income or chargeable gains; or

(b) for charging the income arising from sources, or chargeable gains accruing on the disposal of assets, in the United Kingdom to persons not resident in the United Kingdom; or

(c) for determining the income or chargeable gains to be attributed—

(i) to persons not resident in the United Kingdom and their agencies, branches or establishments in the United Kingdom; or

(ii) to persons resident in the United Kingdom who have special relationships with persons not so resident; or

(d) for conferring on persons not resident in the United Kingdom the right to a tax credit under section 397(1) of ITTOIA 2005 in respect of qualifying distributions made to them by companies which are so resident.

…

130. In the absence of any double tax convention s 790 ICTA, for which the conforming interpretation is required, applies. This provides:

"**790 Unilateral relief**

(1) To the extent appearing from the following provisions of this section, relief from income tax and corporation tax in respect of income and chargeable gains shall be given in respect of tax payable under the law of any territory outside the United Kingdom by allowing that tax as a credit against income tax or corporation tax, notwithstanding that there are not for the time being in force any arrangements under section 788 providing for such relief.

(2) Relief under subsection (1) above is referred to in this Part as "unilateral relief".

(3) Unilateral relief shall be such relief as would fall to be given under Chapter II of this Part if arrangements in relation to the territory in question containing the provisions specified in subsections (4) to (10C) below were in force by virtue of section 788, but subject to any particular provision made with respect to unilateral relief in that Chapter; and any expression in that Chapter which imports a reference to relief under arrangements for the time being having effect by virtue of that section shall be deemed to import also a reference to unilateral relief.

(4) Credit for tax paid under the law of the territory outside the United Kingdom and computed by reference to income arising or any chargeable gain accruing in that territory shall be allowed against any United Kingdom income tax or corporation tax computed by reference to that income or gain (profits from, or remuneration for, personal or professional services performed in that territory being deemed for this purpose to be income arising in that territory).

(5) Subsection (4) above shall have effect subject to the following modifications, that is to say—

(a) where the territory is the Isle of Man or any of the Channel Islands, the limitation to income or gains arising in the territory shall not apply;

(b) where arrangements in relation to the territory are for the time being in force by virtue of section 788, credit for tax paid under the law of the territory shall not be allowed by virtue of subsection (4) above in the case of any income or gains if any credit for that tax is allowable under those arrangements in respect of that income or those gains; and

(c) credit shall not be allowed by virtue of subsection (4) above for overseas tax on a dividend paid by a company resident in the territory unless—

(i) the overseas tax is directly charged on the dividend, whether by charge to tax, deduction of tax at source or otherwise, and the whole of it represents tax which neither the company nor the recipient would have borne if the dividend had not been paid; or

(ii) the dividend is paid to a company within subsection (6) below; or

(iii) the dividend is paid to a company to which section 802(1) applies and is a dividend of the kind described in that subsection.

6) Where a dividend paid by a company resident in the territory is paid to a company falling within subsection (6A) below which either directly or indirectly controls, or is a subsidiary of a company which directly or indirectly controls—

(a) not less than 10 per cent of the voting power in the company paying the dividend; or

(b) less than 10 per cent of the voting power in the company paying the dividend if—

(i) it has been reduced below that percentage on or after 1st April 1972; or

(ii) it has been acquired on or after that date in exchange for voting power in another company in respect of which relief under this subsection by virtue of paragraph (a) above was due prior to the exchange; and the company receiving the dividend shows that the conditions specified in subsection (7) below are satisfied;

any tax in respect of its profits paid under the law of the territory by the company paying the dividend shall be taken into account in considering whether any, and if so what, credit is to be allowed in respect of the dividend. In this subsection references to one company being a subsidiary of another are to be construed in accordance with section 792(2).

…

(11) Where—

(a) unilateral relief may be given in respect of any income or chargeable gain, and

(b) it appears that the assessment to income tax or corporation tax made in respect of the income or chargeable gain is not made in respect of the full amount thereof, or is incorrect having regard to the credit, if any, which falls to be given by way of unilateral relief,

any such assessments may be made as are necessary to ensure that the total amount of the income or chargeable gain is assessed, and the proper credit, if any, is given in respect thereof, and, where the income is, or the chargeable

> gain is, entrusted to any person in the United Kingdom for payment, any such assessment may be made on the recipient of the income or gain.
>
> (12) In this section and in Chapter II of this Part in its application to unilateral relief, references to tax payable or paid under the law of a territory outside the United Kingdom include only references—
>
> (a) to taxes which are charged on income and which correspond to United Kingdom income tax, and
>
> (b) to taxes which are charged on income or chargeable gains and which correspond to United Kingdom corporation tax;
>
> but for this purpose tax under the law of any such territory shall not be treated as not corresponding to income tax or corporation tax by reason only that it is payable under the law of a province, state or other part of a country, or is levied by or on behalf of a municipality or other local body.

131. Mr Bremner contends that the only change necessary to s 790 ICTA, as part of the conforming interpretation, is to create the relevant tax credit, by reference to the FNR. In support he cites the decision of the Court of Appeal in *Prudential Assurance Co Limited v HMRC* [2016] STC 1798 ("*Prudential (CA)*"), where in relation to the ACT provision (s 231 ICTA), in which Lewison LJ, giving the judgment of the Court, said, at [105]:

> "… the relevant conforming interpretation of the ACT provisions is achieved by modifying the interpretation of s 231 by application of the *Marleasing* interpretive obligation so as to create a tax credit of the relevant amount in respect of foreign dividends assessed by reference to the relevant foreign nominal or effective rate of tax (whichever is the higher), capped at the UK nominal rate of tax. No other change to the interpretation of the ACT provisions in accordance with their ordinary meaning was suggested by the court and none is necessary to give effect to the requirements of EU law. It may be observed that although HMRC succeeded in overturning the more generous approach (from the taxpayer's point of view) favoured by the judge in *FII (High Court)*, the solution arrived at leads to the conclusion that Prudential is correct in its submissions on this question in the present appeal.

132. Mr Bremner submits that similarly no other change to the interpretation of s 790 ICTA is necessary to give effect to the requirements of EU law by an expansion of 'unilateral relief' under s 790(2) ICTA or 'tax payable under the law of any territory outside the United Kingdom' under s 790(1) ICTA. He says once a non-compliant UK provision has been moulded by a conforming interpretation the remainder of the statutory code stands and takes effect by reference to and in conjunction with the moulded provision.

133. As Lewison LJ observed at [111] of *Prudential (CA)*:

> "… it is a principle of interpretation which is applied to give a specifiable and specific meaning to a particular provision (or series of provisions, taken one by one), even if it allows considerable latitude as to the wording which may be read into the provision (or provisions). In considering whether a particular conforming interpretation can be given to a particular provision, the court has to check to see that that proposed interpretation does not go against 'the grain' of the legislation in question or conflict with its cardinal features. This was the exercise performed by this court in *FII (CA)* to arrive at the particular conforming interpretation it identified for a specific section, namely s 231(1) of ICTA. That interpretation was sufficient to give effect in domestic law to taxpayers' rights under art 63 precisely because ss 238(1) and 241 continue to operate alongside s 231(1) (as so interpreted) in the usual way."

134. Mr Ewart, however, contends that a claim for credit in respect of WHT is distinct and completely separate from a claim by reference to the FNR. The former being a claim in respect of a parallel tax (juridical double taxation) on the dividend that has been imposed by the state of residence of the dividend-paying company. By contrast, he says, a claim by reference to the FNR is a claim in respect of a rate of tax to which the profits underlying the dividends have been subject and which is intended to relieve economic double taxation. As such, he submits that a claim which is only for credit for WHT does not make an unexpressed claim for credit for ULT either for tax payable or at the FNR.

135. However, I agree with Mr Bremner who contends, on the basis of s 790(3) ICTA, that each of the three types of credit the UK was required to give, credit for tax paid, credit for WHT and credit at the FNR, are all forms of unilateral relief. This is because that is the relief that would be given in relation to the arrangements under s 790(4) – (10C) ICTA. As such, and if it was necessary to do so, a claim for WHT can therefore be identified as a claim for DTR as it would be a claim for unilateral relief.

136. There is, as Mr Bremner submits, nothing in legislation to impose a requirement as to the form of words to be used for such a claim. It is clear from *Prudential (CA)* that once a conforming interpretation has been applied to create the FNR the other provisions apply as normal.

137. Further authority for this, if indeed required, can be found in the decision of the Supreme Court in *Routier and another v HMRC (No 2)* [2021] AC 327. This was an inheritance tax case concerning the free movement of capital which, although not restricted by the relevant provision, s 23 of the Inheritance Tax Act 1984, was restricted by the judicial gloss placed on the words now found in s 989 of the Income Tax Act 2007 in *Camille & Henry Dreyfus Foundation Inc v Inland Revenue Commissioners* [1956] AC 39 of which, as the Supreme Court observed, at [51]:

> "… [t]here can be no doubt that the *Dreyfus* gloss on the language of section 989 of the Income Tax Act, as applied to section 23, is incompatible with article 56 EC."

The Supreme Court continued:

> "52. Article 56 EC is directly applicable as law in the United Kingdom, and must be given effect in priority to inconsistent national law, whether judicial or legislative in origin. It follows that the *Dreyfus* gloss on the language of section 989 of the Income Tax Act cannot be applied to section 23 in situations falling within the scope of article 56. The resultant position is as set out in para 49 above: applying section 23 without incorporating the *Dreyfus* gloss, there is no relevant restriction on the availability of relief beyond the conditions appearing on the face of the provision. That result is in conformity with article 56. Since it is undisputed that the Coulter Trust satisfied those conditions at the relevant time, it follows that it qualifies for the relief.
>
> 53. That is the conclusion which the Court of Appeal should have reached, once it had decided that the *Dreyfus* gloss on the language of section 989 of the Income Tax Act, if incorporated into section 23 of the Inheritance Tax Act, imposed a restriction which was incompatible with article 56. Having reached that decision, the court could not apply that entirely judge-made restriction, and therefore had to apply section 23 without the gloss placed on the language used in section 989 of the Income Tax Act in the *Dreyfus* case. It would then have arrived at a result which complied with article 56.
>
> 54. With great respect to the Court of Appeal, it should not have concerned itself with a hypothetical restriction concerned with the existence of mutual

> assistance agreements, even if it considered that such a restriction might have been justifiable under EU law and might have been imposed by Parliament. The fact was that there was no such restriction in existence. Neither section 23 of the Inheritance Tax Act nor section 989 of the Income Tax Act made relief for trusts in third countries conditional on there being a mutual assistance agreement in place. The fact that such a restriction, if it had existed, might have been in conformity with EU law did not mean that it could be imposed by the court, by means of a purported interpretation of the language used in section 23.
>
> 55. Having reached the conclusion that section 23 of the Inheritance Tax Act can be brought into conformity with article 56 by disapplying the *Dreyfus* gloss on the meaning of the words contained in section 989 of the Income Tax Act, and that, having done so, the gift to the Coulter Trust qualifies for relief under section 23, it is unnecessary for this court to decide the other issues in dispute between the parties: in particular, whether the Court of Appeal was correct to hold that the *Dreyfus* gloss applied to both limbs of section 23(6), and whether it was correct to hold that a general requirement that there be a mutual assistance agreement in place at the time of the testator's death would constitute a justifiable restriction on freedom of movement of capital under EU law. The Court of Appeal's decision cannot stand, even if it was correct in its determination of those issues."

138. Mr Ewart also argues that, because the claims by Schroder Institutional Growth, the lead appellant for this issue, were claims for credit for WHT made under s 788 ICTA, s 790(5) ICTA precludes the application of s 790 ICTA. However, I do not agree as, in the absence of any provision in the relevant double tax convention for an FNR credit the exception in s 790(5) ICTA is not engaged.

Issue 4 – Schedule 1A to the Taxes Management Act 1970 ("TMA")

139. The parties agree that issue 4 asks, in the alternative, do paragraphs 54, 55, 57 and 59 of Schedule 18 to Finance Act 1998 and Schedule 1A TMA create a separate legal claim (the purported Schedule 1A TMA claims)?

140. This issue only arises if and to the extent that the claims made and considered in Issues 2 and 3 do not constitute valid claims. If, contrary to my conclusions on those issues, this is the case, Mr Bremner contends that a claim must take effect as a claim under Sch 1A TMA as this is the only remaining route, described by Mr Bremner as a "fallback" and an "if all else fails" argument, by which a claim may be made and relies on decisions such as *Unibet* and *T-Mobile* (see paragraphs 77 and 79, above) for the proposition that national law procedures are to be interpreted to contribute to the attainment of achieving effective judicial protection.

141. However, as Mr Ewart contends, Schedule 1A, although it defines claims (paragraph 1), provides to whom and in what form they should be made (paragraphs 2 and 3), how they should be dealt with (paragraph 4) in addition to other matters relating to claims it does not specifically provide for a time limit in which a claim is to be made. Perhaps this is not surprising as Schedule 1A provides for a regime for claims similar to that for closure notices and enquiries into returns. It does not, in my judgment, include any provision of a right to make a claim.

Issue 5 – "Out of time" amendments

142. The question raised by this issue, which concerns amendments to returns to show income as exempt which had previously been returned as taxable, is whether the amendment if made beyond the anniversary of the filing date but within the period in s 806(1) ICTA is to be treated as equivalent to an in-time claim for full DTR or as claims made pursuant to Paragraph 51?

143. The time limits material to this issue can be found at s 806 ICTA and in Schedule 18 to the Finance Act 1998.

144. Section 806 ICTA provides:

> **806 Time limit for claims etc**
>
> (1) Subject to subsection (2) below and section 804(7), any claim for an allowance under any arrangements by way of credit for foreign tax in respect of any income or chargeable gain—
>
> (a) shall, in the case of any income or chargeable gain which falls to be charged to income tax for a year of assessment, be made on or before—
>
> (i) the fifth anniversary of the 31st January next following that year of assessment, or
>
> (ii) if later, the 31st January next following the year of assessment in which the foreign tax is paid;
>
> (b) shall, in the case of any income or chargeable gain which falls to be charged to corporation tax for an accounting period, be made not more than—
>
> (i) six years after the end of that accounting period, or
>
> (ii) if later, one year after the end of the accounting period in which the foreign tax is paid.
>
> (2) Where the amount of any credit given under the arrangements is rendered excessive or insufficient by reason of any adjustment of the amount of any tax payable either in the United Kingdom or under the laws of any other territory, nothing in the Tax Acts limiting the time for the making of assessments or claims for relief shall apply to any assessment or claim to which the adjustment gives rise, being an assessment or claim made not later than six years from the time when all such assessments, adjustments and other determinations have been made, whether in the United Kingdom or elsewhere, as are material in determining whether any and if so what credit falls to be given.

145. Under Paragraph 15(4)(a) of Schedule 18 to the Finance Act 1998 an amendment to a self-assessment corporation tax return may be made within one year of the filing date. The time limit under Paragraph 51 of Schedule 18 to the Finance Act 1998 in which to make a claim to recover excessive tax paid by mistake was until 31 March 2009 six years. However, that was reduced to 4 years in relation to claims made on and after 1 April 2010.

146. The test lead appellant in relation to this issue is Fidelity UK Index Fund which filed its returns for APEs 28 February 2009 and 2010 showing EU income as exempt and non EU income as taxable. On 25 February 2013 its tax adviser responsible for filing the Fund's tax return, EY, wrote to HMRC on behalf of Fidelity UK Index Fund:

> "Dear Sirs,
>
> **Accounting periods ended 28 February 2009 and 2010**
>
> We are writing with regard to the above mentioned fund and would like to amend the tax filing positions for the 2009 and 2010 accounting periods stated above under paragraph 31, schedule 18 FA 1998.
>
> The original tax computations and returns were submitted to HMRC on the basis that third country dividends (i.e. non-EU dividends) were brought into the charge to tax. The amendment is to exempt third country dividends for the relevant periods above.

> We have enclosed details of the additional amounts of UK corporation tax repayable which are £13,670 and £14,537 respectively for the 2009 and 2010 accounting periods as a result of this amendment. The tax repayment should be left on account and not repaid until we notify you otherwise.
>
> Please can you acknowledge receipt of this amendment request and if you have any queries or would like to discuss any of the above then please do not hesitate to contact us."

The computation attached to that letter shows the reduction of the non EU income to zero and removes the sum claimed as DTR. Although this amendment was beyond the time limit for amending the return it was within the period to claim DTR under s 806 ICTA or to make a Paragraph 51 claim.

147. Mr Ewart contends that, as no DTR is claimed as a result of the amendment – he says it is "disclaimed" – this cannot be a DTR claim. Neither, he submits, can it be a Paragraph 51 claim. In addition because there was a remedy which was not used Mr Ewart contends that no issue arises in relation to effectiveness either.

148. Mr Bremner submits that, although the exemption amendment was made after the amendment deadline, as it was within the s 806 ICTA and Paragraph 51 time limits it takes effect as either a Paragraph 51 claim or a claim under s 806(1) ICTA. He says given that exemption is equivalent to credit at the FNR the claim for exemption by Fidelity UK Index Fund should be treated as if it had made a claim under s 806(1) ICTA for additional DTR at the FNR. Alternatively, he submits, that it should be treated as a Paragraph 51 claim in any event as the EY letter of 25 February 2013 satisfies the requirements for such a claim.

149. Having come to the conclusion (at paragraph 124, above) that for EU law purposes credit at the FNR is equivalent to exemption it must follow that the claim for exemption in EY's letter must be regarded as a claim for credit at the FNR and, as such, a claim for additional DTR under s 806(1) ICTA.

150. I find support for this in the decision of the Court of Appeal in *Trustees of the BT Pension Scheme v HMRC* [2014] STC 1156 in which Lewison LJ, with whom Briggs and Longmore LJJ agreed, said:

> "28 … in the course of his oral submissions Mr Gammie [counsel for the Trustees] argued that the relevant claim was not that notification, but was either the Trustees' original claim for exemption from tax under s 592 or, alternatively, was the filing of annual returns.
>
> 29. So far as the first of these is concerned, the exemption from income tax on income applied for the purposes of the exempt approved scheme does not turn on any particular form that the income takes. It applies just as much to income from property (eg rents) as to dividends. I do not consider **that this kind of exemption** from income tax can be regarded as a claim to tax credits. …" (emphasis added)

Although Lewison LJ did not consider the type of exemption claimed in that case could be regarded as a claim to tax credits, I agree with Mr Bremner that it is apparent from the reasoning of the Court of Appeal that a claim to a different type of exemption, particularly as in the present case to vindicate EU law rights, could as a matter of principle be regarded as a claim to tax credits.

151. Also, as the EY letter satisfies the necessary requirements for a claim under Paragraph 51 I consider that it can clearly operate as a claim under that paragraph.

Issue 6 – Section 806(2) ICTA

152. Issue 6 concerns s 806 ICTA, in particular the extended time limit in s 806(2) ICTA in which to make a claim for an allowance under any arrangements by way of credit for foreign tax (including for unilateral relief).

153. Section 806(2) ICTA (which is set out at paragraph 144, above) applies in circumstances where the credit given under a double tax treaty is rendered excessive or insufficient by reason of an adjustment of the tax payable in the UK or under the laws of any other territory and extends the time limit for a claim to six years from the time of the adjustment. It is therefore necessary to consider first, whether there has been an adjustment of an amount of tax payable in the UK or in another territory; secondly, whether the amount of credit under the double tax convention is rendered excessive or insufficient by reason of any tax payable; and thirdly the application of the time limit.

154. Paragraph 8 of Schedule 18 to the Finance Act 1998 prescribes how the "amount of tax payable for an accounting period" is to be calculated. This includes giving effect to any DTR.

155. Mr Ewart argues that the effect recognising the FNR under the conforming interpretation of s 790 ICTA does not increase the tax payable in either the UK or under the laws of any other territory and therefore does not fall within s 806(2) ICTA at all. His case is that the conforming interpretation provides for a dual credit, which is either the tax payable or the credit computed at the FNR, but does not go so far as to deem tax to be payable.

156. However, I agree with Mr Bremner who contends that, as a result of the conforming interpretation of s 790 ICTA there is an increase of tax payable, as calculated in accordance with paragraph 8 of Schedule 18 to the Finance Act 1998, under the law of any territory outside the UK. His argument is that under the conforming interpretation s 790 ICTA must be construed as providing the grant for a tax credit for foreign dividends to the extent required to comply with EU law.

157. This requires the UK to provide for a tax credit at the higher of the foreign tax actually paid and the FNR of the dividend paying company with such credits being read into s 790 ICTA. Section 790(1) ICTA provides that relief shall be given as a credit in respect of "tax payable". As Mr Bremner submits such a credit is an express credit in respect of tax payable under the law of any territory outside the UK and for s 790 ICTA to grant additional credit by reference to the FNR in accordance with the conforming interpretation, the concept of "tax payable" in s 790(1) ICTA is to be interpreted as including "tax that would be payable in the relevant overseas jurisdiction applying the FNR".

158. Support for this can be found in the adjustments the Courts have held must be made to the UK provisions, particularly the observations of Henderson J observed in *Prudential (Ch)* and *FII HC 2* at [54] (see paragraph 46, above).

159. In *Prudential Ch* Henderson J said, at [103]:

> "… I consider that it falls well within the scope of conforming interpretation to construe s 790 of ICTA 1988 as providing for the grant of a tax credit for foreign dividends to the extent necessary to secure compliance with EU law. Since s 790 already provides for the grant of tax credits, in the case of both portfolio and non-portfolio dividends, the grant of a further tax credit for portfolio dividends would not in my judgment go against the grain of the UK tax legislation. Nor would it require the court to make policy decisions for which it is not equipped, because the sole purpose of the tax credit would be to secure compliance with the judgments of the ECJ in which the UK tax system has been held to infringe art 63 TFEU."

160. The consequence of the recognition of the requirement to grant credit at the FNR, as Mr Bremner contends, therefore increases the amount of "tax payable" under the laws of the relevant overseas territory. For example, the requirement to grant credit at the FNR in relation to a portfolio dividend paid by a German resident company to a UK resident company increases the "tax payable under the law" of Germany for the purposes of section 790(1) ICTA and therefore for the purposes of section 806(2) ICTA, as the concept of "tax payable" is the same in both provisions.

161. Accordingly, in my judgment, s 806(2) ICTA does apply to claims for credit at the FNR for claims which arise as a result of the decision of the SC in *Prudential (SC).*

Issue 7 – Non-resident dividend income returned as exempt in part

162. Issue 7 also concerns s 806(2) ICTA and raises the issue of whether, if the closure notice brings into account income previously returned as exempt and as a result s 806(2) ICTA is engaged, DTR can only be claimed on the income previously returned as exempt. Such a situation arises when a return shows EU income as exempt and non-EU income as taxable and, following an enquiry, the EU income is brought into charge.

163. Mr Ewart contends that a claim would arise under 806(2) ICTA in relation to the EU income, as there would be an adjustment of the amount of tax payable, but not the non-EU income for which the amount of tax payable would not have been adjusted. He says that it is the words "a claim to which the adjustment give rise" in s 806(2) ICTA that make it clear that the right to an extended time limit under the section can only apply in the case of a claim that has arisen because of an adjustment to the amount of tax payable.

164. However, while I agree with Mr Bremner that there is nothing in section 806(2) ICTA which restricts its operation only to claims that have been returned as exempt – such a limitation would be inconsistent with s 790(11) ICTA which requires "any such assessments" to be made "as are necessary to ensure … the proper credit, if any, is given" – I do not accept his submission that the final words of s 806(2) ICTA, "any and if so what credit falls to be given", support his argument that as they are in general terms they are not limited to the particular credit that relates to the adjustment itself.

165. Section 806(2) ICTA clearly, in my judgment, relates solely to those claims arising by reason of any adjustment of the amount of any tax payable in the UK (or under the laws of any other territory) and, as such, would be applicable to the EU income initially returned exempt but subsequently brought into charge but not the non-EU income always treated as taxable for which no adjustment of the tax payable would have arisen.

Issue 8 – Eligible Unrelieved Foreign Tax ("EUFT")

166. Issue 8 concerns the EUFT provisions in particular whether EUFT can be generated and claimed where s 806(2) is engaged and whether EUFT can be generated by the ULT at the FNR.

167. In *FII HC 1*, at [106], Henderson J said of the EUFT rules that they:

> "… are complex in detail, but the broad principles can be stated quite briefly. The advantages of offshore mixing were largely nullified by the introduction of a 'mixer cap', which operated to restrict the amount of underlying foreign tax which could be credited against the UK corporation tax liability on foreign dividends. The cap applied not only where a dividend was paid by a non-resident company direct to the UK, but also, and critically, where a cross-border dividend was paid at any earlier stage within the group by one non-resident company to another. The mixer cap limited the creditable underlying tax to the UK corporation tax rate. Any unrelieved foreign tax (EUFT) would then be eligible for onshore pooling, and could be offset against the UK

corporation tax payable on certain dividends from low tax countries. However, the dividends against which EUFT could be offset ('qualifying foreign dividends', or 'QFDs') excluded certain important categories of dividend, including in particular:

(a) dividends paid indirectly to the UK in respect of which EUFT had arisen at any point in the corporate chain, subject to a right to disclaim the underlying tax concerned in order to prevent EUFT from arising at that point and thereafter 'tainting' the dividend; and

(b) dividends paid by a controlled foreign company ('CFC') which escaped the application of the CFC rules by pursuing an 'acceptable distribution policy', which in practice meant distributing 90% or more of its profits.

Furthermore, the amount of EUFT which could be relieved was subject to an upper limit of 45% of the aggregate amount of the dividend declared and the underlying tax (including any withholding tax incurred by an intermediate company). There were, however, also some countervailing advantages, which had not been available under the previous regime. For example, surplus EUFT could be carried back and set off against tax payable on QFDs of the same company in the previous three years, and could also be carried forward indefinitely by the same company or surrendered to another group company."

168. Turning to the applicable EUFT provisions, s 806A ICTA provides:

806A Eligible unrelieved foreign tax on dividends: introductory

(1) This section applies where, in any accounting period of a company resident in the United Kingdom, an amount of eligible unrelieved foreign tax arises in respect of a dividend falling within subsection (2) below paid to the company.

(2) The dividends that fall within this subsection are any dividends which are chargeable under Chapter 2 of Part 10 of CTA 2009 (dividends of non-UK resident companies), or which would be so chargeable but for section 982 of that Act (priority rules), other than—

(a) any dividend which is trading income for the purposes of section 393;

(b) any dividend which, in the circumstances described in paragraphs (a) and (b) of subsection (8) of section 393, would by virtue of that subsection fall to be treated as trading income for the purposes of subsection (1) of that section;

(c) in a case where section 801A applies, the dividend mentioned in subsection (1)(b) of that section;

(d) in a case where section 803 applies, the dividend mentioned in subsection (1)(b) of that section;

(e) any dividend the amount of which is, under section 811, treated as reduced.

(3) For the purposes of this section—

(a) the cases where an amount of eligible unrelieved foreign tax arises in respect of a dividend falling within subsection (2) above are the cases set out in subsections (4) and (5) below; and

(b) the amounts of eligible unrelieved foreign tax which arise in any such case are those determined in accordance with section 806B.

(4) Case A is where—

(a) the amount of the credit for foreign tax which under any arrangements would, apart from section 797, be allowable against corporation tax in respect of the dividend, exceeds

(b) the amount of the credit for foreign tax which under the arrangements is allowed against corporation tax in respect of the dividend.

(5) Case B is where the amount of tax which, by virtue of any provision of any arrangements, falls to be taken into account as mentioned in section 799(1) in the case of the dividend (whether or not by virtue of section 801(2) or (3)) is less than it would be apart from the mixer cap. But if that is so in any case by reason only of the mixer cap restricting the amount of underlying tax that is treated as mentioned in subsection (2) or (3) of section 801 in the case of a dividend paid by a company resident in the United Kingdom, the case does not fall within Case B.

(6) In determining whether the circumstances are as set out in subsection (4) or (5) above, sections 806C and 806D shall be disregarded.

169. The amounts of EUFT arising in the cases set out in s 806A(4) and (5) ICTA are determined in accordance with s 806B ICTA which provides:

806B The amounts that are eligible unrelieved foreign tax

(1) …

(2) In Case A, the difference between—

(a) the amount of the credit allowed as mentioned in section 806A(4)(b), and

(b) the greater amount of the credit that would have been so allowed if, for the purposes of subsection (2) of section 797, the rate of corporation tax payable as mentioned in that subsection were the upper percentage,

shall be an amount of eligible unrelieved foreign tax.

(3) In Case B, the amount (if any) by which—

(a) the aggregate of the upper rate amounts falling to be brought into account for the purposes of this paragraph by virtue of subsection (4) or (5) below, exceeds

(b) the amount of tax to be taken into account as mentioned in section 799(1) in the case of the [dividend falling within section 806A(2), before any increase under section 801(4B),

shall be an amount of eligible unrelieved foreign tax.

…

170. Section 806C ICTA concerns the onshore pooling to which Henderson J referred in *FII HC 1* (see paragraph 167, above).

171. Section 806D(2) ICTA provides:

806D Utilisation of eligible unrelieved foreign tax

(1) For the purposes of this section, where—

(a) any eligible unrelieved foreign tax arises in an accounting period of a company, and

(b) the dividend in relation to which it arises is paid by a company which, at the time of payment of the dividend, is related to that company,

that tax is "eligible underlying tax" to the extent that it consists of or represents underlying tax.

(2) To the extent that any eligible unrelieved foreign tax is not eligible underlying tax it is for the purposes of this section "eligible withholding tax".

(3) For the purposes of giving credit relief under this Part to a company resident in the United Kingdom—

(a) the amounts of eligible underlying tax that arise in an accounting period of the company shall be aggregated (that aggregate being referred to as the "relievable underlying tax" arising in that accounting period); and

(b) the amounts of eligible withholding tax that arise in an accounting period of the company shall be aggregated (that aggregate being referred to as the "relievable withholding tax" arising in that accounting period).

(4) The relievable underlying tax arising in an accounting period of the company shall be treated for the purposes of allowing credit relief under this Part as if it were—

(a) underlying tax in relation to the single related dividend that arises in the same accounting period,

(b) relievable underlying tax arising in the next accounting period (whether or not any related qualifying foreign dividend in fact arises to the company in that accounting period), or

(c) underlying tax in relation to the single related dividend that arises in such one or more preceding accounting periods as result from applying the rules in section 806E,

or partly in one of those ways and partly in each or either of the others.

(5) The relievable withholding tax arising in an accounting period of the company shall be treated for the purposes of allowing credit relief under this Part as if it were—

(a) foreign tax (other than underlying tax) paid in respect of, and computed by reference to, the single related dividend or the single unrelated dividend that arises in the same accounting period,

(b) relievable withholding tax arising in the next accounting period (whether or not any qualifying foreign dividend in fact arises to the company in that accounting period), or

(c) foreign tax (other than underlying tax) paid in respect of, and computed by reference to, the single related dividend or the single unrelated dividend that arises in such one or more preceding accounting periods as result from applying the rules in section 806E,

or partly in one of those ways and partly in any one or more of the others.

(6) The amount of relievable underlying tax or relievable withholding tax arising in an accounting period that is treated—

(a) under subsection (4)(a) or (c) above as underlying tax in relation to the single related dividend arising in the same or any earlier accounting period, or

(b) under subsection (5)(a) or

(c) above as foreign tax paid in respect of, and computed by reference to, the single related dividend or the single unrelated dividend arising in the same or any earlier accounting period,

must not be such as would cause an amount of eligible unrelieved foreign tax to arise in respect of that dividend.

172. Rules for the carry back of tax relievable under s 806D ICTA are set out at s 806E ICTA.

173. Sections 806F and 806G ICTA provide:

806F Credit to be given for underlying tax before other foreign tax etc

(1) For the purposes of this Part, credit in accordance with any arrangements shall, in the case of any dividend, be given so far as possible—

(a) for underlying tax (where allowable) before foreign tax other than underlying tax;

(b) for foreign tax other than underlying tax before amounts treated as underlying tax; and

(c) for amounts treated as underlying tax (where allowable) before amounts treated as foreign tax other than underlying tax.

(2) Accordingly, where the amount of foreign tax to be brought into account for the purposes of allowing credit relief under this Part is subject to any limitation or restriction, the limitation or restriction shall be taken to have the effect of excluding foreign tax other than underlying tax before excluding underlying tax.

806G Claims for the purposes of section 806D(4) or (5)

(1) The relievable underlying tax or relievable withholding tax arising in any accounting period shall only be treated as mentioned in subsection (4) or (5) of section 806D on a claim.

(2) Any such claim must specify the amount (if any) of that tax—

(a) which is to be treated as mentioned in paragraph (a) of the subsection in question;

(b) which is to be treated as mentioned in paragraph (b) of that subsection; and

(c) which is to be treated as mentioned in paragraph (c) of that subsection.

(3) A claim under subsection (1) above may only be made before the expiration of the period of—

(a) six years after the end of the accounting period mentioned in that subsection; or

(b) if later, one year after the end of the accounting period in which the foreign tax in question is paid.

174. Mr Ewart contends that EUFT cannot arise on the basis of the FNR as the FNR credit cannot exceed the amount of corporation tax charged in the UK on a dividend and therefore create EUFT. However, I agree with Mr Bremner that such an approach fails to recognise the

effect of the conforming interpretation under which the credit for foreign tax under s 790 ICTA must be taken to include the credit at the FNR which, as it forms an "integral part" of the UK's existing tax system (see eg Henderson J in *FII HC 2* at [54], paragraph 46, above), must include the EUFT provisions which are therefore applicable.

175. This is consistent with the decision of the Supreme Court in *FII SC 3* which addressed the EUFT provisions, observing at [132]:

> "Following the introduction of the Eligible Unrelieved Foreign Tax rules ("the EUFT rules" discussed at paras 206—209 below), applicable to dividends arising after 30 March 2001, surplus EUFT could be carried forward or surrendered to another group company. The credit continued to be based on the foreign tax paid rather than the FNR, and it could only be set against particular categories of dividend income.

The Supreme Court continued, having referred to the decision of the CJEU in in *Osterreichische Salinen AG v Finanzamt Linz*, which was joined with and reported as *Haribo Lakritzen Hans Riegel BetriebsgmbH v Finanzamt Linz* (Joined Cases C-436/08 and C-437/08) [2011] STC 917 ("*Salinen*):

> "140. In the light of this decision [*Salinen*], it is clear that in so far as United Kingdom law prevented the carrying forward of unused DTR credits, prior to the introduction of the EUFT rules (and to the extent, if any, that those rules may themselves have prevented the carrying forward of unused credits in full), it was in breach of article 63 of the TFEU. It is not suggested that the position would be any different under article 43, which is also relevant in the present proceedings, and the same reasoning would appear to apply, mutatis mutandis.
>
> …
>
> 145. In principle, therefore, the problem can be resolved by disapplying the domestic rule that the DTR credit given in respect of particular income can only be allowed against tax computed by reference to the same income, to the extent that it prevents unused DTR credits from being carried forward and applied against tax liabilities arising in subsequent years, and giving effect instead to the EU rule that unused DTR credits (calculated on a FNR basis) can be carried forward for use against tax liabilities arising in subsequent years. …
>
> Looking to the future, therefore, any unused DTR credits (calculated on a FNR basis) must in principle be regarded as remaining available to be applied against other income in subsequent years, notwithstanding any statutory provisions or other domestic rules of law to the contrary effect. …"

176. I also do not accept Mr Ewart's submission that account must be taken of WHT before credit at the FNR. Although he relies on the observation of Henderson J at [96] in *Prudential (Ch)*, (see paragraph 45, above) who treated the WHT "as the first of the credits to be set against the Case V charge, thereby reducing (and placing a cap on) the amount of the charge available to be set off by the foreign tax credit", it is clear that Henderson did so for "the sake of simplicity" and without the benefit of detailed argument in that case or "prejudice to the resolution of any issues which may emerge at a future date" and, as such, left open the question of the order of the application of the credits.

177. Finally, in relation to this issue, I consider that s 806(2) ICTA applies to EUFT. Although s 806G(3) ICTA sets a time limit for claims under s 806D ICTA, s 806(2) ICTA, which provides that "nothing in the Tax Acts limiting the time … shall apply", overrides all time limits in the Tax Acts including that under s 806G ICTA. As such, there is no basis for

excluding EUFT from s 806(2) ICTA. Indeed, to do so would be contrary to general directive in s 790(11) ICTA to secure proper credit is given.

178. It therefore follows that EUFT, which can be generated by ULT at the FNR can be generated and claimed where s 806(2) ICTA is engaged.

Issue 9 – "in time" amendments following an enquiry notice

179. Issue 9 concerns the circumstances in which HMRC can refuse to give effect (in whole or part) to an amendment to a return made before the anniversary of the filing date on the grounds that an enquiry into the return had already been opened.

180. Paragraph 31(1) of Schedule 18 to the Finance Act 1998, applies if a company amends its corporation tax return in relation to any matter on which an enquiry is in progress. The paragraph continues:

> (2) The amendment does not restrict the scope of the enquiry but may be taken into account (together with any matters arising) in the enquiry.
>
> (3) So far as the amendment affects—
>
> > (a) the amount stated in the company's self-assessment as the amount of tax payable, or
> >
> > (b) any amount that affects or may affect—
> >
> > > (i) the tax payable by the company for another accounting period, or
> > >
> > > (ii) the tax liability of another company for any accounting period,
>
> it does not take effect while the enquiry is in progress in relation to any matter to which the amendment relates or which is affected by the amendment. This does not affect any claim by the company under section 59DA of the Taxes Management Act 1970 (claim for repayment in advance of liability being established).
>
> (4) An amendment whose effect is deferred under sub-paragraph (3) takes effect as follows—
>
> > (a) if the conclusions in a partial or final closure notice state either—
> >
> > > (i) that the amendment was not taken into account in the enquiry, or
> > >
> > > (ii) that no amendment of the return is required arising from the enquiry,
> >
> > the amendment takes effect when a partial closure notice is issued in relation to the matters to which the amendment relates or which are affected by the amendment or, if no such notice is issued, a final closure notice is issued;
> >
> > (b) in any other case, the amendment takes effect as part of the amendments made by the closure notice.
>
> (5) For the purposes of this paragraph the period during which an enquiry is in progress in relation to any matter is the whole of the period—
>
> > (a) beginning with the day on which an officer of Revenue and Customs give notice of enquiry into the return, and
> >
> > (b) ending with the day on which a partial closure notice is issued in relation to the matter or, if no such notice is issued, a final closure notice is issued

181. HMRC's guidance on the application of paragraph 31 is contained in its internal Enquiry Manual, EM3835, which, under the heading, "Concluding the Enquiry: SA Legislation: Notice to reflect all matters to which an enquiry relates" states:

> "…
>
> You must also deal with any amendment the taxpayer has made during the enquiry.
>
> If you did not enquire into the amendment you must say so in your closure notice and you must give effect to the amendment. If you enquired into the amendment and concluded it is correct you must now give effect to it in your closure notice.
>
> If you issue one or more partial closure notices, any taxpayer amendment will be restricted to the matters to which the relevant notice relates, or the matters affected by the amendment.
>
> If you enquired into the amendment and concluded it was incorrect your closure notice must include conclusions about the amendment as well as your conclusions about the original self assessment."

182. Mr Ewart submits HMRC can reject an in-time amendment to a return. He gave the example of a company self-assessment return showing tax payable of £100. An amendment made during an enquiry reduced the tax due to £0. However, it remained at £100 whilst the enquiry was in progress as the amendment does not come into effect until the enquiry is concluded (paragraph 31(3)). At the conclusion of the enquiry HMRC having taken the amendment into account decide to reject it and issue a closure notice confirming the amount at £100 at which point the amendment takes effect (paragraph 31(4)(b)). He contends that, as there was never a point at which there had been any adjustment to the amount of tax payable, the tax payable had always been £100. Accordingly, he says, s 806 ICTA could not apply to enable any claim for DTR to be made.

183. Mr Bremner contends that if Mr Ewart's argument was correct it would amount to HMRC being given the right to effectively ignore an amendment to a return notwithstanding that it was made in time. This, he says, would be a "nonsensical result" and completely inconsistent with both paragraph 31(4), under which the amendment is required to "take effect" rather than be ignored, and HMRC's own guidance.

184. However, the amendment, in Mr Ewart's example, is not ignored but does take effect, under paragraph 31(4)(b), as "as part of the amendments made by the closure notice" and, as such, is consistent with HMRC's guidance to "include conclusions about the amendment as well as your conclusions about the original self assessment." In the circumstances envisaged in the example, although the amendment "takes effect" it does not result in any adjustment to the amount of tax payable.

185. Accordingly s 806 ICTA cannot apply. That said, provided it meets the necessary requirements there is nothing to prevent such an amendment being a claim under Paragraph 51 (see Issue 2, above).

Issue 10 – Section 75 ICTA 1988 (management expenses)

186. The parties agree that this issue concerns whether the statutory provisions when read compatibly with EU law, prohibit the application of management expenses if the effect is to prevent the full utilisation of the DTR available? Alternatively, can DTR which cannot be fully utilised by reason of management expenses be carried forward and generally applied?

187. As anticipated by both parties at the hearing, this issue was addressed by the Supreme Court in its decision in *FII SC 3*.

188. Having noted, at [140], that the judgment of the CJEU in *Salinen* "made it clear" that UK law, in so far as it prevented the carrying forward of unused DTR credits, was contrary to EU law, the Supreme Court continued:

> "141. A question then arises as to the appropriate remedy. As we have explained, the claimants argue that where tax has been paid in a subsequent tax year which would not have been paid if unused DTR credits had been carried forward, that tax is recoverable on the *San Giorgio* basis. Where no tax has yet been paid, they argue that the unused DTR credits remain available for use. The Revenue, on the other hand, argue that in order to comply with EU law, the DTR credits must be treated as having been used to relieve tax, in priority to management expenses. That result can be achieved, according to the Revenue, by giving section 75 of ICTA what they describe as a conforming interpretation, so as to exclude Case V income from "total profits". The use made of group relief need not be taken into account, according to the Revenue's argument, because it was not the result of legislation but of a choice made by the companies in question.
>
> 142. We are unpersuaded that the solution proposed by the Revenue is appropriate. The problem which arises in this case under EU law is not the result of an incompatibility between the rules governing management expenses or group relief and the requirements of EU law: so far as appears from the arguments in this appeal, the provisions governing management expenses and group relief are fully compliant with EU law. The problem which was identified in *Salinen*, and which is relevant also in the present case, is that legislation which prevents the carrying forward of unused DTR credits is precluded by EU law, since it results in a difference in treatment between domestic-sourced dividends, which are fully protected against economic double taxation, and foreign-sourced dividends, which are indirectly subject to economic double taxation if the applicable credit cannot be fully used. It is therefore the DTR legislation which is contrary to EU law; and if the problem can be resolved by addressing the DTR legislation, that is the appropriate place to find the solution.
>
> 143. It is also necessary to bear in mind that the obligation to interpret national law in conformity with the requirements of EU law is subject to the qualifications explained in European cases such as Criminal proceedings against *Kolpinghuis Nijmegen BV* (Case 80/86) [1987] ECR 3969 and *Impact v Minister for Agriculture and Food* (Case C-268/06) [2009] All ER (EC) 306, as well as domestic cases such as *Duke v Reliance Systems Ltd* [1988] AC 618. Having regard to those qualifications, there is a question, which this court need not answer, as to whether the words "the total profits" where they appear in section 75 of ICTA, could in any event properly be "interpreted" as meaning "the total profits (excluding any income falling within Case V of Schedule D)".
>
> 144 Focusing instead on the DTR legislation, the problem results from the rule that the DTR credit given in respect of particular income can only be allowed against tax computed by reference to the same income. That rule is contrary to EU law, to the extent that it prevents unused DTR credits from being carried forward and applied against other income in subsequent years. The requirement arising under EU law, that it must be possible to carry forward unused DTR credits for use against tax liabilities arising in subsequent years, was at all material times directly applicable as law in the United Kingdom, and had to be given effect in priority to inconsistent domestic law, whether legislative or judicial in origin.

> 145. In principle, therefore, the problem can be resolved by disapplying the domestic rule that the DTR credit given in respect of particular income can only be allowed against tax computed by reference to the same income, to the extent that it prevents unused DTR credits from being carried forward and applied against tax liabilities arising in subsequent years, and giving effect instead to the EU rule that unused DTR credits (calculated on a FNR basis) can be carried forward for use against tax liabilities arising in subsequent years. The disapplication of the domestic rule is in accordance with the approach which has been taken to legislation which is incompatible with directly applicable EU law since *R v Secretary of State for Transport, Ex p Factortame Ltd (No 2)* [1991] 1 AC 603. As Lord Bridge of Harwich stated in that case at p 659:
>
>> "Under the terms of the [European Communities] Act of 1972 it has always been clear that it was the duty of a United Kingdom court, when delivering final judgment, to override any rule of national law found to be in conflict with any directly enforceable rule of Community law."
>
> Looking to the future, therefore, any unused DTR credits (calculated on a FNR basis) must in principle be regarded as remaining available to be applied against other income in subsequent years, notwithstanding any statutory provisions or other domestic rules of law to the contrary effect. That result is consistent with the treatment of unutilised (lawful) ACT in *Prudential*, para 103."

189. The Supreme Court concluded, at [158]:

> "Accordingly, we conclude that, in so far as tax was paid as a result of the inability to carry forward unused DTR credits, calculated at the higher of the FNR rate and the tax paid, a claim lies in restitution to recover that tax, together with interest, subject to the law of limitation. Since the claim for repayment proceeds on the basis that the DTR credits would (but for the claimants' mistake) have been carried forward and used, those credits cannot be regarded as remaining available in addition to the restitution of the tax: otherwise, there would be double recovery. To the extent, however, that the inability to carry forward unused DTR credits did not result in the payment of tax, the unused credits must be regarded as remaining available."

190. It must therefore follow that it would be a breach of EU law if the effect of the application of management expenses were to prevent the full utilisation of the DTR available.

191. Accordingly, DTR (calculated at the higher of the FNR and tax paid) which cannot be fully utilised by reason of management expenses can be carried forward and generally applied. I would also add that I am unable to find any support in the judgment in *FII SC 3* for HMRC's argument that a pre-existing and in-time claim for DTR that cannot be fully utilised because of management expenses is necessary in order to carry forward that DTR.

Issue 11 – Management expenses and s 806(2) ICTA

192. Issue 11 asks whether s 806(2) ICTA be engaged where a closure notice brings dividend income returned as exempt into account but then offsets that income with management expenses? If the answer to this question is yes, in respect of which accounting period is s 806(2) ICTA engaged?

193. The parties agree that issue is to be addressed in the light of my conclusion in relation to Issue 10 that, as confirmed by the decision of the Supreme Court *FII SC 3*, under EU law where management expenses prevent its full utilisation, DTR calculated at the FNR can be carried forward for general use.

194. The factual situation in which Issue 11 arises is illustrated by the following example, taken from Mr Bremner's post *FII SC 3* written submissions, which simplifies the facts of the Fidelity test case:

(1) There are two relevant tax years (Year 1 and Year 2). In both tax years the fund received relevant dividend income of £100. The fund incurred management expenses of £100 in Year 1. It also received interest income in Year 2 of £200.

(2) In its tax returns the fund showed the dividend income as exempt. If credit had been claimed at the FNR instead of exemption full DTR would have been provided.

(3) Because the dividend income was returned as exempt, the management expenses of £100 from Year 1 were carried forward and set against the interest income in Year 2 leaving a net profit of £100. The fund returned a nil tax liability in Year 1 and in Year 2 paid tax (at 20%) on the net interest income of £100 (i.e. tax of £20). Enquiries were opened into both.

(4) Closure notices are issued in May 2020. Under the closure notice for Year 1, dividend income of £100 is now treated as taxable but is then offset with management expenses of £100. The closure notice for Year 2 now shows income of £300 (£100 of dividend income and £200 of interest income) but no management expenses as these were expended in Year 1. No DTR is allowed. Consequently tax is shown as due for Year 2 on £300 or £60 tax.

(5) On receiving the closure notices the fund then claimed DTR at the FNR in Years 1 and 2 but beyond the 4 or 6 year period for doing so in s806(1) ICTA.

(6) Section 806(2) ICTA lifts the time period to make DTR claims on, among other conditions, an adjustment to tax payable. However the Closure Notice for Year 1 did not acknowledge an adjustment to tax payable in Year 1: both the return and the closure notice show nil tax to pay (although on different bases).

(7) Issue 11 asks how the position in Year 2 should be analysed.

195. There is agreement between the parties that there will have been an adjustment to the tax payable in the UK by reason of the closure notice bringing income into charge in Year 2 and that s 806(2) ICTA would therefore apply in relation to Year 2.

196. Mr Bremner contends that the automatic carry forward of DTR engages section 806(2) ICTA. This, he says, is consistent with the observation of the Supreme Court in *FII SC 3* at [145] (see paragraph 188, above). This is because the DTR which could not be used in Year 1 as a result of the prior application of management expenses is automatically carried forward. That automatic carry forward, he says, necessarily has the result that the "tax payable in the United Kingdom" is adjusted in Year 2, as:

(1) under paragraph 8 of Schedule 18 to the Finance Act 1998, which prescribes how "tax payable" is to be calculated, it is necessary to deduct "any double taxation relief under s 788 or s 790 [ICTA]"; and

(2) as a result of the automatic carry forward of DTR to Year 2 as required by EU law (and which has been recognised in *FII SC 3*), the amount of tax payable in the United Kingdom in Year 2 is in turn adjusted.

As such, the credit given under the arrangements has been "rendered insufficient by reason of" that adjustment in the tax payable in the UK which did not permit the credit to be carried forward from Year 1 to Year 2 and, as a result, the amount of DTR given by the UK in respect of Year 2 was insufficient.

197. Therefore, in the above example:

(1) the DTR claim by the fund for Year 1 is unnecessary. As confirmed by the Supreme Court in *FII SC 3*, the DTR arises and is carried forward by the effect of EU law in any event; and

(2) the DTR claim by the fund for Year 2 is in-time and also satisfies the conditions of s 806(2) ICTA with the outcome that:

(a) The DTR claimed for the Year 2 dividend income meets the tax on that income;

(b) No management expenses were carried into Year 2; however

(c) The brought forward credits from Year 1 meet the tax liability on £100 of the interest income leaving net profits of £100 or tax due of £20.

198. HMRC do not agree with this analysis. First it is argued that a valid in-time claim for capped DTR is necessary; and secondly, that even if an amount of DTR was carried forward from Year 1 to Year 2 it would not have rendered the amount of any credit insufficient by reason of any adjustment of tax payable "either in the UK or under the laws of any other territory".

199. However, for the reasons already stated (see eg under Issues 2 and 3, above), I do not consider a claim for DTR to be necessary. I also agree with Mr Bremner that, as is clear from *FII SC 3* at [144], additional DTR is carried forward from Year 1 to Year 2 and, as a consequence the amount of credit that had been granted under the UK legislation was insufficient.

Issue 12 – Non-resident dividend income taxed under Case 1 of Schedule D

200. The parties have been unable to agree how this issue should be formulated. In essence it concerns non-resident dividend income taxed under schedule D Case I and whether it would make any difference if it were taxed under Case DV. The test case for this issue is Avon.

201. However, given the consequence of my conclusion in relation to Issue 6, namely that HMRC are required to issue a closure notice, it is not necessary to determine this issue.

202. Moreover, as Mr Bremner recognised in his skeleton argument, none of HMRC's decisions that are under appeal turn on this issue. Therefore, given that the Court of Appeal has confirmed, in *Hamnett v Essex County Council* [2017] 1 WLR 1155, that although there is a narrow discretion to proceed where the issue between the parties is academic it is to be exercised with caution, I have come to the conclusion that it is not appropriate to do so in relation to this issue.

Issue 13 – Section 811 ICTA

203. This issue, as formulated by HMRC, asks, subject to issue 11 above, in closing enquiries to bring income returned as exempt into account without DTR, must withholding tax incurred be deducted pursuant to s 811 ICTA?

204. However, as it is agreed that in no circumstances can management expenses be applied against WHT it not necessary to consider this issue further.

Issue 14 – Baillie Gifford

205. This issue concerns a question of fact, whether the tax return of Baillie Gifford, for the APE 2005, was amended within the period for doing so in paragraph 15 Schedule 18 to the Finance Act 1998, ie by giving notice of the amendment to HMRC not more than 12 months after the filing date. It is common ground that in order to succeed on this issue Baillie Gifford

must establish, on a balance of probabilities, that the return was amended and sent to HMRC by 30 April 2007. It is also accepted that HMRC cannot locate any document amending the return within its electronic or paper files.

206. HMRC Officers Keith Forbes and Stuart Scott-Wilson gave evidence in relation to this issue. Both were somewhat defensive witnesses who were reluctant to say or agree anything that could be perceived as a criticism of HMRC. However, as it is accepted that HMRC cannot locate the documents amending the return for APE 2005, the evidence of Mr Forbes and Mr Scott-Wilson, that after undertaking thorough searches of HMRC's electronic and paper files the documents cannot be found, does not take the matter further.

207. Colin Fraser of Baillie Gifford explained that between 2004 and 2006 he was a Fund Accounting Manager and, as such, a senior member of the accounting team responsible for the day to day operations of the Baillie Gifford funds including the five sub-funds of the Baillie Gifford Overseas Growth Funds ICVC (the "Five Funds"), for which he was jointly responsible, with his colleague Derek McGowan, for tax compliance. This included making the claims necessary to enforce the funds' EU claims for the recovery of tax on non-resident dividend income under Paragraph 51 which Mr Fraser described as "the most interesting part of the job".

208. He explained that to make these EU claims he and Mr McGowan had been provided with template covering letters drafted by KPMG to file Baillie Gifford's tax returns and claims with HMRC.

209. For the 2004, 2005 and 2006 APEs, they adopted the general practice of filing tax returns on the basis that all overseas dividends were chargeable to tax in accordance with the UK tax provisions at the time (ie with DTR claimed just for foreign WHT) which they referred to as a "Normal" return. They would then prepare amended returns on the basis that the non-resident dividend income was exempt (on what they understood to be an EU law basis), either in the form that only income from the EU was exempt or that worldwide income was exempt and refer to such returns as "EU Excluded" or "All Excluded" respectively.

210. Although the EU Excluded or All Excluded returns were often prepared at the same time as the Normal returns they would usually be submitted after the Normal returns but only a day or so later. Mr Fraser explained that this was because "it didn't seem quite right to lodge a tax return and then at the same time amend it onto a different basis". The amended returns would be submitted to HMRC under cover of one of the KMPG template covering letters amended to refer to the particular fund and accounting period or periods concerned. It was their practice to have a separate covering letter for each fund. Mr McGowan and Mr Fraser referred to such EU law basis returns as "Re-Submitted Returns".

211. Mr Fraser referred to Baillie Gifford's archived paper records regarding the APE 2005 for the Five Funds which included the Normal and Re-Submitted Returns on an "All Excluded" basis. Although the Re-submitted Returns were neither signed or dated and covering letters submitting these to HMRC could not be found, Mr Fraser explained that the archived copies of the Re-Submitted Returns for the APE 2004 were not signed or dated either and that the covering letter could have been lost in archiving. As such, he considered nothing turned on the fact the amended returns for APE 2005 were not signed and dated and that being on the files was confirmation that the Re-Submitted Returns were "obviously prepared" and sent to HMRC as, once they had been prepared, there would have been no reason not to send them.

212. With regard to the process by which the amendments were made Mr Fraser confirmed that paper returns were completed in manuscript. As there were five in the team their duties were split. He explained that any one of the five could have manually filled in the corporation tax return form and completed the tax computations using an Excel spreadsheet but that it

would have been either him or Mr McGowan, the more senior accountants in the team, that would have reviewed and "signed off" the reconciliation.

213. It appears that sometimes copies were made of the "paper packs" of documents before they were signed and sometimes this was done after with the copies being placed in a yellow tax file. Mr Fraser did not recall when the covering letter was generated, or if this was before or after the return was signed, but said that the letter would generally have been printed by a secretary and after being signed would be placed in the file with the return and computation.

214. He confirmed that they tended to "do an ICVC at a time" and that once signed the tax return and computation would be placed in an envelope with a covering letter. Mr Fraser said that one of the team would put the documents in the envelope and place it in the "mail tray" for collection by the Facilities Team to be posted. Mr Fraser confirmed that no steps were taken to confirm that the documents had been received by HMRC and explained that:

> "Our focus very much at that time was on the preparation and production of the returns and getting them to the Revenue within time, and yes, with hindsight it would have made all our lives a lot easier today if we had had some sort of documentation relating to that."

215. However, Mr Fraser said that, so far as he could remember, the 2005 returns were amended and filed as Re-Submitted Returns in the same manner as the 2004 amended returns had been. He referred to two Excel spreadsheets, which have not been amended since 10 April 2006 and 9 October 2006 respectively. These had been prepared by Mr McGowan to keep track of the various claims Baillie Gifford had made and submitted to HMRC for the funds under the ICVC. Mr Fraser explained that these had been "filled in when we were submitting the returns" and he was therefore able to conclude on the basis of these spreadsheets that the Re-Submitted Returns had been sent to HMRC between 11 April and 9 October 2006.

216. Mr Fraser considered it to be "virtually inconceivable" that the amended returns had not been submitted by 9 October 2006. He said that it was "most likely" by first class post but that they "may have been hand delivered." When asked if he was able to give any positive evidence about the amendments or whether he was relying on the documents and Baillie Gifford's general systems Mr Fraser said that he was:

> "… relying purely on the fact that, as I mentioned, this was incredibly important to us. We had done the work. We have got the Excel spreadsheets with all the calculations and we have got the returns. We just don't have the signed copies in our yellow files."

He said that the spreadsheets were:

> "… a record of the returns we were submitting, but what I can't definitively tell you is the timeline between Derek [McGowan] entering that number and physically putting the documentation in the post. I can't attest that, but it is my recollection that this was our way of recording that the returns had been completed and sent.

217. I found Mr Fraser to be credible and straightforward witness who did his best to assist the Tribunal. However, and perhaps not surprisingly, as his evidence related to matters that occurred some 15 years previously while he was able to describe the systems adopted by Baillie Gifford in general terms and provide an overview of what should have happened he was not able to explain the actual process of how or who was responsible for dispatching post or even whether the amendments were posted to HMRC or delivered by hand.

218. Although I find, on the basis of his evidence, that it was more likely than not that an amended return was prepared for the APE 2005, I am unable to conclude that it was submitted

to HMRC by 30 April 2007 as required by paragraph 15 of Schedule 18 to the Finance Act 1998.

219. There is no direct evidence that it was posted or hand delivered (although if Baillie Gifford had kept a post book recording the outgoing letters I would probably come to a different conclusion). Although the file copies of the APE 2005 amended returns were not signed, unlike the returns for the APE 2004 for which the file copies were also not signed, there is no covering letter on the file to indicate that the 2005 amendments were submitted. Also, although not conclusive, the 2005 documents have not been recorded as having been received by HMRC whereas those for other years have.

RESOLUTION OF CLOSURE NOTICE APPLICATIONS AND APPEALS

220. As noted above (at paragraph 5) having determined the issues, on 26 October 2021 I provided the parties with a draft of this decision and directed that they file an agreed joint statement (or in the absence of agreement their respective submissions) in relation to the impact and consequences of the draft decision on the Applicants/Appellants in the eight test cases.

221. Unfortunately the parties were unable to produce an agreed joint statement and, in accordance with the directions, filed separate statements on the disposal of the proceedings. They also identified the following five areas of dispute providing written submissions on how they considered each could be resolved:

(1) Disputed Issue A (closure notice directions) – Where the Tribunal directs the closure of an enquiry, does the Tribunal also have power to indicate the conclusions and amendments to be effected by the closure notice?

(2) Disputed Issue B (applying excess DTR to other tax liabilities) – Can DTR credits in excess of the amount of UK corporation tax due be set against corporation tax on other income or only against tax on dividend income?

(3) Disputed Issue C (excess management expenses and s 811 ICTA) – Where management expenses exceed profits (eg Fidelity APEs ending 2007 and 2008), should the net dividend be brought into account applying s 811 ICTA or should the Case DV income be grossed up for foreign tax?

(4) Disputed Issue D (dismissing successful appeals) – Where, as for Henderson in the accounting periods ending 2006 and 2007, there are two decisions both of which have succeeded to the same effect, should only one appeal be allowed and the other dismissed?

(5) Disputed Issue E (EUFT at the FNR) – Can EUFT be claimed for credit at the FNR and applied in year (rather than being carried forward)?

Issue A

222. HMRC contend that, in connection with the closure notice applications, the Tribunals can only direct the closure of the relevant enquiries and that it does not have the jurisdiction to direct that an enquiry should be closed in any particular way. The Applicants, however, submit that the Tribunal can direct HMRC as to the conclusions and amendments that must be set out in the closure notice.

223. Having considered the Tribunal's jurisdiction in relation to this issue (see paragraphs 8 – 21, above), I concluded (at paragraph 19) that the Tribunal does have the jurisdiction to decide incidental questions of law and/or fact. It therefore follows that where such incidental questions have been determined and HMRC is directed to close an enquiry, the resulting closure notice is required to give effect to and apply those conclusions.

Issue B

224. This issue concerns whether DTR credit in excess of the amount of UK corporation tax due can be set against corporation tax on any other income or only against tax on dividend income. Although HMRC contend that DTR credit is "always capped at the UK rate of income tax that applied to the foreign dividend" I do not agree. This is clear from my conclusion, at paragraphs 190 and 191, above, that "it would be a breach of EU law if the effect of the application of management expenses were to prevent the full utilisation of the DTR available" and that DTR (calculated at the higher of the FNR and tax paid) which cannot be fully utilised by reason of management expenses can be carried forward and generally applied" (emphasis added).

225. Accordingly, as the Appellants contend, DTR credits in excess of the amount of UK corporation tax due can be set against corporation tax on other income.

Issue C

226. This issue, which concerns management expenses and s 811 ICTA, affects Fidelity. It arises where management expenses exceed profits (eg Fidelity APEs 2007 and 2008) and raises the issue of whether the net dividend should be brought into account applying s 811 ICTA as the Appellants contend or, as HMRC argue, the Case DV income should be grossed up for foreign tax.

227. The parties agree that the Case DV income should be grossed up for APEs 2009 and 2010. HMRC's position is that the same approach should be taken for 2007 and 2008, years in which there are valid claims for DTR, contending that since the credits will be carried forward the dividends should be grossed up. However, I agree with the Appellants that such an approach is inconsistent with my conclusions (at paragraph 199) in relation to Issue 11. It is also contrary to the agreed outcome of Issue 13 regarding s 811 ICTA (see paragraphs 203 – 204, above). Accordingly it is the net income that should be brought into account

Issue D

228. This issue relates to Henderson. HMRC contend that Henderson's appeal against HMRC's decision on the 2006 Paragraph 51 claim should be allowed to the extent that £313,700.99 tax has been overpaid. As regards 2007, HMRC contend that as there is no tax remaining payable following the determination of the appeal against the closure notice, the appeal should be dismissed on the basis that no unlawful tax remains payable.

229. However, in my judgment this cannot be right. Not only could it lead to an Appellant having to appeal against a decision in which it had been successful but does not take into account that there are two decisions, an appeal against a closure notice and a Paragraph 51 claim, both of which have succeeded and should therefore be allowed

Issue E

230. Having concluded that EUFT can arise on the basis of the FNR (at paragraph 174, above), that s 806(2) ICTA applies to EUFT (at paragraph 177, above) and that EUFT, which can be generated by ULT at the FNR, can be generated and claimed when s 806(2) is engaged (at paragraph 178, above), it must follow that EUFT can be claimed for credit at the FNR and applied in year (rather than being carried forward).

CONCLUSIONS

231. In view of my conclusions in relation to the areas of dispute the test case proceedings are determined as follows:

Schroder Asian – Accounting Periods ending 31 January 1991 and 15 January 2009

(1) The DTR claims made on 14 January 2015 are valid and in time (Issue 6) and accordingly an enquiry was commenced by notice of 10 June 2015 into those claims.

(2) The outcome is:

Accounting period ending	Additional ULT credit	Reduction in tax due
31/1/91	£71,656	£70,866
15/1/09	£275,680	£71,790

(3) It is directed that the enquiry be closed within 60 days.

(4) Should HMRC seek permission to appeal against this decision and direction within that period the direction is stayed until the later of 60 days following:

(a) the determination of that application,

(b) any renewed application for permission to the Upper Tribunal or

(c) any dismissal of the appeal should permission be granted, subject in any case to any direction by the Upper Tribunal.

Avon – Accounting Periods ending 31 December 1997 to 31 December 2003

(5) The DTR claims made on 8 November 2018 are valid and in time (Issue 6) and accordingly an enquiry was commenced by notice of 14 February 2019.

(6) The outcome is:

Accounting Period ending 31 December	Reduction in tax due
1997	£389
1998	£12,979
1999	£22,597
2000	£28,490
2001	£39,362
2002	£33,855
2003	£32,458
Total unlawful tax:	£170,130

(7) It is directed that the enquiry be closed within 60 days.

(8) Should HMRC seek permission to appeal against this decision and direction within that period the direction is stayed until the later of 60 days following:

(a) the determination of that application,

(b) any renewed application for permission to the Upper Tribunal or

(c) any dismissal of the appeal should permission be granted, subject in any case to any direction by the Upper Tribunal.

Baillie Gifford – Accounting Period ending 30 April 2005

(9) The return was not amended within the period for doing so (Issue 14). Accordingly the DTR claims made on 12 November 2018 are valid and in time (Issue 6). The outcome is that DTR claimed is increased to £328,943 resulting in tax overpaid of £23,637 and EUFT carried forward of -£155,193 (Issues 8 and 10).

(10) It is directed that the enquiry, commenced by notice of 21 November 2019, be closed within 60 days.

(11) Should HMRC seek permission to appeal against this decision and direction within that period the direction is stayed until the later of 60 days following:

(a) the determination of that application,

(b) any renewed application for permission to the Upper Tribunal or

(c) any dismissal of the appeal should permission be granted, subject in any case to any direction by the Upper Tribunal.

SLMM – Accounting Periods ending 31 March 2004, 2005, 2006

(12) The appeal against the decision dated 21 April 2020 rejecting the claims made on 15 December 2009 under Paragraph 51 is allowed (Issue 2 or Issue 5).

(13) The outcome is:

Accounting Period ending 31 March	Unlawful tax to be repaid
2004	£342
2005	£76,008
2006	£104,178

(14) The DTR claim dated 7 November 2018 is valid and in time (Issues 6, 8, 10 and 11).

(15) The outcome replicates the outcome of the claim under Paragraph 51 with the addition of a claim for EUFT as follows:

Accounting Period ending 31 March	Unlawful tax to be repaid	EUFT carried forward
2004	£342	£9,895
2005	£76,008	£331,581
2006	£104,178	£769,643

(16) It is directed that the enquiry, commenced by notice of 10 December 2019, be closed within 60 days.

(17) Should HMRC seek permission to appeal against this decision and direction within that period the direction is stayed until the later of 60 days following:

(a) the determination of that application,

(b) any renewed application for permission to the Upper Tribunal or

(c) any dismissal of the appeal should permission be granted, subject in any case to any direction by the Upper Tribunal.

Schroder European – Accounting Period ending 15 January 2003

(18) The appeal against the decision dated 21 April 2020 rejecting the claims made on 6 December 2005 under Paragraph 51 is allowed (Issue 2 or Issue 5).

(19) The outcome is:

Unlawful tax to be repaid: £174,053.00

(20) The DTR claim dated 29 January 2015 is valid and in time (Issues 6, 8, 10 and 11). The outcome replicates the outcome of the Paragraph 51 claim with the addition of a claim for EUFT as follows:

Unlawful tax to be repaid: £174,053.00

EUFT carried forward: -£10,463,846

(21) It is directed that the enquiry, commenced by notice of 10 June 2015, be closed within 60 days.

(22) Should HMRC seek permission to appeal against this decision and direction within that period the direction is stayed until the later of 60 days following:

(a) the determination of that application,

(b) any renewed application for permission to the Upper Tribunal or

(c) any dismissal of the appeal should permission be granted, subject in any case to any direction by the Upper Tribunal.

Schroder Institutional Growth – Accounting Period ending 30 June 2004

(23) The appeal against the closure notice dated 27 March 2020 is allowed (Issue 3).

(24) The DTR claims made on alternative or revised bases to include claims for EUFT dated 24 March 2015, 27 April 2020, 14 May 2020 and 1 June 2020 are all valid and in time (Issues 6 and 8).

(25) It is directed that the enquiry, commenced by notice of 17 April 2015, be closed within 60 days. Should HMRC seek permission to appeal against this decision and direction within that period the direction is stayed until the later of 60 days following (i) the determination of that application, (ii) any renewed application for permission to the Upper Tribunal or (iii) any dismissal of the appeal should permission be granted, subject in any case to any direction by the Upper Tribunal.

(26) The outcome is:

Other income less management expenses:	£1,427,407
DV Income:	£41,347
Tax at 20%	£293,751
Less income tax deducted at source:	£4,378
Less DTR	£8,438
Less EUFT	£9,779
Tax payable	£271,155
Unlawful tax to be repaid	£12,972

Fidelity UK Index Fund – Accounting Periods ending 28 February 2007 and 29 February 2008

(27) The appeals are allowed.

(28) The closure notices are amended to reduce DV income to dividends net of withholding tax and the management expenses set against that income (Issue 13) as follows:

	APE 28/2/07	APE ending 29/2/08
Management expenses brought forward	-£7,489,236	-£5,291,325
Management expenses generated in year	-£978,987	-£1,379,010

Net dividend income (per HMRC letter 9/3/21)	£409,759	£524,652
Other taxable income	£2,767,139	£5,411,155
Management expenses utilised	-£3,176,898	-£5,935,807
Management expenses carried forward	-£5,291,325	-£734,528

Accounting Period ending 28 February 2009

(29) The appeal is allowed.

(30) The closure notice is amended (1) to show DTR brought forward from accounting periods ending 2006-8 (Issue 10), (2) to allow DTR at the FNR on all non resident dividend income not just that income returned as exempt (Issue 3 or 5 or 6 or 11), (3) to allow EUFT (Issue 8) and (4) to allow DTR to be offset against D Case III income (Issues 8 and 10) as follows:

Management expenses brought forward	-£734,528
Management expenses generated in year	-£1,242,164
Other taxable income	£3,525,118
DTR brought forward	-£803,595.30
Net dividend income	£1,029,789
WHT	-£170,523
ULT	-£366,382.80
DV income	£1,566,694.80
Tax at 20%	£623,024.16
Total tax payable after DTR	nil
DTR carried forward	-£717,476.94

(31) The s 806(2) ICTA claims made on 9 March 2015 and re-made on 19 May 2020 and 16 June 2020 are valid and include DTR carried forward from earlier accounting periods (Issues 6, 8, 10 and 11). No enquiries having been opened into those claims, no direction can therefore be given to close them. Those claims replicate the outcome of the appeal.

Accounting Period ending 28 February 2010

(32) The appeal is allowed. The closure notice is amended (1) to show DTR brought forward from accounting period ending 2009 (Issue 10), (2) to allow DTR at the FNR on all non resident dividend income not just that income returned as exempt (Issue 3 or 5 or 6 or 11), (3) to allow EUFT (Issue 8) and (4) to allow DTR to be offset against D Case III income (Issues 8 and 10) as follows:

Management expenses brought forward	nil
Management expenses generated in year	-£1,673,901
Other taxable income	£5,306,103
DTR brought forward	-£717,476.94
Net dividend income	£377,642
WHT	-£58,344
ULT	-£139,417.81
DV income	£575,403.81
Tax at 20%	£841,521.16
Total tax payable after DTR	nil
DTR carried forward	-£73,717.59

(33) The s 806(2) ICTA claims made on 9 March 2015 and re-made on 19 May 2020 and 16 June 2020 are valid and include DTR carried forward from earlier accounting periods (Issues 6, 8, 10 and 11).

(34) No enquiries having been opened into those claims, no direction can therefore be given to close them. Those claims replicate the outcome of the appeal.

Henderson - Accounting Period ending 31 October 2006

(35) The appeal against the decision dated 25 September 2020 rejecting the claim made on 28 September 2009 under Paragraph 51 is allowed (Issue 2 or Issue 5).

(36) The outcome is:

Unlawful tax paid:	£329,845.40

(37) The appeal against the closure notice dated 15 April 2020 is allowed.

(38) The claim for WHT in the return in respect of non EU/EEA income and the claim made on 31 March 2010 are valid claims for DTR within the period in s 806(1) ICTA in respect of WHT and ULT (Issues 3, 5 and 8).

(39) The outcome is:

Unlawful tax paid:	£329,845.40
EUFT generated in the period:	-£562,353

(40) The DTR claim dated 12 October 2016 is valid and in time (Issues 6 and 8). The outcome replicates the outcome of the appeal against the closure notice.

(41) It is directed that the enquiry, commenced by notice of 21 October 2016, be closed within 60 days.

(42) Should HMRC seek permission to appeal against this decision and direction within that period the direction is stayed until the later of 60 days following:

(a) the determination of that application,

(b) any renewed application for permission to the Upper Tribunal or

(c) any dismissal of the appeal should permission be granted, subject in any case to any direction by the Upper Tribunal.

Accounting Period ending 31 October 2007

(43) The appeal is allowed.

(44) The amendment made on 28 September 2009 was a claim under Paragraph 51 (Issue 2) or a claim for DTR for WHT and ULT within the period in s 806(1) ICTA (Issue 5), or in the further alternative both the claim for WHT in the return in respect of non EU/EEA income (Issue 3) and the claim made on 31 March 2010 (Issue 5) were also valid claims for DTR within the period in s806(1) ICTA in respect of WHT and ULT.

(45) The outcome is:

Unlawful tax paid:	£186,752.65
EUFT generated in the period:	-£390,267

(46) The DTR claim dated 12 October 2016 is valid and in time (Issues 6 and 8) to the same effect.

(47) It is directed that the enquiry, commenced by notice of 21 October 2016, be closed within 60 days.

(48) Should HMRC seek permission to appeal against this decision and direction within that period the direction is stayed until the later of 60 days following:

(a) the determination of that application,

(b) any renewed application for permission to the Upper Tribunal or

(c) any dismissal of the appeal should permission be granted, subject in any case to any direction by the Upper Tribunal.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

232. 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.

JOHN BROOKS
TRIBUNAL JUDGE

Release date: 08 DECEMBER 2021