[2022] UKFTT 00095 (TC)

TC 08425/P

VAT – claim for repayment of VAT wrongly paid – whether HMRC can rely upon s80(3) VATA defence against a public body - yes – whether Appellant would be 'unjustly enriched' - yes – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2018/03398

BETWEEN

THE MAYOR'S OFFICE FOR POLICING AND CRIME **Appellant**

-and-

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

TRIBUNAL: JUDGE GERAINT WILLIAMS

The Tribunal determined the appeal on 9 March 2022 without a hearing under the provisions of Rule 29 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. Both parties consented to the appeal being determined in this way and the Tribunal considered that it was in the interests of justice to do so.

The Tribunal decided the appeal having first read the Notice of Appeal dated 14 May 2018 (with enclosures), HMRC's Amended Statement of Case dated 25 July 2019 (original dated 21 June 2019), witness statement of Mr Ian Percival dated 6 December 2019 (with exhibits), two submissions on behalf of the Appellant, the first, undated but served on 2 July 2020 and, the second, dated 23 July 2020, the submissions on behalf of the Respondents dated 16 July 2020, together with the other documents contained in an e-bundle and referred to in the main body of this Decision.

REPRESENTATION

Mr Dario Garcia, of Mishcon de Reya, for the Appellant.
Mr Peter Mantle, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs for the Respondents.

DECISION

INTRODUCTION

1. This appeal concerns whether the Respondents ("HMRC") can rely on the unjust enrichment defence in s 80(3) Value Added Tax Act 1994 ("VATA") in relation to a claim (an overpayment of VAT) by the Appellant, The Mayor's Office for Policing and Crime ("MOPAC"). MOPAC, a public body, contends that it would not be enriched because any amount repaid would remain for the benefit of the public.

2. MOPAC appealed under s 83(1)(t) Value Added Tax Act 1994 ("VATA") against the decision of HMRC dated 12 April 2018 denying MOPAC's four claims made under s 80 VATA in the period 1 September 2008 to 28 February 2017. MOPAC claimed that approximately £1.7m was paid by MOPAC to HMRC on a mistaken understanding that this was VAT due to HMRC. The four claims relate to the sale of privately owned vehicles seized by MOPAC under various statutory powers and disposed of for breaking or scrap. HMRC have accepted that when MOPAC sold the seized vehicles no VAT was chargeable on the sales. HMRC refused the four claims on the basis that crediting MOPAC under s 80(1) would unjustly enrich MOPAC and HMRC have a defence to the claims under s 80(3). It is MOPAC's case that repayment would not enrich or unjustly enrich it and therefore the s 80(3) defence is not available to HMRC.

BACKGROUND TO THE APPEAL

3. The following claims ("the Claims") were submitted to HMRC by MOPAC for VAT overpaid on the disposal of seized vehicles at auction and for breaking and scrap:

Date of claim	Period	Amount of VAT overpaid
31 August 2012	Sept 08 – Jan 2012	£1,390,494.63
6 August 2015	Feb 12 – Mar 16	£1,763,498.00
12 May 2016	Apr 15 – Mar 16	£490,568.00
29 March 2017	Apr 16 – Feb 17	£498,521.47

4. On 12 April 2018 HMRC wrote to MOPAC ("the Decision") and confirmed that HMRC accepted the auction element of the Claims as it did not believe that the VAT was passed on as the successful purchasers were likely to have been individual members of the public and not VAT registered. The claims for VAT overpaid on the disposal for breaking and scrap were rejected on the basis that "100% of MOPAC 'scrap disposal' customers are VAT registered and able to recover the VAT levied on the supplies in full" and that repayment of the 'scrap element' of the Claims would unjustly enrich MOPAC.

5. MOPAC did not seek a statutory review of the Decision. On 14 May 2018 MOPAC filed a Notice of Appeal. The Notice of Appeal contained, at paragraph 16, an application for an extension of time of two days to submit its appeal as the expiration of the 30-day deadline for MOPAC to make an appeal to the Tribunal was 12 May 2018.

6. On 13 December 2018 MOPAC made an application to the Tribunal for a direction that its Grounds of Appeal be extended by addition of the following:

> "Further or in the alternative, the Appellant's case is that in substance and reality the repayment of VAT at all times remains for the benefit of the public as a body. There is neither impoverishment nor enrichment."

HMRC did not object to MOPAC's application to amend its Grounds of Appeal.

7. On 4 June 2019 MOPAC's representatives, Mishcon de Reya, sent a letter via e-mail to the Tribunal and HMRC, and withdrew, pursuant to Rule 17(1)(a) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009, part of its case, namely the grounds advanced in its Notice of Appeal and stated that it would only pursue the Ground of Appeal stated at paragraph 6 above.

8. On 25 July 2019 HMRC, in compliance with the agreed directions, served an Amended Statement of Case addressing the alternative ground. The parties agreed that the appeal was to be determined on the papers and agreed draft directions to that effect which were endorsed by Judge Poole on or about 25 June 2020.

LATE APPEAL APPLICATION

9. MOPAC's Notice of Appeal, filed on 14 May 2018, included at paragraph 16 an application for permission to submit its appeal late as the deadline for MOPAC to make an appeal to the Tribunal was 12 May 2018 (Saturday). MOPAC confirmed that it had corresponded with HMRC on 13 May 2018 (Sunday) in order to request a short extension of time until 31 May 2018 to file and serve an appeal. Unsurprisingly, no response was provided by HMRC on 13 May 2018 and, as it was unsure whether the appeal was being made in time, MOPAC filed the appeal on 14 May 2018 to avoid any further delay. MOPAC confirmed at paragraph 16 that:

> "In light of this, the Appellant requests that the Tribunal allows this appeal to be made on this date, despite potentially being made two days after the 30 day deadline. The Appellant has made the appeal on the first working day thereafter and HMRC will suffer no prejudice in respect of this limited delay."

10. HMRC in their Amended Statement of Case dated 25 July 2019 confirmed at [8]:

> "A notice of appeal, appealing the Decision, was filed on behalf of MOPAC dated 14 May 2018 ('The Notice of Appeal'). The Notice of Appeal was filed more than 30 days after the date of the Decision letter. HMRC accept that, in all the circumstances, this appeal should be entertained, and that the extension of time requested at paragraph 16 of the Notice of Appeal should be granted."

11. I considered the circumstances that lead to the appeal being filed two days late in light of the relevant case law, in particular *Martland v HMRC* [2018] UKUT 0178 (TCC) and *HMRC v Katib* [2019] UKUT 0189 (TCC), and HMRC's agreement that the appeal should be admitted late. Having considered all the relevant factors I decided to give MOPAC permission to make a late appeal and allowed the application.

THE EVIDENCE

12. The Tribunal was provided with the following evidence:

(1) Witness statement of Mr Ian Percival, Director of Finance, Metropolitan Police Service. Exhibited to the witness statement was Exhibit IP 1 – Home Office: Police Funding for England and Wales 2015-2020 dated July 2019 and Exhibit IP 2 – Metropolitan Police Service Business Plan 2019-2022 (undated);

(2) Framework Agreement between (1) Metropolitan Police Authority and (2) A1 Wokingham Car Spares and Metal recycling dated 7 September 2011;

(3) Metropolitan Police Service, Appendix 2: "Specification – the Recycling, Breaking and Scrapping of Vehicles from MOPAC Car Pounds" dated 2014;

(4) Framework Agreement for the provision of vehicle disposal concession services between (1) MOPAC and (2) MotorHog Ltd. dated 2015; and

(5) Framework Agreement for the provision of vehicle disposal concession services between (1) MOPAC and (2) Raw2K Ltd. dated 2015.

THE FACTS

Agreed facts

13. The following facts were agreed:

(1) During the Period, MOPAC seized privately owned vehicles under various powers in legislation, identified by MOPAC as the Road Traffic Regulations Act 1984, the Removal and Disposal of Vehicles Regulations 1986, the Road Traffic Act 1988, the Police Reform Act 2002, the Powers of Criminal Courts (Sentencing) Act 2000 (in tandem with the Police Property Act 1897) and the Police and Criminal Evidence Act 1984 (together "the Vehicle Seizure Legislation"). When MOPAC disposed of vehicles seized pursuant to those powers, MOPAC operated under a special legal regime and did not carry-on business within the meaning of s 4(1) VATA.

(2) MOPAC used vehicle recovery operators to undertake all statutory removals and provide secure storage facilities. Whichever of the relevant powers applied, there was a statutory process that had to be followed by MOPAC before the vehicle could be released back to its owner/driver. That process involved the payment of a statutory fee.

(3) In some cases, where the statutory fee was not paid, MOPAC authorised the disposal of the vehicle in satisfaction of the statutory fee that was payable. In some of those cases the vehicle was destroyed and a scrap value realised by MOPAC.

(4) The proceeds received from the disposal of the vehicles were no more than the realisation of a statutory fee that was payable by the owner of the vehicle to MOPAC.

(5) During the Period, MOPAC entered into contracts with a small number of companies ("the Scrap Companies") under which the Scrap Companies agreed to provide breaking and scrapping services to MOPAC in relation to seized vehicles. Those contracts included provisions under which the Scrap Companies agreed to pay MOPAC in return for the right to dispose of components derived and scrap produced when the seized vehicles were broken and scrapped by the Scrap Companies.

(6) All of the Scrap Companies were registered for VAT in the United Kingdom. VAT was added once the 'price' for the scrap sales was determined in accordance with the contract.

(7) MOPAC accounted to HMRC for the relevant overpaid amounts by way of output tax. MOPAC passed on the burden of the amounts wrongly accounted for as output tax to the Scrap Companies in the price of the relevant supplies. The Scrap Companies recovered as input tax the amounts accounted for by MOPAC as output tax. The Scrap Companies have not suffered any VAT expense or burden.

(8) HMRC have not assessed the Scrap Companies to recover the relevant amounts nor do they have any intention to do so.

Quantum of Claims not agreed

14. HMRC have not accepted the quantum of the Claims, in the event that MOPAC's appeal succeeds it is anticipated that quantum can be agreed between the parties.

Mr Percival

15. HMRC accepted without challenge the witness evidence of Mr Percival. I found Mr Percival's evidence to be of limited assistance. Mr Percival's evidence, in so far as is relevant

to the determination of this appeal and relied upon by MOPAC in support of its submissions, is as follows:

(1) The Home Office is responsible for the 43 territorial police forces of England and Wales, each of which is governed by a local policing body (MOPAC for the Metropolitan Police Service. There is no national police force in the UK. Arrangements for police funding are complicated and have changed over time.

(2) Government funding for policing is set at spending reviews with details set out annually. The majority of Government funding for police forces in England and Wales is provided by the Home Office and is agreed by the UK Parliament on an annual basis through the Appropriations Act. Each year the Home Office publishes a Provisional Police Grant Report which contains grant funding allocations to be paid out under the Police Act 1996. Following consultation, the Final Police Grant Report is published and voted on by the UK Parliament. Published alongside the Police Grant Report is a Written Ministerial Statement which includes details of other elements of policing funding, notably for the MPS, this includes elements such as counter-terrorism police funding. Collectively, these are often referred to as the police funding settlement.

(3) The Metropolitan Police Service ("MPS") is responsible for policing in the 32 London boroughs, plays a central role in the delivery of National Counter Terrorism agenda and responsible for protection commands such as Royalty, Parliamentary, Diplomatic and policing national infrastructure (e.g. airports) and events (e.g. national sporting venues and protests).

(4) The exhibited reports confirm that the overwhelming source of MOPAC's funding comes from central government sources (between 73 to 77 per cent from 2015 onwards), funding from local authorities via the Council Tax Precept is small in comparison.

(5) The Police Reform and Social Responsibility Act 2011 ("PRSRA") established a Police and Crime Commissioner ("PCC") for each police force area across England and Wales. In London, the elected Mayor is the equivalent of the PCC and is responsible for the totality of policing in the capital (outside of the City of London).

(6) The corporate structure of London based policing involves four bodies:

(i) The Greater London Authority ("GLA"). Created by the Greater London Authority Act 1999 ("GLA 1999"), the GLA is a strategic regional authority and a body corporate. It consists of two political branches: the executive Mayoralty and the 25-member London Assembly, which serves as a means of checks and balances on the former. The Mayor and Assembly members are both elected every four years.

(ii) The London Assembly ("LA"). The LA is a 25-member elected body, part of the GLA, that scrutinises the activities of the Mayor of London and has the power, with a two-thirds majority, to amend the Mayor's annual budget and to reject the Mayor's draft statutory strategies.

(iii) The Mayor's Office for Policing and Crime (MOPAC). MOPAC was established by the PRSRA and is a corporation sole. It is a functional body within the meaning of the GLA 1999.

(iv) The Commissioner of Police of the Metropolis ("the Commissioner"). The Commissioner is a corporation sole and directs the Metropolitan Police Service.

RELEVANT LEGISLATION

16. All references are to VATA unless stated.

> 24 Input tax and output tax
>
> (1) Subject to the following provisions of this section 'input tax', in relation to a taxable person means the following tax, that is to say –
>
> (a) VAT on the supply to him of goods …
>
> 26 Input tax allowable under section 25
>
> (1) The amount of input tax for which a taxable person is entitled to credit at the end of any period shall be so much of the input tax for the period (that is input tax on supplies, acquisitions and importations in the period) as is allowable by or under regulations as being attributable to supplies within subsection (2) below.
>
> (2) The supplies within this section are the following supplies made or to be made by the taxable person in the course or furtherance of a business –
>
> (a) taxable supplies; …
>
> 80 Credit for, or repayment of, overstated or overpaid VAT
>
> "(1) Where a person—
>
> (a) has accounted to the Commissioners for VAT for a prescribed accounting period (whenever ended), and
>
> (b) in doing so, has brought into account as output tax an amount that was not output tax due,
>
> the Commissioners shall be liable to credit the person with that amount.
>
> …
>
> (2A) Where—
>
> (a) as a result of a claim under this section by virtue of subsection (1) or (1A) above an amount falls to be credited to a person, and
>
> (b) after setting any sums against it under or by virtue of this Act, some or all of that amount remains to his credit,
>
> the Commissioners shall be liable to pay (or repay) to him so much of that amount as so remains.
>
> (3) It shall be a defence, in relation to a claim under this section by virtue of subsection (1) or (1A) above, that the crediting of an amount would unjustly enrich the claimant.
>
> (3A) Subsection (3B) below applies for the purposes of subsection (3) above
>
> where—
>
> (a) an amount would (apart from subsection (3) above) fall to be credited under subsection (1) or (1A) above to any person ("the taxpayer"), and
>
> (b) the whole or a part of the amount brought into account as mentioned in paragraph (b) of that subsection has, for practical purposes, been borne by a person other than the taxpayer.
>
> (3B) Where, in a case to which this subsection applies, loss or damage has been or may be incurred by the taxpayer as a result of mistaken assumptions made in his case about the operation of any VAT provisions, that loss or

damage shall be disregarded, except to the extent of the quantified amount, in the making of any determination—

(a) of whether or to what extent the crediting of an amount to the taxpayer would enrich him; or

(b) of whether or to what extent any enrichment of the taxpayer would be unjust.

(3C) In subsection (3B) above—

'the quantified amount' means the amount (if any) which is shown by the taxpayer to constitute the amount that would appropriately compensate him for loss or damage shown by him to have resulted, for any business carried on by him, from the making of the mistaken assumptions; and

'VAT provisions' means the provisions of— any enactment, subordinate legislation or EU legislation (whether or not still in force) which relates to VAT or to any matter connected with VAT; or any notice published by the Commissioners under or for the purposes of any such enactment or subordinate legislation.

(4)

…

(7) Except as provided by this section and paragraph 16I of Schedule 3B and paragraph 29 of Scheduler 3BA, the Commissioners shall not be liable to credit or repay any amount accounted for or paid to them by way of VAT that was not VAT due to them.

S 80A Arrangements for reimbursing customers

(1) The Commissioners may by regulations make provision for reimbursement arrangements made by any person to be disregarded for the purposes of Section 80(3) except where the arrangements—

(a) contain such provision as may be required by the regulations; and

(b) are supported by such undertakings to comply with the provisions of the arrangements as may be required by the regulations to be given to the Commissioners.

PARTIES' SUBMISSIONS

17. All statutory references are to VATA unless otherwise stated. Mr Garcia's submissions on behalf of MOPAC are summarised as follows:

(1) The appeal is a dispute between two emanations of the UK Government, each a proxy for the same entity – the UK body public. MOPAC has a claim to repayment of the £1.7m (approximately) as a matter of principle and therefore it has a right to repayment of the monies mistakenly paid.

(2) Money movements ('payments') between HMRC and MOPAC are a mere reallocation within that body public resulting in neither net enrichment nor net expense since there is no more than an internal circulation of the £1.7m. The payment by HMRC to MOPAC, each being a proxy for the body public, represents both an equal expense and an enrichment to the body public without any marginal or net effect or change in position of the body public.

(3) The strict separation of the repayment right in s 80(1) and the unjust enrichment defence in s 80(3) is critically important - assertion of the right to repayment does not

engage any question or consideration of enrichment or unjust enrichment. Allocation within the body public can be presumed to assume the correct functioning of the VAT system which in this case had malfunctioned, repayment to MOPAC cures the malfunction. The assertion of the unjust enrichment defence by HMRC does not cure the malfunction of the VAT system and so does not reinstate the assumed basis for allocation within the body public.

(4) Section 80 is a national law measure closely analogous to the common law remedy of restitution which, for VAT purposes, is a substitute and effectively a codification of the common law remedy. Domestic UK authority on unjust enrichment in the law of restitution remains binding and may only be departed from if a result contrary to EU law would result from its application. That is not the position here and no departure is required. MOPAC relies upon two authorities in support of its submissions - *HMRC v Investment Trust Companies* [2017] UKSC 29 ("*ITC*") and *Baines & Ernst Limited v HMRC* [2006] EWCA Civ 1040 ("*Baines*").

18. Mr Mantle's submissions on behalf of HMRC are summarised as follows:

(1) Whilst both bodies are governed by public law, MOPAC and HMRC are not the same person as a matter of UK law generally or for the purposes of the PVD or VATA in general or s 80 and s80(3) in particular. Whatever is meant by 'body public', it is a concept unrecognised in both the PVD and VATA.

(2) MOPAC, with its s 80 claims refused, is not "out of pocket". MOPAC has passed on the burden of the overpaid VAT in full. If MOPAC's s 80 claims were to be paid it would be unjustly enriched.

(3) Section 80 and s 80(3) treat all claims the same whether they are made by bodies governed by public law or any other person and the s 80(3) defence applies in the same way to all claimants. HMRC's position is that 'passing on' and 'no consequential loss' are the only requirements of the s 80(3) defence and therefore HMRC have a complete defence to MOPAC's claim.

(4) The two authorities relied upon by MOPAC do not support its submissions and, to an important extent, support HMRC's submissions.

DISCUSSION

19. I have considered the issues in this appeal in the same order that I have summarised Mr Garcia's submissions above.

'body public'

20. Mr Garcia submitted that HMRC and MOPAC are both proxies for the same entity, the general public as a body - the 'body public'. Therefore, the payment of the Claims by HMRC to MOPAC both represents an equal expense and an enrichment to the 'body public' without any marginal or net effect or change in the position of the 'body public'. When the claim is considered at the 'body public' level the question of unjust enrichment does not arise. Mr Mantle submitted that MOPAC and HMRC are different, separate persons, including for the purposes of VATA and s 80 generally and s 80(3) in particular. Whatever is meant by the term 'body public' it is not a person, neither a legal person nor a natural person, nor is it a concept recognised in the PVD or VATA. MOPAC's proposition is, when analysed, no more than dressing up the fact that both MOPAC and HMRC are separate bodies governed by public law both established by statute in the UK. That fact has no consequences for s 80 or s 80(3).

21. Mr Garcia, in his written reply to HMRC's written submissions, confirmed that the public, as a conceptual body, does not exist only in a world of MOPAC's own invention and

relied upon the chapter heading in the PVD immediately after Article 131: "Chapter 2 Exemptions for certain activities in the public interest".

22. I accept Mr Mantle's submission that the 'body public' is not a concept recognised in the PVD or VATA. It was common ground between the parties that HMRC and MOPAC are distinct and separate legal persons, including for the purposes of VATA. Both are bodies governed by public law, established by statute (see Mr Percival's evidence at paragraph 15(6)(iii) above, s 3 PRSRA and s 1 and s 5 Commissioners for HM Revenue and Customs Act 2005 ("CRACA") with different public functions. It was also common ground that both HMRC and MOPAC carry out their public functions in the public interest. It was not disputed that both the PVD and VATA exempt from VAT certain identified activities in the public interest. The OED (3rd Edition) defines public interest as "*the benefit or advantage of the community as a whole; the public good*." However, the concept of the 'public as a body' asserted by Mr Garcia is an entirely different concept to "the public interest" which is a concept recognised in the PVD and VATA.

23. Section 33 VATA provides for "Refunds of VAT in certain cases" and, at s 33(3)(f), includes MOPAC in the list of bodies to which s 33 applies.

24. If Mr Garcia's submission were correct, there would be no requirement to explicitly identify MOPAC as a body to which s 33 applies and the various provisions of VATA differentiating between public bodies, Government departments and other bodies governed by public law would be otiose.

25. I accept Mr Mantle's submission that MOPAC and HMRC and the other identified bodies governed by public law are, for the purposes of VATA, treated as separate and distinct bodies and not as indistinct or undifferentiated "emanations of the State". Similarly, s 80 (considered below) does not distinguish between bodies governed by public law and other persons.

Proxy for the UK public

26. Mr Garcia submitted that HMRC and MOPAC are each a proxy for the UK public as a body, any payment between HMRC and MOPAC is a mere reallocation within the public as a body with the result that there is neither enrichment nor expense. Mr Mantle submitted that neither MOPAC nor HMRC are a proxy for the public as a body. I do not accept Mr Garcia's submission. Proxy is defined by the OED (3rd Edition) as "*3 a.- a person appointed or authorised to act on behalf of another; an attorney, a representative; an agent; a substitute*". As stated above, MOPAC and HMRC are both separate and distinct bodies governed by public law, established by statute with different public functions The appeal is made on the basis that MOPAC is the sole claimant and HMRC are the potential payer. In the event that the appeal succeeds the repayment of £1.7m will be paid to MOPAC, the monies will belong to MOPAC to use in accordance with its statutory functions and powers and it will be under no obligation, as one would expect of a proxy, to pay the monies to any other body or person. I cannot see how either MOPAC or HMRC could be said to be a "proxy" in the ordinary sense for the UK public as a body.

Reallocation within the 'body public' results in neither enrichment nor expense

27. Mr Garcia submitted that any payment between HMRC and MOPAC results in neither enrichment nor expense as the monies circulate and are merely reallocated within the same entity – the 'body public' - for and in place of which each of MOPAC and HMRC stand and represent. In simple terms, the 'body public' retains use/consumption of £1.7 million despite its reallocation. The precise form of the benefit retained and reallocated is not relevant, i.e. reallocation from one type of expenditure (for example defence, road building etc) to another (in this case policing) leaves the position of the body public unaltered in net terms. Mr Mantle submitted that, in essence MOPAC, seeks to persuade the Tribunal that it makes no difference

whether money is available to the UK Government to spend or allocate or if it is spent by a particular body governed by public law, MOPAC, in discharge of its statutory functions. I do not accept Mr Garcia's submission.

28. Mr Garcia relied upon Mr Percival's evidence to support his submission that any payment and expense should be determined at central Government level. Mr Percival's unchallenged evidence confirmed that the majority of MOPAC's funding was provided by and approved by central Government and, in so far as is relevant, additionally carries out national functions, see paragraph 15(3) above. Whilst I note that Mr Percival's evidence at paragraph 15(1) above confirmed that MOPAC is a "local policing body"; I do not consider that anything turns on that point. Mr Garcia principally relied upon Mr Percival's accepted evidence to confirm that the majority of MOPAC's funding is provided from central Government. Whilst it is accepted that MOPAC is largely funded by central Government, I do not accept that that position supports Mr Garcia's submission that "the monies are merely reallocated" and "precise form of the benefit retained and reallocated is not relevant". Mr Percival's evidence stated:

> "11. … arrangements for police funding are complicated and have changed over time.
>
> 12. Government funding for policing is set at spending reviews with details set out annually. The majority of Government funding for police forces in England and Wales is provided by the Home Office and is agreed by the UK Parliament on an annual basis through the Appropriations [sic] Act. Each year the Home Office publishes a Provisional Police Grant Report which contains grant funding allocations to be paid out under the Police Act 1996. Following consultation, the Final Police Grant Report is published and voted on by the UK Parliament. Published alongside the Police Grant Report is a Written Ministerial Statement which includes details of other elements of policing funding, notably for the MPS, this includes elements such as counter-terrorism police funding. Collectively, these are often referred to as the police funding settlement."

29. Mr Percival's evidence confirms, if confirmation were required, that it is for Parliament to authorise expenditure requested in spending estimates and allow the Treasury, in accordance with the Appropriation Act, to issue funds out of the Consolidated Fund to the appropriate department or body, in this case MOPAC. Monies may not be spent for purposes other than for the purpose for which it is appropriated and unspent monies returned to the Consolidated Fund. HMRC are under a statutory obligation to pay all monies received into the Consolidated Fund which is the equivalent of the UK Government's current back account held at the Bank of England administered by the Treasury. Section 44 CRCA provides:

> "44 Payment into Consolidated Fund
>
> (1) The Commissioners shall pay money received in the exercise of their functions into the Consolidated Fund—
>
> (a) at such times and in such manner as the Treasury directs,
>
> (b) with the exception of receipts specified in subsection (2), and
>
> (c) after deduction of the disbursements specified in subsection (3)."

30. In my judgement, it is apparent that if HMRC were required to pay £1.7m to MOPAC, MOPAC would receive an additionally £1.7m and HMRC would have £1.7m less to pay into the Consolidated Fund. It is clear that, contrary to Mr Garcia's submission, the "precise form of the benefit retained and reallocated" is relevant and it is a matter for the UK Government to determine, subject to any necessary approvals by Parliament, how the monies as spent.

Section 80

Codification of common law remedy of restitution

31. Mr Garcia submitted that s 80 is a national law measure closely analogous to the common law remedy of restitution. For VAT purposes, s 80 is a substitute for the common law remedy and effectively a codification of the common law remedy. Section 80 is not an EU law derived regime imported into UK legislation, therefore domestic UK authority on unjust enrichment in the law of restitution remains binding and should only be departed from if a result contrary to EU law would result from its application. Mr Garcia relied upon [39] of *ITC* which confirmed that the "claim to recover money at common law is made as a matter of right". The application of the first two of the four critical questions posed at [24] in *ITC* results in an internal circulation/reallocation of £1.7m and the question of unjust enrichment does not arise.

32. Mr Mantle submitted that s 80 is a bespoke statutory remedy and unlike the established causes of action for restitution it does not depend on establishing a mistake of fact or law. For a claim to be made under s 80(1) all that is required is that the statutory conditions in s 80(1)(a) and (b) are met. It is plainly distinct and different from common law claims for restitution, s 80(7) expressly excludes common law claims for restitution of amounts of overpaid VAT against HMRC. In any event, *ITC* does not support Mr Garcia's submissions. I accept Mr Mantle's submissions.

33. In my view, *ITC* conclusively deals with Mr Garcia's main submissions that s 80 was a codification of the common law remedy of restitution. At [77], Lord Reed stated:

> "It is common ground that, for persons who have accounted to the Commissioners for VAT that was not due, s 80 and the associated regulations provide a code for the recovery of VAT which is exhaustive and excludes other remedies such as a common law claim based on unjust enrichment."

The parties' joint position was accepted without reservation by Lord Reed.

34. At [87], Lord Reed further stated:

> "More fundamentally, the determining factor in the present case is that the scheme created by s 80 is inconsistent with the existence of a concurrent non-statutory liability on the part of the Commissioners to make restitution to consumers. In the absence of s 80(7), one would therefore conclude that s 80 impliedly excluded such liability (assuming that it might otherwise exist). Given the existence of an express exclusion in s 80(7) which is capable of covering such liability, it is unnecessary to rely on implication: one can construe s 80(7) as having the same exclusionary effect."

35. In my judgement, it is clear that *ITC* does not provide any support for Mr Garcia's submissions that s 80 is a statutory codification of the English law of restitution, indeed, the decision clearly contradicts the submissions. Furthermore, it did not deal with claims by public bodies and consequently did not consider proxy in the context of public bodies.

Section 80(3) Unjust Enrichment

36. Mr Garcia relied upon the Court of Appeal decision in *Baines* in support of his submission that the statutory s 80(3) unjust enrichment defence is a UK national law defence and that domestic laws regarding repayment are not supplanted or replaced with or by an EU law set of rules. EU law simply sets out criteria for evaluation of national rules, in the case of s 80 and restitution. Therefore, in this appeal the Tribunal need look no further than national law. The Court paid special attention to the EU law requirements that national rules should allow account to be taken of collateral loss or damage, a requirement now provided for in s 80(3A), 80(3B) and 80(3C) providing for this as common law restitution would do. Section 80(3), EU law and the common law all require the same approach – that approach requires a

comprehensive and complete financial enquiry on the basis of substance and economic reality not just passing on and consequential loss. Mr Mantle submitted that the facts of this appeal are very different from those in *Baines* as Baines & Ernst ("BE)" was not a body governed by public law nor did the proxy issue arise. The focus in *Baines* was on passing on, not collateral economic damage, passing on has been admitted by MOPAC in this appeal. *Baines* does not provide any support for MOPAC's proposition that s 80(3) applies differently to bodies governed by public law nor support the proposition that the Tribunal need look no further than national law or the common law of restitution.

Look no further than national law

37. Mr Garcia's submission was that whilst *Baines* provided an analysis of what EU law permitted a Member State to do in its own domestic law regarding repayment, it was clear that national rules and law were not supplanted by or replaced with an EU law set of rules. Mr Mantle submitted that whilst MOPAC is correct that the statutory unjust enrichment defence is a UK national law defence, it is clear from *Baines* and the decision of Moses J in *Marks and Spencer plc v CCE* [1999] STC 205 ("*M&S*") the UK defence of unjust enrichment is dependent on EU law and the jurisprudence of the CJEU and not English common law causes of action based on unjust enrichment. I agree with Mr Mantle.

38. Moses J in *M&S* (at pages 236 to 237) stated:

> "There is no definition of the concept of 'unjust enrichment' within the 1994 Act. But it is accepted that the jurisprudence of the Court of Justice in relation to the concept of unjust enrichment should inform decisions relating to the defence in our domestic law. As the Lord President (Hope) remarked in *Customs and Excise Comrs v McMaster Stores (Scotland) Ltd* (in receivership) [1995] STC 846 at 853, the origins of the concept in respect of the repayment of overpaid indirect tax under Community law provide a basis for reference to the jurisprudence of the Court of Justice."

39. Lloyd LJ, who gave the single judgment in *Baines,* stated:

> "6. Most VAT law is derived from one or more European Directives, but that is not true of the unjust enrichment defence. Nor, on the other hand, is it a purely domestic law concept. It is sanctioned by decisions of the European Court of Justice, albeit that these decisions have not, for the most part, involved VAT itself."

40. At [12], having exclusively considered and applied the case law of the CJEU in order to interpret s 80(3), he further stated:

> "12. From the cases mentioned above, and others relied on in argument before us, the propositions most relevant to this case seem to me to be these:
>
> i) A taxpayer who has paid tax which was not due has a primary right to be repaid the amount of that tax.
>
> ii) Community law permits a Member State, by way of exception, to limit the right of repayment if the whole burden of the tax has been borne by someone other than the taxpayer, and the repayment would constitute unjust enrichment of the latter. If part of the burden has been borne by the taxpayer, that part is repayable.
>
> iii) The burden of proof lies on the Member State, and no presumptions are to be applied, including any assumption that because the tax has been included in the price, it has been borne by the customer."

Passing on and no consequential loss

41. Mr Garcia submitted that s 80(3), EU law and the common law all require the same approach – a comprehensive and complete financial enquiry on the basis of substance and economic reality not just passing on and consequential loss. Mr Mantle submitted that the s 80(3) defence of unjust enrichment does have two elements – "passing on" the burden of the charge and "unjust enrichment" resulting from reimbursement. I agree with Mr Mantle.

42. There is no definition of 'unjustly enrich' in s 80 or elsewhere in VATA. *Baines*, relied upon by Mr Garcia, stated at [12ii] (at paragraph 40 above) that the s 80(3) unjust enrichment defence required it to be established that the burden had been passed on and there was no consequential loss. That conclusion was reached following a review of the case law of the CJEU by Lloyd LJ in *Baines* at [8] – [11].

43. It is clear from Lloyd LJ's review of relevant case law of the CJEU that the s 80(3) defence has two elements- passing on and unjust enrichment arising from reimbursement. Mr Garcia relied upon [10] and [11] in *Baines*, which referred to the opinion and judgment in *Weber's Wine World "(WWW"),* in support of his submission that "all the facts and circumstances of an individual case must be considered (i.e. body public, bodies governed by public law: cases are fact sensitive". I do not accept that *WWW* supports that submission, it is clear that when the Opinion of AG FG Jacobs and the Judgment are read as a whole that the sections relied upon by Mr Garcia were only considering passing on and consequential loss.

44. In *ITC* at [81] the Supreme Court confirmed that s80(3) creates a statutory defence of passing on:

> "[81] Under s 80(3), the Commissioners have a statutory defence to a claim under s 80—a claim which, it is agreed, can only be made by a supplier—where crediting the supplier would unjustly enrich him. The possibility of unjust enrichment (in a non-technical sense) arises because the supplier normally recovers from his customers the output tax for which he accounts to the Commissioners. The subsection therefore creates a statutory defence of passing on. Section 80A, and the 1995 Regulations, then create a scheme under which the defence is disapplied where 'reimbursement arrangements' are made with the purpose of ensuring that the payment to the supplier is used to reimburse the consumers who have borne the economic burden of the tax. Sections 80 and 80A, together with the 1995 Regulations, thus create a scheme which enables consumers who have been wrongly charged VAT to obtain reimbursement. The consumers are able to recover the VAT which they were wrongly charged, to the extent that it was remitted by the supplier to the Commissioners, through the medium of the supplier's claim under s 80."

Application of s 80 to MOPAC's claim

45. MOPAC would be unjustly enriched because it passed on the VAT which it wrongly charged to the Scrap Companies who themselves recovered it from HMRC. It follows that if the music stops now, no one is out of pocket but if the music continues and HMRC pay MOPAC then MOPAC will have a gain.

CONCLUSION

For the reasons set out above I dismiss MOPAC's appeal.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

46. 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.

GERAINT WILLIAMS
TRIBUNAL JUDGE

Release date: 11 MARCH 2022