Neutral Citation: [2024] UKFTT 00490 (TC)

Case Number: TC09188

FIRST-TIER TRIBUNAL
TAX CHAMBER

Taylor House London

Appeal reference: LON/2000/0765
LON/2008/2228
LON/2009/0572
TC/2011/03844

VALUE ADDED TAX – claim to additional interest under section 84(8) Value Added Taxes Act 1994 (now repealed) – whether entitlement arises for post 1 April 2009 appeals – no – whether entitlement arises in respect of section 80 VATA claims – yes – application of Emblaze – discretion exercised – appeal allowed in part.

Heard on: 16 and 17 April 2024
Judgment date: 29 May 2024

Before

TRIBUNAL JUDGE AMANDA BROWN KC
MEMBER JULIAN STAFFORD

Between

COLAINGROVE LIMITED

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Mr Kieron Beal KC and Mr Tom Lowenthal of counsel, instructed by Pricewaterhouse Coopers LLP

For the Respondents: Mr Philip Moser KC and Mr Andrew Macnab of counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs

DECISION

INTRODUCTION

1. This matter concerns an application made by Colaingrove Limited (**Appellant**) for an award of interest under section 84(8) Value Added Tax Act 1994 (**VATA**) (**s84(8) or s84(8) Interest**) in respect of sums repaid to the Appellant by HM Revenue and Customs (**HMRC**) following the resolution of a series of matters litigated by the parties over the period 2000 to 2020.

2. The dispute before us is substantially a legal one and we are grateful to both Counsel teams and those instructing them for their detailed skeleton arguments and comprehensive oral submissions. In reaching our decision on this application we have considered everything drawn to our attention by way of submission and the documents referred to. It is, however, inevitable, given the detail of the arguments that not everything in the application is given specific mention in this judgment.

BACKGROUND

3. The Appellant is part of a group of companies supplying leisure services, operating under the Haven and Warner Leisure Hotels brands. During the VAT periods in question, Butlins was also part of this group of companies.

4. The parties were engaged in a series of disputes concerning the VAT treatment of certain of the Appellant's activities as follows:

(1) For VAT prescribed accounting periods 03/87 to 12/11 HMRC considered that supplies of removable contents, when sold together with static caravans, should have been standard rated. The Appellant considered the supplies were zero rated. The matter was finally resolved following various stages of litigation with a partial settlement pursuant to which HMRC made a payment (as recorded in the settlement agreement) of £13.8m together with statutory interest. These sums were repaid on 15 December 2014. (**Contents Dispute**)

(2) For VAT prescribed accounting periods 03/89 to 12/11 HMRC considered that verandas sold with caravans too should be standard rated whereas the Appellant considered them to be zero rated. Again, following litigation HMRC repaid to the Appellant a sum of £2.6m; the payment being made on 7 May 2015. (**Verandas Dispute**)

(3) VAT was overpaid in VAT prescribed accounting periods 06/73 to 09/08 in connection with bingo participation fees. In the relevant periods HMRC considered bingo participation and session fees to be standard rated. However, following litigation conducted by others it was established that such charges were properly exempt from VAT. On 4 May 2010 HMRC repaid £3.4m in respect of VAT overpaid in the period 03/75 to 09/08. (**Bingo Dispute**)

(4) VAT was also overpaid in respect of prescribed accounting periods 12/02 to 12/05 in relation to certain gaming machine income. Again, such income had been considered to be subject to VAT at the standard rate when properly it should have been exempt from VAT. That resulted in a repayment of VAT in the sum of £5.6m, such payment being made on 16 November 2020. (**Gaming Dispute**)

5. HMRC accepted that for the full period for which the Appellant had been denied the correct VAT treatment, and had thereby been kept out of the associated funds, interest was due under section 78 VATA (**s78**) i.e. that due to an error on the part of the Commissioners the Appellant had accounted to HMRC for an amount by way of output tax which was not

output tax due from the Appellant and/or had paid assessments to VAT which was not due. The total interest paid by HMRC under s78 is £9,321,655.75 calculated by reference to the period for which HMRC withheld funds properly due to the Appellant and applying the statutory rate for such interest.

6. However, and in consequence of their having bought a series of appeals before initially the VAT and Duties Tribunal (**VDT**) and subsequently to this Tribunal (**FTT**), the Appellant claims it is entitled to invite the Tribunal to direct that additional interest is paid in accordance with s84(8). The Appellant contends that it should be paid £8,244,823.19 in additional interest. That sum has been calculated, by reference to the evidence adduced (and in the main accepted by HMRC), as the margin between the statutory rate paid under s78 and the estimated true cost of borrowing incurred by the Appellant in the period in which it was wrongfully denied the funds by HMRC. The additional interest is not claimed in respect of the full sums repaid and referred to in paragraph 4. above. The Appellant accepts that part of the sum repaid in settlement of the Contents Dispute related to claims which were never appealed and in respect of which no s84(8) Interest entitlement accrues. We understand that certain appeals may also have been excluded from the additional interest claim; Mr Beal did not know why that was the case and indicated it may have been in error. In any event, as they are not included in the application, we do not consider them.

7. HMRC contend that no additional interest is due. In the alternative they contend that the maximum rate at which it should be payable is the conventional rate i.e. Bank of England base rate plus 1%.

8. Attached as Appendix 1 to this judgment is a table of each of the relevant appeals lodged by the Appellant in respect of which the payments referred to in paragraph 4. were made. The Appendix identifies the appeal reference for each of the appeals as originally lodged with the VDT/FTT, the category of dispute, the consolidated appeal reference as appropriate, the nature of the underlying decision (i.e. whether the sums were collected/repayment was withheld by HMRC through the raising of an assessment or denial of a repayment claim), the date of the assessment/claim, date of rejection of any claim, VAT periods concerned, VAT repaid, gross interest claimed, statutory interest paid, and additional interest now claimed.

9. Lines 1 – 20 of Appendix 1 concern the Contents Dispute; 21 – 24 the Verandas Dispute, 25 – 26 the Bingo Dispute and 27 the Gaming Dispute.

10. For the reasons set out below we allow the appeal in part. Attached as Appendix 2 is a table setting out the summarised reason for our decision on an appeal-by-appeal basis (by reference to Appendix 1). The parties are to recalculate the interest due in consequence of our decision.

CHRONOLOGY OF THE APPEALS

Contents Dispute

11. Examination of the chronology of the Contents Dispute demonstrates that it originated in correspondence in at least early 2000 to which reference was then made in a claim made by the Appellant for recovery of sums considered to have been overpaid as output tax. That claim was made on 30 June 2000 and, consistent with the limitation period which applied to VAT output tax overpayment claims made under section 80(1) VATA as it then stood, was limited to the three preceding years i.e. the claim was for periods 06/97 – 09/99. The value of the claim was £2,177,925.16. The claim was rejected on 12 July 2000 "until the underlying liability query" had been resolved. The notice of appeal referred to the decision of 12 July 2000 and appealed on grounds that the decision was "wrong in law … and that the voluntary disclosure [was] properly made and repayable by [HMRC]" (line 17(1) in Appendix 1).

12. It appears that the Appellant began accounting for VAT on the basis that removable contents were zero rated from VAT prescribed accounting period 03/01. This prompted HMRC to assess for the VAT which would have been due on the basis that the supplies were standard rated. The assessments were appealed on the grounds that there was no output tax due on the supplies. It is not clear from the documents which were made available to us whether these early assessments were issued on a protective basis whilst HMRC continued to consider the underlying liability of removeable contents (lines 1 – 4 of Appendix 1).

13. Following the judgment of the CJEU in *Marks & Spencer plc v CEC* C-62/00 which indicated that the Appellant was entitled to make claims for periods earlier than 06/97, further claims to over paid VAT were made in August 2002. These claims were rejected on 23 August 2002 expressly on the basis that the underlying supplies were properly subject to VAT. The appeal was stated to be bought under section 83(t) VATA and against a rejected claim to overpaid VAT. However, the grounds of appeal challenge HMRC's conclusion as to the liability of the supplies (line 17(2) Appendix 1).

14. Further assessments continued to be issued post August 2002. Some assessments were appealed. The grounds of appeal brought into challenge the liability of the supplies in the context of having been assessed (lines 5 – 8 Appendix 1).

15. For some periods it appears that the Appellant did not appeal the assessments when made; but, approximately once per annum, made claims for VAT overpaid in connection with the assessments. Section 80 VATA was amended by section 4(6) Finance (No 2) Act 2005 with effect from 20 July 2005. That amendment had the effect of bifurcating what had been section 80(1) (providing the basis of a claim to overpaid VAT) into provisions which separately provided for claims in respect of output tax over paid/declared on a return (which became subsection (1)) and sums over declared in consequence of an assessment raised by HMRC (subsection (1A)). The terms of the amendment provided that claims submitted on or after 26 May 2005 in respect of sums over declared by way of assessment were treated as submitted pursuant to section 80(1A) VATA. In the present case therefore, as the claims were submitted from 1 July 2005 they were all were treated as submitted pursuant to section 80(1A) VATA. Those claims were rejected, and the rejections appealed. The notice of appeal states such appeals were bought under section 83(b) and (p) VATA. We note that whilst these appeals did represent appeals against HMRC's decision as to the VAT chargeable on a supply (thus within section 83(b)) they cannot have been section 83(p) VATA appeals as the decision appealed is the rejection of the claim to overpayment on the assessments and not the assessments themselves despite the effect of a claim against an overpaid assessment being the same as a challenge to the assessment (lines 9 – 16 Appendix 1).

16. It appears that in or about period 06/06 the Appellant reverted to treating removable contents as standard rated when rendering its VAT returns such that for all periods from 06/06 through to 12/11 claims were made pursuant to section 80(1) VATA which, at the time of those claims, provided for claims in respect of sums bought into account on a VAT return as output tax which was not due. The claims for periods from 06/07 were submitted after 1 April 2009 and were made on the basis that there was no longer a dispute that the supply of some items of removable contents was properly zero rated. When HMRC rejected the claims, they did so on the basis that they were "unable to accept the claim because agreement has yet to be reached on what is a fair and reasonable method of valuing the removable contents within the supply of a caravan". The grounds of appeal used were apparently a cut and paste of previous appeals and did not reflect the basis on which the claim had been rejected and thereby did not reflect the true issue between the parties at that time i.e. that the

basis of apportionment had not been agreed rather they implied a continuing dispute as to liability (lines 18 – 20 Appendix 1).

17. All the appeals relating to the Contents Dispute were either consolidated or joined under Tribunal reference LON/2000/0765 (the first appeal lodged and referred to in paragraph 11. above).

Verandas Dispute

18. The first claim for verandas was made on 17 December 2007 for periods 12/04 to 06/07, it formed part of a contents claim for the same period. The second claim was made on 22 January 2008 for periods 03/89 to 09/04 with an additional claim for periods 12/04 to 06/07. The letters of claim form part of a series of correspondence. As regards the verandas the assertion was that where a veranda is supplied at the same time as the caravan it should be zero rated as a structure adjacent and fixed to a new dwelling. It was however, accepted that the later supply of a veranda would be standard rated. HMRC's position on that assertion was invited.

19. HMRC's response to both claims was dated 23 May 2008. It identified the information considered and communicated: "having considered that documentation and taken legal advice, I have concluded that the zero-rate which applies to caravans under VATA 1994 Schedule 8 Group 9 Item 1 should not be extended to verandas, as they do not form part of the caravan or fall within the scope of what Parliament intended when the zero rate provisions was enacted". It proceeded to provide a fuller explanation of the reason for reaching that conclusion.

20. The notice of appeal identified the letter of 23 May 2008 as the decision appealed and contended that it was wrong in law being based on an incorrect construction of the legislation. The Appellant applied for the appeal to be joined to the earlier contents appeal (lines 21 – 22 Appendix 1).

21. On 21 September 2011, again forming part of additional claims in respect of contents, veranda claims were submitted for periods 09/07 to 06/08. Perhaps understandably given the duration of the dispute, there is no specific narrative of the basis on which the VAT was overpaid. However, the claim was rejected by HMRC on the basis that, in their view, the supply of verandas was subject to VAT at the standard rate. The notice of appeal narrated the nature of claim, basis for refusal and the challenge to HMRC's liability decision as grounds of appeal (line 23 Appendix 1).

22. Further veranda claims were submitted on 30 September 2012 in respect of periods 09/08 to 11/12 and as part of a wider claim including contents. The claim does not explicitly refer to verandas. The claim was rejected on 30 September 2012 on the basis that litigation was ongoing. The substance of the grounds set out in the notice of appeal addressed the question of liability in the context of the identified decision of HMRC to reject the additional claims (line 24 Appendix 1).

23. The Veranda Dispute appeals too were consolidated with the Contents Dispute appeals under VDT reference LON/2000/0765. During the course of the litigation the verandas issue was hived off for separate determination but remained part of the consolidated appeal.

Bingo Dispute

24. The first claim in the Bingo Dispute was submitted on 14 November 2007 for periods 03/75 to 12/02. The claim narrates the legislative analysis at domestic and EU level which it was claimed justified a conclusion that bingo participation fees should be exempt from VAT. The quantum of the claim was extrapolated. Claims were then submitted for period 03/03 on 31 March 2006 and periods 06/03 to 09/05 on 30 June 2006. The letters for these claims

were in identical form. Neither explicitly referenced the basis on which it was asserted that the VAT had been overpaid.

25. All three claims were rejected on 2 October 2008. The explanation given was that HMRC did not agree that the relevant supplies were exempt from VAT. It was this decision which was appealed to the Tribunal and the grounds of appeal provide a full explanation of the basis on which the liability of the bingo supplies should have been exempt (lines 25 and 26 Appendix 1).

Gaming Dispute

26. On 19 October 2005 the Appellant submitted a claim for overpaid VAT on certain gaming machine turnover which domestic law treated as taxable whereas it should have been exempt from VAT. The letter recites the basis on which the claim is predicated by reference to the then disputed liability of the gaming supplies. That claim was for periods 03/04 – 09/05. A second claim was submitted on 9 December 2005 for periods 03/03 – 12/03. The claim followed the same form as the earlier claim with an identical narrative as to the challenge to the VAT liability of the supplies. Further claims were submitted in the same form on 30 June 2006 for periods 03/04 – 12/05. The claims were revised by letter dated 14 November 2007.

27. HMRC rejected the claims by letter dated 2 October 2008 on the basis that the Appellant had failed to show that the gaming machines in question were similar and in competition with machines/gaming which was exempt from VAT. The refusal of the claim was appealed on 17 October 2008 (line 27(1) Appendix 1).

28. However, on 20 April 2011 HMRC wrote to the Appellant confirming that a repayment would be made against the claim but subject to the issue of a recovery assessment raised pursuant to section 80(4A) VATA. That assessment was issued on a "protective" basis such that HMRC informed the Appellant that it would not be enforced against them pending the outcome of continuing litigation (to which the Appellant was not party) and therefore did not require to be paid (unless the Appellant wanted to protect itself from interest accruing on the amount should it ultimately require enforcement). The Appellant appealed it on 15 May 2011 (line 27(2) Appendix 1) and paid the assessments when they were enforced on various dates in 2014.

29. The appeal at line 27(1) was not formally settled or withdrawn.

FINDINGS OF FACT

30. Derived from the chronology above we determine the following facts:

(1) The core and underlying issue in respect of the Contents Dispute appeals at lines 1 – 17 was the liability to VAT of removable contents generally. However, each disputed decision concerned either an assessment or the rejection of a claim to overpaid output tax in identified periods consequent upon the underlying dispute. The appeals were against the disputed decisions and included grounds which concerned the VAT chargeable on the supply.

(2) The Contents Dispute appeals identified at lines 18 – 20 in Appendix 1 also concerned the VAT chargeable on supplies but the principal question was apportioning the price paid for the zero-rated caravan, zero rated removable contents and standard rated removable contents.

(3) All the disputed decisions and associated appeals (save that identified at line 27(2) of Appendix 1) in respect of the Verandas Dispute, Bingo Dispute and Gaming Dispute challenged the VAT chargeable on the underlying supplies in the context of

rejected claims to overpaid VAT. Line 27(2) Appendix 1 is an appeal against a recovery assessment issued as there was an ongoing dispute as to the VAT chargeable on the underlying gaming machine supplies.

31. We were provided with two witness statements from Mr Iain MacMillan, the current Chief Financial Officer of the Appellant. His first witness statement set out his first-hand knowledge of the Appellant's financing for the period from 2018. It also explained a series of investigations and exercises he had carried out. He sought to identify the Appellant's financing strategy and rate of borrowing evidenced by the documents identified. The earliest documents retained by the Appellant and identified in the search dated back to 2000. He also explained and presented an extrapolation exercise he had undertaken to identify a reasonable estimation of the borrowing rates available to the Appellant in the period from 1975 to 1999. By his second statement he confirmed, by reference to the annual statements available, that year on year the Appellant was in a net debt position.

32. HMRC accepted the majority of Mr MacMillan's evidence and cross examination was limited.

33. From the written statement, oral testimony and annexed documents we find the following facts:

(1) Throughout the period from 1975 to 2022 the Appellant operated cash balances which facilitated the running of its business from day to day. The cash balance at 31 December each year was generally strong having completed the peak season and as deposits for the following summer were being collected.

(2) Throughout the period from 2000 there is direct evidence that the Appellant's borrowings were by way of a revolving credit facility (**RCF**) and term loan facilities (**Term Loan**). Whilst there is no direct evidence for the period prior to 2000, by reference to the annual accounts available (all years bar 1994, 1992, 1985, 1983, 1981, 1979, and 1975 were available to us), it is reasonable to conclude that the Appellant was similarly funded throughout the period 1975 - 2022.

(3) The cash balance shown in the annual accounts available for each year 1975 – 2022 as at 31 December each year was smaller than total borrowing from its RCF and Term Loan. Accordingly, it is reasonable to conclude that the Appellant traded consistently in a net debt position throughout the period 1975 - 2022.

(4) There is direct evidence that the Appellant's principal lender from 2000 was Barclays Bank Plc (**Barclays**). From at least 2013 the senior facility with Barclays was syndicated. Mr MacMillan believed that Barclays had been the principal lender from 1975 and was not challenged in that belief; we therefore find that Barclays was the primary lender throughout the period from 1975 - 2022.

(5) The interest rate terms on which the RCF and Term Loan were provided were driven by the base lending rates and the specific attributes of the Appellant. Under the loan agreement extant from 2000 the interest rate for the Term Loan was calculated by reference to London Interbank Offered Rate (**LIBOR**) plus a risk margin with a cap at 3.3% and a collar of 2%.

(6) Mr MacMillan was able to calculate the average interest rate paid under the Term Loan for each year 2000 – 2020 as compared to the average statutory rate for the year. He accepted in cross examination that the rate applicable under the RCF may have been different but on the basis that the RCF is a short term facility principally used for emergency funding it was not a facility which was used as part of the cash flow

forecasting for the business and not, in his view, relevant for determining the cost incurred by the Appellant in consequence of having overpaid VAT to HMRC.

(7) The figures were not challenged by HMRC and we accept them:

Year	Interest rate paid	Average Statutory Rate
2000	8.62	4.90
2001	7.87	4.19
2002	6.94	3.00
2003	6.56	2.67
2004	7.44	3.32
2005	6.22	3.68
2006	5.73	3.32
2007	6.88	4.41
2008	6.67	3.79
2009	3.43	0.21
2010	2.96	0.50
2011	2.96	0.50
2012	2.88	0.50
2013	2.52	0.50
2014	2.49	0.50
2015	2.51	0.50
2016	2.42	0.50
2017	2.29	0.50
2018	2.59	0.50
2019	2.72	0.50
2020	3.41	0.50

(8) Mr MacMillan undertook/caused to have undertaken an extensive search, including a request made of Barclays to locate the relevant facility agreement(s) for earlier periods but was unable to locate them. He therefore undertook an analysis which compared known facility rates to both LIBOR and Bank of England base rate across the period 2000 to 2020 from which he was able to calculate the average margin for that period to each official rate. The average margin to Bank of England base rate was calculated at 2.27%. Mr MacMillan then applied that average margin to known Bank of England base rates in the period 1975 – 1999 (LIBOR was introduced in 1996 and did not therefore represent a basis for extrapolation for earlier periods) to determine a reasonable estimate of the Appellant's borrowing cost in the period 1975 – 1999. Neither the assumptions for, nor the accuracy of, this exercise was challenged by HMRC; we therefore accept that a reasonably inferred interest rate at which the Appellant was likely to have borrowed is as follows:

Year	Bank of England Base Rate	Inferred interest with 2.27% margin
1975	10.76	13.03
1976	11.73	14.00
1977	8.46	10.73
1978	9.14	11.41
1979	13.76	16.03
1980	16.30	18.57
1981	13.16	15.43
1982	11.96	14.23
1983	9.86	12.13
1984	9.67	11.94
1985	12.06	14.33
1986	10.74	13.01
1987	9.60	11.87
1988	9.96	12.23
1989	13.68	15.95
1990	14.65	16.92
1991	11.56	13.83
1992	9.43	11.70
1993	5.90	8.17
1994	5.34	7.61
1995	6.57	8.84
1996	5.89	8.16
1997	6.66	8.82
1998	7.23	9.50
1999	5.35	7.62

(9) During the period in which overpayments had been made to HMRC the sums so overpaid were not available to the Appellant in the running of its business and therefore either directly or indirectly the borrowing requirements of the Appellant were increased as a consequence of the overpayments.

(10) The Contents Dispute was settled by way of a settlement agreement dated 20 November 2014. The terms of that settlement agreement provided that if HMRC did not repay the agreed sum by 11 December 2014 (being 21 days from the date of the agreement) HMRC would be liable to pay simple interest on the sum at 1.5% per annum above the base lending rate from time to time of Barclays Bank Plc.

TRIBUNAL'S POWER TO DIRECT THE PAYMENT OF INTEREST

34. We start by considering our power to direct a payment of additional interest.

35. The FTT was established with effect from 1 April 2009. Prior to that date disputes between HMRC (and prior to 2005 with HM Customs and Excise (**HMCE**)) and taxpayers in connection with VAT were litigated before the VDT.

36. Both the VDT and the FTT have a jurisdiction defined by statute and not a general jurisdiction to determine disputes between taxpayers and HMRC. That jurisdiction is framed by reference to a list of "matters" in respect of which an appeal "shall lie" as prescribed initially in section 40(1) Finance Act 1972 (**FA72**) and subsequently in section 40(1) Value Added Tax Act 1983 (**VAT Act 83**) and latterly section 83 VATA. Under FA72 and VAT Act 83 the statute specifically referenced a decision in respect of the listed matters; section 83 VATA excludes a reference to a "decision" though it remains at least implicit from the list of matters that there must be a decision "with respect to" one of the listed matters. Throughout the period from 1973 to 2011 the list of matters included:

> "the VAT chargeable on the supply of any goods or services" ((c) in FA72 and (b) in VAT Act 83 and VATA)
>
> "the amount of any input tax which may be credited to a person" ((d) in FA 72, (c) in VAT Act 83 and VATA)
>
> "an assessment [to VAT raised pursuant to HMRC's power to assess to the best of their judgment where a taxpayer has failed to render a VAT return, or where a return is incorrect]" ((b) in FA72, (m) in VAT Act 83 and (p) in VATA)"

37. From the implementation of VAT in 1973 through to 31 March 2009 it was a requirement (pursuant initially to section 40(2) FA72 and then section 40(2) VAT Act 83 and finally section 84(2) VATA) that in order for an appeal to be entertained by the VDT a taxpayer was required to have made and paid all VAT returns which were required to be made. This provision was repealed with effect from 1 April 2009.

38. It was a further (and remains a) requirement that no appeal be entertained by either the VDT or the FTT in respect of decisions regarding the VAT chargeable on a supply and assessments (and subsequently a wider class of matters[1]) unless:

> "the amount which the Commissioners have determined as payable has been paid or deposited with them; or on being satisfied that the appellant would otherwise suffer hardship the Commissioners agree or the tribunal decides that it should be entertained notwithstanding that the amount has not been so paid or deposited" (section 40(3) FA72, section 40(3) VAT Act 83 and section 84(3) VATA).

39. In the period 1 April 1973 – 31 March 2009, section 40(4) FA72, section 40(4) VAT Act 83 and s84(8) then all relevantly provided:

> "Where on an appeal under this section it is found:
>
> (a) that the whole or any part of any amount paid or deposited in pursuance of subsection (3) [be that of section 40 FA72, 40 VAT Act 83 or section 84 VATA] above is not due; or
>
> (b) that the whole or part of any [VAT credit] due to the appellant has not been paid

[1] By 2009 an appeal could not be entertained without the payment of amounts determined by HMRC as due by way of penalty or surcharge under sections 59 to 69B, 76 and paragraph 10(1) Schedule 11 VATA and a joint and several liability notice under section 77A VATA.

> so much of that amount as is found not to be due or not to have been paid shall be repaid … with intertest at such rate as the tribunal may determine; …"

40. That provision was repealed with effect from 1 April 2009 and section 85A was inserted into VATA. Until 31 December 2022, section 85A VATA provided for the payment of interest in the same circumstances as had been provided for under s84(8) but the discretion given to the tribunal to set the rate was removed and the rate was fixed by statute (Bank of England base rate minus 1%). Post 1 January 2023 the FTT no longer has the power to award interest but pursuant to section 102 Finance Act 2009 (**FA 09**) where an amount is repayable pursuant to section 85A VATA on a successful appeal there is a mandatory requirement for HMRC to pay interest at the statutory rate. The effect of section 102 FA 09 is therefore to provide for interest to be paid for the full period in which a taxpayer is out of pocket when the taxpayer is required to litigate a dispute leading to repayment in circumstances in which s78 interest may only be payable for part of the period.

41. Despite the repeal of s84(8) it continued to provide a discretion to the FTT to award interest in accordance with the transitional provisions set out in Schedule 3 the Transfer of Tribunal Functions and Revenue and Customs Appeals Order 2009 (**TTFO**). Schedule 3 prescribed the transitional arrangements to be applied to each permutation of situation in which HMRC had issued a decision in respect of which the previous jurisdiction of the VDT (or the General/Special Commissioners) may have been invoked. So far as relevant to the Appellant's application for interest it is to be noted that:

(1) Paragraph 4 concerned decisions of HMRC of a type listed in section 83 VATA which had been made and notified, but which had not yet been appealed to the VDT. The provisions of VATA continued to apply to such decisions subject to the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (**Tribunal Rules**).

(2) Paragraphs 6 and 7 provided for the continuation of proceedings commenced inter alia before the VDT prior to 1 April 2009, again subject to the Tribunal Rules.

(3) Paragraph 9 concerned decisions of the VDT made before 1 April 2009 and provided explicitly for the continued application of s84(8).

42. The scope and application of the TTFO on the question of s84(8) Interest was considered in the matter of *Emblaze Mobility Solutions Ltd v HMRC* [2014] UKFTT 0679 (TC) (***Emblaze***). That case concerned a taxpayer who had been denied repayment of an amount shown on its return as owing to it in consequence of HMRC having denied entitlement to input tax claimed on the return. The decision to deny input tax recovery, and thereby deny repayment of a VAT credit (where input tax credit exceeds output tax due on any particular VAT return) was taken and communicated to the taxpayer before 1 April 2009. However, post 1 April 2009 the Tribunal determined that the taxpayer was entitled to claim the input tax in question and thereby that HMRC had failed to make a repayment on the relevant VAT returns which was due to the taxpayer.

43. On an application for s84(8) Interest the FTT determined that the taxpayer in that case had a contingent/inchoate right to interest which accrued under s84(8) from the point at which HMRC had wrongly refused to accept the input tax claim (i.e. before 1 April 2009). The Tribunal went on to consider whether the repeal of s84(8) carried the consequence that the contingent right to interest was to be denied. The Tribunal considered the provisions of section 16(1) Interpretation Act 1978 (**IA**) which provides that unless a contrary intention appears, where an act is repealed, such repeal does not affect any right or privilege which had accrued under the repealed enactment. The Tribunal concluded that there was nothing within the TTFO which represented an intention contrary to the provisions of section 16 IA and that

therefore the right to invite the Tribunal to exercise a discretion to direct the payment of interest under s84(8) continued beyond the repeal of the provision. Whilst *Emblaze* went on appeal to the Upper Tribunal (**UT**) ([2018] UKUT 373 (TCC) (***Emblaze UT***)) there was no challenge to the Tribunal's conclusion in this regard.

44. However, *Emblaze UT* provides guidance on how the s84(8) discretion is to be exercised. At paragraph 34, the UT cites from the earlier judgment of the High Court in *HMRC v Royal Society for the Prevention of Cruelty to Animals* [2007] EWHC 422 (Ch) (***RSPCA***) in which the Court concluded that in the context of a discretion that provided no guidance on how to it was to be applied, it would be inappropriate to prescribe how the discretion should be exercised. However, the UT observed that a tribunal that applied the principles commonly and commercially applied to compensate a party for being kept out of money which ought to have been paid to him (rather than to compensate for any damage caused) could not readily be criticised. In that regard therefore, whilst the starting position for determining a fair rate might be the conventional rate payable in commercial cases (as per section 35A Supreme Court Act 1981 base rate plus 1%) where a taxpayer could evidence that the borrowing rate available to it in the relevant period was higher than that conventional rate such higher established rate might be appropriate.

45. Continuing at paragraph 35, *Emblaze UT* confirmed the parameters by reference to which the discretion provided for under s84(8) should be exercised which we summarise as follows:

(1) The payment of interest is not punitive and the use to which the paying party may have put the funds is irrelevant;

(2) The additional award will only be simple interest;

(3) The conventional starting point for the award of interest is Bank of England base rate plus 1% (i.e. there will be a margin of 2% from the statutory interest rate latterly payable under s78);

(4) This rate may be increased where, on the evidence, a higher rate represents a just and appropriate rate by reference to the rate at which the taxpayer might have borrowed funds which would otherwise have been available to it had HMRC not wrongly held those funds.

(5) In undertaking the assessment of what is fair compensation we need not undertake a precise and detailed assessment but should consider the general characteristics of the Appellant, but we may also consider evidence of the actual borrowing rate.

46. When determining the appropriate rate of interest, we also note that in *RSPCA* (at paragraph 121) the Court narrates the criteria that HMRC were prepared to consider represented bona fide evidence of a taxpayer having incurred costs exceeding those compensated by s78 interest:

> "(1) the increased borrowing took place and the interest claimed was actually paid by the claimant;
>
> (2) the evidence is from a reputable financial institution from whom a business carrying out normal commercial activities would be expected to be able to borrow money;
>
> (3) the financial institution is entirely independent of the business making the claim for interest;

> (4) the claimant can show not only that it has borrowed at the interest rate claimed, but that the rate is typical for a fully secured loan entered into by a business of that size and turnover, carrying on a normal mainstream commercial activity;
>
> (5) in the event that a business maintains that the effect of the Commissioners' action has been to cause it to enter into borrowing at a higher rate of interest, it will be required to show that the business was solvent before the Commissioners refused credit, i.e. that it was not borrowing on this basis before the Commissioners took action; and
>
> (6) there is clear evidence that the borrowing was used to finance the continuation of the claimant's business activity and that it was in respect of the same business activity in respect of which the claim for a VAT credit had been refused by the Commissioners."

ISSUES IN THE APPLICATION

47. The issues for us to resolve are not matters which appear to have been the subject of previous litigation and principally concern what HMRC contend to be jurisdictional objections to the application of s84(8) in the present case.

48. The first objection: "**Post- April 2009 Objection**" is that the Tribunal has no jurisdiction to award additional interest under s84(8) in respect of a decision taken on or after 1 April 2009 and/or relating to VAT repaid in respect of prescribed accounting periods after that date.

49. By reference to Appendix 1 the Post- April 2009 Objection would exclude interest in respect of lines 18 – 20, 23 – 24 and 27(2). In the case of each of those lines the appealed decision post-dated 1 April 2009. In the case of lines 19 and 24 the appealed decisions also concerned tax paid in respect of prescribed accounting periods after 1 April 2009.

50. The second objection: "**Section 80 Objection**" is that we have no jurisdiction to award s84(8) Interest in respect of sums repaid following litigation of a section 80 VATA claim.

51. By reference to Appendix 1 HMRC contend that the Section 80 Objection would exclude interest in respect of all lines 9 – 27. As explained further at paragraph 112. below, the Appellant contends that even if this objection represents a valid impediment to the payment of s84(8) Interest it does not operate so as to preclude interest in respect of lines 9 – 16.

52. There is no jurisdictional objection with regard to lines 1 – 8. However, HMRC contend that we should not exercise our discretion to pay additional interest. Primarily this is on the basis that statutory interest has been paid to the Appellant in respect of all sums and that payment of those sums represents reasonable redress or an adequate indemnity (**Adequacy**). With regards to the sums paid in respect of the disputes identified at paragraphs 4.(2) (verandas) 4.(3) (bingo) and 4.(4) (gaming machines), HMRC contend that the claim is opportunistic (**Opportunism**).

53. Finally, there is the question of quantum (**Quantum**).

ADEQUACY

54. Adequacy is the only objection raised by HMRC in connection with lines 1 – 8. In addition, however, the Appellant seeks to overcome each of the Post-1 April 2009 and Section 80 Objections by invoking the EU principle of adequate indemnity. It is therefore appropriate to deal with the Adequacy issue first.

EU principle of adequate indemnity

Appellant's submissions

55. The Appellant contends that it had an EU law right to receive an adequate indemnity or reasonable redress for having been kept out of its money over the prolonged period in which the various disputes were litigated. It was further contended that this EU right had accrued well before 31 December 2020 and was therefore protected by virtue of section 16 IA and in accordance with section 22(5) Retained EU Law (Revocation and Reform) Act 2023 and section 28 Finance Act 2024.

56. The Appellant relies on the judgment of the Court of Justice of the European Union (**CJEU**) in *Littlewoods Limited v HMRC* C-591/10 ([2012] STC 1714) (***Littlewoods CJEU***) (paragraphs 24 – 31) and the EU general principles of effectiveness and equivalence to assert that without the additional interest claimed it will not receive an adequate indemnity or reasonable redress for having been kept out of pocket. Mr Beal contended that the Supreme Court judgment in *Littlewoods Limited v HMRC* [2017] UKSC 70 (***Littlewoods SC***) embraced and facilitated the payment of s84(8) Interest where necessary for the purposes of achieving an adequate indemnity. In Mr Beal's submission the conclusion of the Supreme Court only excluded any non-statutory claim to interest (see paragraph 38) of the type claimed by Littlewoods.

57. By reference to *Littlewoods SC* and *RSPCA*, which confirm that only simple interest is payable, we were urged to see that the rate of interest was the only variable capable of ensuring an adequate indemnity for disputes with their origins pre-1 April 2009. Support for this conclusion was garnered from the fact that the judgment of the UT in *Emblaze* post-dated *Littlewoods SC* and confirmed that additional interest was payable in that case.

58. The Appellant contended that to the extent that the statutory language did not readily lend itself to ensuring interest representing an adequate indemnity, it was open to us to apply a muscular and conforming construction of the statue so as to ensure an adequate indemnity. In this regard we were referred to *Vodafone 2 v HMRC* [2009] EWCA Civ 446.

HMRC's submissions

59. Before us HMRC accepted that such EU law rights as the Appellant could establish to additional interest were protected rights as asserted and for the reasons articulated by the Appellant (see paragraph 55. above). They reserved their position to contend otherwise should this matter go on appeal and subject to the views expressed by more senior courts in this apparently fluid area of law.

60. However, HMRC principally contended that the Appellant had no extant EU law right to further interest. In this regard, HMRC submit that whilst it is unquestionably the case that where tax is levied in breach of EU law that tax must be repaid with interest the CJEU was clear in *Littlewoods CJEU* that it was for the internal legal order of each member state to lay down the conditions on which such interest is to be paid and in particular to prescribe the rate and method of calculation (see paragraph 27). Mr Moser submitted that whilst the Supreme Court in *Littlewoods SC* had principally considered the question of the method of calculation (simple v compound) the reasoning applied equally to the rate at which interest should be paid in respect of tax levied contrary to EU law (i.e. in relation to all of the present Disputes). He contended that the Supreme Court had determined that all that EU law required was that there was payment of "some form of interest" and that it did not prescribe the level of compensation required to be met by way of interest (see paragraph 53). Further, he contended that the Supreme Court was clear that the language of "adequate indemnity" and "reasonable redress" provided no formulation for the amount of interest which is required and specifically that interest need not represent full compensation (see paragraph 55).

Discussion

61. HMRC rightly did not dispute that in light of *Littlewoods CJEU* where, as here, there has been an overpayment of VAT in consequence of the misapplication/misinterpretation of EU law the taxpayer has a right to be repaid the overpaid VAT with interest. The dispute between the parties centres on the amount of interest and in particular whether having received interest under s78 at the statutory rate of Bank of England base rate minus 1% the Appellant's EU law rights have been satisfied.

62. Resolution of that dispute is, in our view, to be found in *Littlewoods SC*. In our view the Supreme Court has clearly and unequivocally confirmed that where sums have been overpaid by way of VAT contrary to EU law an adequate indemnity must be provided through the payment of "some form" of interest (see paragraph 53) and that what represents an adequate indemnity or reasonable redress will fall within a range of possible outcomes (see paragraph 55). The Supreme Court has also confirmed that it is ultimately a question for Parliament to set the parameters by reference to which interest is payable and has done so through the enactment of s78 which provides for the payment of simple interest at the statutory rate (see paragraphs 34 and 54). Prior to its repeal s84(8) also provided a statutory route for interest to be payable at the discretion of the VDT/FTT in respect of sums determined as repayable to appellants who had been required to litigate a dispute whilst HMRC held disputed tax. In the period from 1 April 2009 and 1 January 2023 section 85A VATA provided an alternative vehicle for the payment of simple interest at the statutory rate. These provisions were noted by the Supreme Court as being part of the statutory infrastructure for providing an adequate indemnity (see paragraphs 38 and 39).

63. As we interpret the judgment in *Littlewoods SC* the Supreme Court was confirming that the statutory regime adopted by the UK principally through s78 but also s84(8) and, importantly, section 85A VATA meets the UK obligation under EU law to provide for an adequate indemnity and/or reasonable redress.

64. That conclusion closes out any asserted scope for a conforming interpretation.

65. On that basis, it is our view that our role is to apply the statutory provisions as drafted to the facts of the present case. If and to the extent that the Appellant is within the provisions of s84(8) (in consequence of the application of the transitional provisions in Schedule 3 TTFO) we will have a discretion to determine whether additional interest should be paid, applying the approach adopted and approved by the High Court in *RSPCA* and UT in *Emblaze*. Otherwise, the provisions of section 85A VATA will apply. By the repeal of s84(8) and the enactment of section 85A Parliament determined to limit the indemnity provided. However, and by reference to the conclusion in *Littlewoods SC*, we consider that the remedy provided under section 85A VATA and subsequently under section 102 FA 09 to be an adequate indemnity simply at a lower point in the range of possible but nevertheless adequate remedies.

Adequacy of section 78 interest in the context of Appendix 1 Lines 1 – 8

Parties' submissions

66. The Appellant contends that the task for us in respect of these lines leads to the irrefutable conclusion that additional interest should be paid. We are invited to apply the approach adopted in *RSPCA* and *Emblaze UT* as set out at paragraphs 44. to 46. above.

67. HMRC accept in respect of lines 1 – 8 we have a discretion but contend that s78 interest is sufficient. In the alternative, they contend that the conventional rate is sufficient and that there is no basis for a rate higher than the conventional rate.

Discussion

68. As set out in paragraph 62. above it is our view that it was determined in *Littlewoods SC* that Parliament has provided a complete and statutory remedy which provides an adequate indemnity in respect of VAT overpaid in breach of EU law. As regards lines 1 – 8 that remedy is for the payment of at least the statutory rate but with a discretion available to the FTT to direct the payment of interest at a higher rate.

69. Binding guidance is provided by the High Court and UT as to the approach to be adopted by the Tribunal in exercising its discretion.

70. By reference to that guidance, we are entitled to apply the principles commonly applied as between commercial entities. Additional interest should be awarded so as to compensate the Appellant for being kept out of the money but not to provide for full compensation or to penalise HMRC. In doing so the starting point will usually be the conventional rate prescribed under section 35A Supreme Court Act of base rate plus 1%.

71. By reference to the guidance in *RSPCA* and *Emblaze UT* and the jurisprudence to which those cases refer we must determine whether the statutory rate broadly reflects the Appellant's cost of borrowing. We are satisfied that in a situation in which the statutory rate broadly reflected or was marginally under the actual cost of borrowing we would need to consider, in all the circumstances, whether it was in accordance with the overriding objective to make any additional award of interest mindful of the restriction on not over-compensating.

72. However, on the evidence we are satisfied that the Appellant's actual cost of borrowing, taking account of the matters identified by HMRC as relevant in *RSPCA* (see paragraph 46. above) substantially exceeded the statutory rate in all periods from 1975. We have accepted the evidence that throughout the period:

(1) the Appellant was a net borrower;

(2) its principal source of debt funding was Barclays, a reputable financial institution;

(3) the rates paid were set according to conventional lending criteria (i.e. a base lending rate plus a risk based margin);

(4) the Appellant was solvent at all times;

(5) the VAT overpaid was a general cost of business which was factored into the Appellant's cash flow annually;

(6) the Term Loan was used to a relevant extent in funding the Appellant after the Appellant had paid the assessments and throughout the period of litigation to payment under the settlement agreement.

73. We consider that the statutory power granted by Parliament under s84(8) as part of the infrastructure for securing an adequate indemnity thereby permits us to direct the payment of additional interest it having been established that further compensation for being out of the money is appropriate and within the scope of the statutory scheme.

74. We must then consider at what rate. The starting point is the conventional rate of base rate plus 1%, the highest rate we could direct is the rate year on year identified in the tables in paragraphs 33.(7) and 33.(8) above.

75. Having carefully considered all of the evidence available to us we have concluded that the Appellant is entitled to interest at base plus 1.5%. We have taken full account of the evidence presented by Mr MacMillan and the rates he established or estimated had been paid on borrowing. However, we are mindful of the need not to overcompensate the Appellant particularly in the context of total borrowings substantially in excess of the overpaid VAT.

But we consider it more appropriate to use the rate set in the settlement agreement agreed between these parties in respect of the Contents Dispute The Appellant considered base plus 1.5% an appropriate rate to apply in that context and that was a rate that HMRC considered to be reasonable in the event that there was a further delay in repayment of the overpaid tax in circumstances in which it might have been considered appropriate to apply a penal rate. We do not consider base plus 1.5% to be a penal rate in the context of the rates that the Appellant was paying at the time (as per the table at paragraph 33.(7) the Appellant was paying 2.51% against a base rate of 0.5% i.e. a margin of 2.01%).

76. We therefore award additional interest in respect of lines 1 – 8 be paid on the margin between the statutory interest paid and Bank of England base rate plus 1.5% for the full period from when the assessments were paid to the date of repayment under the settlement agreement.

POST APRIL 2009 OBJECTION

Parties' submissions

Appellant's submissions

77. The Appellant accepts that in a pure sense s84(8) does not apply to decisions of HMRC which were made and notified after 1 April 2009 but nevertheless contends that none of the decisions in lines 18 – 20, 23 – 24 and 27 are decisions made post 1 April 2009 in the sense that the subject matter of the appeals each depends on pre-1 April 2009 decision which had been appealed prior to that date.

78. It is contended that paragraph 4 Schedule 3 TTFO provides for the continued application of VATA (including section 84(8)) where HMRC have notified a decision relating to a matter to which section 83 VATA applies and to which any subsequent decision is related. The Appellant submits that each rejected claim and assessment subsequent to a notified decision "relating to" the VAT chargeable on a supply (i.e. a liability ruling) meets the description in paragraph 4 and reflects an interpretation of paragraph 4 which facilitates it meeting its purpose which was said to be to ensure that taxpayers were not prejudiced by long running disputes started pre-April 2009 but not concluded until after that date.

79. Further, it was contended that in accordance with *Emblaze*, as the contingent or inchoate right to interest arose with each payment of tax, it must be the case that at least for each payment of tax predating 1 April 2009 the right to interest under s84(8) accrued.

80. We also understood Mr Beal to contend that the position in respect of Line 27 (concerning the Gaming Dispute) was even stronger. The Gaming Dispute essentially comprised two appeals. The first was brought against the rejection of a claim made for recovery of overpaid VAT and was made on 17 October 2008. Although sums were then repaid against the claims in April 2011, such repayment was protected by the issue of recovery assessments pursuant to section 80(4A) VATA which were then appealed on 16 May 2011. Mr Beal contends that the repayment ultimately made on 16 November 2020 was made against the original claim which had been appealed prior to 1 April 2009 and not against the recovery assessment.

81. In the alternative, it was contended that if the plain language of s84(8) and Schedule 3 TTFO did not facilitate the payment of additional interest then we were required to apply a conforming interpretation to ensure that the Appellant's EU law right to an adequate indemnity was secured.

HMRC's submissions

82. HMRC contend that as s84(8) was repealed with effect from 1 April 2009 it can have no application to any decision taken by HMRC after that date. They point to the transitional

provisions in Schedule 3 TTFO which deal forensically with each permutation of circumstance in respect of decisions issued by HMRC pre-1 April 2009.

83. By reference to paragraphs 18 and 19 of the judgment of the High Court in *Touchwood Services Limited v HMRC* [2007] EWHC 105 it is submitted that a decision for the purposes of section 83 and thereby for the transitional provisions assumes "… a resolution, … by [HMRC], which is wholly or partly adverse to the putative appellant, in the sense of its rejection of or failure to accept some claim advanced by him…" which is "sufficiently related to that which is specified in [section 83] to be describable as being 'with respect to' the material referred to in [the relevant subsection of 83]" and one which is specific and not general in nature such that the decision must be adverse in some ascertained or ascertainable way.

84. Accordingly, it is contended that HMRC took a series of individual decisions in relation to the tax affairs of the Appellant. Whilst those individual decisions may have been connected thematically i.e. relating to the Contents, Verandas, Bingo or Gaming Disputes, each was a separate decision with its own ascertained adverse effect on the Appellant carrying an independent right to appeal to the VDT or FTT, such right actually exercised by the Appellant. The relevant application of the transitional provisions of TTFO thereby apply to each decision and for decisions issued by HMRC after 1 April 2009 only the provisions of section 85A apply. As the amount paid pursuant to s78 is equated with that which might have been due under s85A VATA there can be no further sum due.

85. Countering the Appellant's submission on conforming interpretation HMRC contended, as with Adequacy, that the Supreme Court has confirmed in *Littlewoods SC* that the statutory regime provides an adequate remedy such that there was no basis on which to modify or reinterpret either provision to secure interest that is not otherwise provided for on a strict application of the statute. Thus, there was no EU law challenge to the repeal of section 84(8) VATA and the introduced limit to the rate of interest payable under section 85A VATA.

Discussion

Application of TTFO

86. How then should s84(8) be applied in light of the provisions of Schedule 3 TTFO and in respect of decisions and appeals which essentially protect each party's position pending resolution of the substantive dispute?

87. As summarised in paragraph 41.(1) above Paragraph 4 Schedule 3 TTFO has the effect of enabling the FTT to direct the payment of additional interest in relation to appeals against "decisions relating to a matter to which section 83 VATA applies" which have been notified by HMRC prior to 1 April 2009. The full provisions of VATA are to be applied to such decisions together with rule 4(2) VAT Tribunal Rules 1986 (**VTR**) (permitting an extension of time in which to bring an appeal where the request was made within the 30-day appeal time limit provided for in rule 4(1)). The provisions of s84(8) are also expressly preserved to apply in respect of a decision of the VDT taken before 1 April 2009. *Emblaze* determined that whilst not explicit the TTFO also preserved the power to direct the payment of interest in respect of continuing proceedings i.e. those commenced pre 1 April 2009 but concluded after that date.

88. In each of the scenarios considered in paragraphs 4, 6, 7 and 9 of the TTFO what is required is a "decision" of HMRC that had to have been notified to the taxpayer and which "related to a matter within section 83" VATA. We interpret "relating to a matter with section 83" as to be interpreted as giving rise to a right of appeal under section 83 on the basis that the statutory language chosen is very similar to that of section 83 itself. Given that s84(8) only applies where there has been a Tribunal determination of an issue before it (or so treated

by virtue of a settlement agreement reached under section 85 VATA) we conclude that s84(8) applies to any decision of HMRC in respect of which either an appeal had been lodged or for which the time limit in which to bring an appeal has not expired on 1 April 2009. By reference to the provisions of VTR time limits run from the date of the document containing the disputed decision of the Commissioners. What was therefore required for s84(8) to continue to apply was therefore an appealable decision of HMRC notified prior to 1 April 2009.

89. The majority of cases which have considered the question of whether there is an appealable decision have concerned situations in which the taxpayer has asserted that there was such a decision and HMRC have contended otherwise. *Touchwood* is an example of the VDT and then the High Court considering whether HMRC had issued an appealable (or in rule 4(1) VTR terms a "disputed") decision in the context of a part refusal of a claim to input tax recovery. As quoted in paragraph 83. above a decision requires a "resolution" on an issue which is adverse to the taxpayer in some regard.

90. A further example articulating what represents an appealable decision can be seen in *Olympia Technology v HMRC (No 3)* (2006) VAT Decision 19984 where the VDT stated that "there must be an issue between the parties which has been sufficiently crystalised to constitute a decision" such that it amounts to "a determination of the issue which is in dispute".

91. In *Earlsferry Thistle Golf Club v HMRC* [2014] UKUT 0250 (TCC) (***Earlsferry***) a question arose as to whether correspondence from HMRC constituted a decision concerning the VAT liability of supplies made to the taxpayer. The taxpayer had made a claim for repayment of the sums it considered it had been over charged. HMRC applied to strike out the appeal on the grounds that they had not issued an appealable decision as the letter identified as the decision simply expressed a view that the claim made by Earlsferry should have been made by the supplier. The UT, reversing the FTT, considered that there was no appealable decision.

92. *Earlsferry* was then applied by the FTT in striking out the appeal in *Adam Mather v HMRC* [2014] UKFTT 1062 (TC) (***Mather***). Mr Mather had written to HMRC contending that the VAT charged to him on a 57 minute phone call with Canada was over charged because the call had not been used and enjoyed 100% in the UK. HMRC's response to Mr Mather refused to express a decision though referenced the provisions of HMRC guidance which HMRC considered answered Mr Mather's concern. The Tribunal determined there was no liability decision issued by HMRC. It also determined that even were there a decision Mr Mather did not have the locus standi to bring an appeal.

93. There is no dispute that HMRC issued an appealable decision in respect of each of the Contents, Verandas, Bingo and Gaming Disputes before 1 April 2009 and that those decisions were appealed. We understand the Appellant to contend that the appeals which post-date 1 April 2009 do not concern "decisions" taken post-1 April 2009 but relate to appeals that were submitted before that date on the basis that they all concerned the tax accounted for under an erroneous decision as to the tax chargeable on a supply and which was the subject of an extant appeal.

94. We cannot accept the Appellant's position in this regard.

95. Firstly, we consider that the language of paragraphs 4, 6, 7 and 9 Schedule 3 TTFO plainly relate to the different stages of challenge against specific decisions of HMRC, meeting the descriptions as per *Touchwood, Earlsferry* and *Mather* which were capable of and were then actually appealed to the VDT/FTT (so as to invoke the tribunal's jurisdiction

under s84(8)). For s84(8) to have continuing application the appealable decision had to predate 1 April 2009.

96. Each of the appeals referenced in lines 18 – 20, 23 – 24 and 27(2) were made in respect of individual appealable decisions i.e. they relate to matters within section 83 VATA which are adverse to the Appellant in a specific and identified regard being an assessment or rejected claim and the decision in each case post-dates 1 April 2009 such claims and assessments arising consequent upon a dispute regarding the VAT liability of the underlying supplies. In our view they are not within the terms of the transitional provisions of Schedule 3 TTFO.

97. We do not consider that the individual decisions can in some way be ignored in favour of a more general and underpinning dispute or decision concerning the VAT chargeable on the supplies as the right under s84(8) to first repayment and consequently to interest arises in respect of amounts determined as repayable pursuant to a tribunal appeal. The extent to which the subject matter of the appeal is determinative of an entitlement to s84(8) Interest is considered below in connection with the Section 80 Objection; but for present purposes in order for there to be an amount determined as repayable on an appeal there must be an amount which is identified within the scope of the appeal by reference to the decision under appeal i.e. the individual decision of HMRC adverse to the taxpayer in a specific and identifiable amount. It is a such a decision which must have been made and notified prior to 1 April 2009 in order for s84(8) Interest to be payable.

98. We have also considered whether, to the extent that the decisions which post-date 1 April 2009 relate to prescribed accounting periods prior to that date, an inchoate right to interest had accrued. In this regard we have carefully considered the FTT judgment in *Emblaze*.

99. We have concluded that there was no such right.

100. In *Emblaze* the taxpayer had been given an appealable decision by which it was denied input tax credit to which it was entitled and it had appealed that decision. The inchoate or contingent right accrued "when HMRC wrongly refused to pay the amount of input tax claimed" (see paragraph 31 of the FTT judgment). The fact that the right was contingent on an appeal being brought and a positive judgment from the Tribunal requiring repayment of the VAT claimed did not preclude a conclusion that there was an inchoate right which was then protected by virtue of section 16 IA on the repeal of s84(8).

101. By contrast, in the present case the Appellant had overpaid the VAT in question period by period pre-dating 1 April 2009 but the inchoate right arising from such overpayment was the right to be repaid the tax with an adequate indemnity by way of statutory interest under s78. Further inchoate rights accrued to those who had overpaid VAT but who had received an appealable decision from HMRC prior to 1 April 2009 and in respect of which an appeal had been bought or the time limit for appeal was running. Those inchoate rights were protected by section 16 IA as per *Emblaze*.

102. For the reasons given at paragraph 96. such rights had not accrued to the Appellant regarding lines 18 – 20, 23 – 24 and 27(2).

103. Such rights did however accrue in respect of the decision in the Gaming Dispute at line 27(1). That appeal relates to HMRC's refusal of a section 80 claim (the Section 80 Objection is considered below), the appealable decision was issued prior to 1 April 2009 and an appeal was lodged in time and before 1 April 2009. The Appellant therefore had the inchoate right to invite the Tribunal to exercise its discretion to pay interest in the event that sums were repayable in the appeal. On or shortly before 20 April 2011 HMRC repaid sums due to the

Appellant on the claims made. Without reference to the protective assessment the Appellant thereby succeeded in their appeal. We are therefore of the view that the Appellant's inchoate right to seek a direction for the payment of further interest had crystalised. There is no time limit by reference to which an application for additional interest must be made under s84(8). There is not even a requirement that the appeal remain live, though in this case the Tribunal's file on the line 27(1) appeal was never closed. It is therefore our view that the Appellant's invitation that the payment of further interest be directed in respect of the appeal at line 27(1) is not barred under the Post-1 April 2009 objection. We deal below with the broader implications for the payment of interest on that appeal.

104. For the reasons already stated above on the Adequacy issue we see no basis for applying a conforming interpretation as invited by the Appellant as the statutory provisions provide an adequate indemnity.

105. For the reasons set out above we consider that the Appellant is not entitled to the payment of interest in respect of lines 18 – 20, 23 – 24 and 27(2).

SECTION 80 OBJECTION

106. The Section 80 Objection applies to rows 9 – 27(1) of Appendix 1 i.e. to all claims made pursuant to section 80 VATA. As a reminder, lines 9 – 16 represent claims made or treated as made pursuant to section 80(1A) VATA which provides for claims "where the Commissioners have assessed a person to VAT for a prescribed accounting period … and in doing so have bought into account as output tax an amount that was not output tax due…". Lines 17 – 26 and 27(1) concern claims made pursuant to section 80(1) VATA as amended post 19 July 2005 which provides for claims "where a person has accounted to the Commissioners for VAT for a prescribed accounting period … and in doing so has bought into account as output tax an amount which was not output tax due."

Parties' submissions

Appellant's submissions

107. The Appellant contends that the Section 80 Objection is inconsistent with the wording of s84(8) and if right would result in an absurd outcome.

108. It is said that the power to award interest is available where an amount which is not due has been paid to HMRC whether by way of the operation of the VAT scheme generally or where the amount is paid or deposited against a demand from HMRC and so that an appeal against the demand may be entertained in accordance with section 84(3) VATA.

109. The Appellant points to the absurdity of a situation in which a taxpayer who applies the law as drafted and as reflected in HMRC's public guidance then identifies that VAT has been overpaid and makes a claim for recovery is denied additional interest whereas a taxpayer who accounted for VAT contrary to the law or HMRC's guidance but whom is then assessed and required to pay the tax in order to bring an appeal is entitled to additional interest.

110. By reference to the judgments in *R (Edison First Power) v Central Valuation Officer* [2003] UKHL 20 (paragraphs 116 – 117) we were reminded that Parliament is generally to be understood not to prescribe absurd outcomes.

111. The Appellant resists HMRC's submission that the sums subject to the section 80 claims in this case were not "paid … in pursuance of subsection (3)". The Appellant contends that as the underlying issue in all the disputes was a question concerning the VAT liability of each of the categories of supply (falling within section 83(b) VATA) the Appellant was required to and had paid all sums due in order that the appeal be entertained.

112. Finally, the Appellant contends that it is inappropriate to treat the appeals at lines 9 – 16 as section 80 VATA claims at all. As indicated in the chronology of the Contents Dispute for administrative convenience to both the Appellant and HMRC the Appellant accepted and paid assessments as they were made and then once a year submitted claims under section 80(1)/(1A) VATA in respect of the assessments so paid and brought appeals in respect of the rejected claims. The Appellant contends that there is no difference in substance between an appeal against an assessment and a subsequent claim that the sums determined as due and paid on the assessment were not due and thereby overpaid.

113. The Appellant also, and again, relies on the principle of conforming interpretation as necessary to achieve an adequate indemnity.

HMRC's submissions

114. HMRC contend that prior to repeal, s84(8) provided a limited restitutionary remedy for the repayment of principal and interest where HMRC had compelled a trader to pay VAT rather than where the taxpayer had self-assessed itself to the VAT in question. Where VAT was overpaid on a return section 80 VATA represents the only and exclusive restitutionary remedy. It was argued that there must be a causal connection between the demand issued by HMRC and the payment in order to bring an appeal before the provisions of s84(8) are in play.

115. It was submitted that such interpretation is clear from the language of s84(8) which through section 84(3) VATA relates only to appeals brought, so far as relevant in this case, under section 83(b) and/or (p) VATA and not to appeals brought under section 83(t) VATA. The obligation under s84(8) vis à vis the principal sums is for the repayment of so much of the sum determined as payable by the HMRC and in fact paid pursuant to section 84(3) in respect of appeals bought under section 83(b) or (p). The corresponding obligation to repay following an appeal in connection with a rejected section 80 VATA claim is said to be provided for under section 80 itself which provides expressly that on such claims HMRC shall have a liability to repay sums overpaid or liable to be credited in consequence of having been incorrectly accounted for as output tax (see section 80(1) VATA pre 19 July 2005 and sections 80(2A) post 19 July 2009).

116. HMRC assert that the discretion for the Tribunal to award interest follows only the liability of HMRC to repay arising under s84(8). In doing so they rely on paragraph 70 in *FJ Chalke Ltd v HMRC* [2009 in which it was said:

> "The starting point, in my judgment, is that the interest claimed in the present case, whether simple or compound, can only be interest in respect of the VAT which was overpaid and which has now been repaid, or in other words (to adopt the terminology of the particulars of claim and the reply) can only be interest on the principal sums. Without that original overpayment of VAT, there would have been no unjust enrichment of the Commissioners at the expense of the claimants, and the claimants would not have been deprived of money for the loss of use of which they can make a claim. However, it is formulated, their claim for interest depends on, and stems from, the original overpayment."

117. In respect of each of the decisions at lines 9 – 27 HMRC contend that the decision was not a matter within section 83(b) VATA, they did not determine any amount payable (the Appellant did that for themselves) with the consequence that no amount was paid or deposited within the meaning of section 84(3) VATA such that there is no amount to be repaid pursuant to section 84(8) VATA in respect of which the payment of interest can be directed.

118. HMRC accept that there is some overlap between decisions under sections 83(b) and (t) VATA but contend that consistent with the Court of Appeal judgment in *CEC v Cresta Holidays Ltd* [2001] EWCA Civ 215 (***Cresta***) and the authorities cited therein it is clear that:

(1) Sections 83(b), 84(3) and 84(8) VATA do not form part of a general restitutionary remedy;

(2) The overlap is limited to determining the question of jurisdiction where the putative Appellant is the recipient of a supply in the context of the exclusive right of the supplier which accounted for output tax to seek repayment from HMRC;

(3) Repayment of sums following an appeal and under s84(8) is to be distinguished from a repayment made under section 80 VATA;

(4) Section 84(3) VATA represents a threshold condition in respect of an appeal against HMRC's determination as to amounts payable by the taxpayer appellant, there being a comparable threshold in respect of an appeal against the rejection of a section 80 VATA claim.

119. In response to the Appellant's submission set out at paragraph 112. above HMRC contend that the Appellant made a procedural choice whether to appeal the assessments under paragraph 83(p) VATA which would have carried with it the benefit of section 84(8) VATA or to group the assessments and bring a claim. Mr Moser hinted that the decision made to bring claims could have been criticised as a means of circumventing the appeal time limit against the assessment such that it was entirely appropriate that the Appellant lost the benefit of the potential to additional interest.

Discussion

120. Two issues arise in connection with the Section 80 Objection:

(1) In the context of this appeal is s84(8) properly interpreted so as to restrict the payment of discretionary interest to situations in which sums have been paid to HMRC consequent upon a decision notified and appealed of a description falling within section 83(b) VATA and in respect of which HMRC have determined the amounts as payable?

(2) If so, are any or all of the appeals in lines 10 – 27(1) appeals section 83(b) VATA appeals in which HMRC have so determined the amounts ultimately repaid as payable.

Meaning of "paid"

121. In addressing this question, we start with the *Cresta* judgment. *Cresta* concerned insurance premium tax (**IPT**) and not VAT. However, as noted by the Court in that case the IPT regime had provisions all but identical to VATA sections 80, 83(b) and (t), and 84(3) and (8). The issue before the Court concerned Cresta's rights of appeal. Cresta bore the burden of IPT which had been due from and paid to HMRC by insurance companies offering holiday insurance. The IPT on insurance offered by insurance companies through tour operators and travel agents had impermissibly been taxed at the higher rate of IPT when the same insurance offered other than through holiday companies had been at the standard rate. Cresta sought to claim that the inequality of treatment of such supplies prior to a change in the law taxing them all at the higher rate should be rectified by treating supplies of holiday insurance made through tour operators and travel agents prior to the law change as taxable at the standard rate entitling them to repayment of the sums borne by them.

122. HMRC refused the claims and when requested to review the decisions (a prerequisite to bringing an appeal as appeals are against review decisions under the IPT regime) upheld the decisions. When Cresta appealed HMRC sought to strike out the appeals on the basis that, as the party which had borne rather than paid the IPT, the Tribunal had no jurisdiction to hear

the appeals as no appeal lay in respect of the review decisions under the equivalent provisions of section 83(b) and (t).

123. The Court of Appeal reflected on the history of sections 80, 83 and 84 VATA. At paragraph 7, Simon Brown LJ notes that when VAT was introduced the appeal provisions provided only for an appeal in respect of a decision on the VAT chargeable on a supply which, by reference to section 40(3) FA72 needed to be paid in order to bring an appeal and in respect of which repayment in the event of a successful appeal was ensured by section 40(4) FA72. The court notes that despite the terms of section 40 FA72 the VDT had determined in *Williams & Glyn's Bank Ltd v CEC* [1974] VATTR 262 (***Williams & Glyn's***) that the recipient of a supply (with sufficient interest) had a right of appeal against a decision as to the VAT chargeable on a supply and that where the VDT determined the liability question in a way that indicated that VAT had been overpaid, HMCE were bound to give effect to the decision by repaying the overpaid VAT to the (non-appellant) supplier which would hold the monies as constructive trustee for the appellant.

124. The Court proceeds to note at paragraph 8 that prior to the enactment of provisions providing for the repayment of overpaid VAT (originally under section 24 Finance Act 1989 (**s24 FA 89**)and subsequently reflected in section 80 VATA) taxpayers had developed a practice of recovering overpaid VAT by using the machinery available for correcting errors, a practice challenged by HMC&E, but vindicated by the House of Lords (thereby precluding recovery of the sums so claimed by way of error correction as a debt due to the Crown) in *CEC v Fine Art Developments plc* [1989] STC 85. Adjustment by such means however, precluded HMC&E from raising any form of unjust enrichment defence and, as noted by the Court, led to the enactment of s24 FA 89. The Court apparently rejected the view that the enactment of s24 FA 89 was overturning the decision in *Williams & Glyn's*.

125. When considering the relationship between the equivalent provisions to section 83(b) and (t) VATA the Court acknowledges that where a liability dispute results in overpaid VAT (or IPT) a claim to repayment will be required (for VAT under section 80 VATA) but notes [quotation adapted to reflect the VAT provisions rather than the IPT provisions]:

> "11. … But there may perhaps be other cases in which the taxpayer will wish to have some point of principle resolved before finally formulating his repayment claim or before deciding whether to involve himself in expensive unjust enrichment litigation. And if, say, the dispute arises whilst the tax at issue is still being charged … and then the tax regime changes before the appeal is heard, it would seem quite wrong to have to discontinue an existing para (b) appeal so as to replace it with a retrospective para [(t)] appeal. How, one wonders, would that affect the taxpayer's rights to recover any tax paid under [section 84(8)]?
>
> 12. That brings me to the conundrum presented by the contrast between subsections [(4) and (8) of [s84] which apply in a [s83(b)] case and the unjust enrichment defence available to the commissioners in a repayment case. Various possible solutions were suggested to us. To my mind, however, it is unnecessary for present purposes to resolve this difficulty. If it were not regarded as insuperable in [*Williams & Glyn's*], still less should it be so regarded here. After all, in a case like this, by definition the disputed tax will have been paid." (emphasis added)

126. The Court concluded by a majority that Cresta had an appeal under (b) in respect of the IPT chargeable irrespective of any claim or appeal bought by the insurance company in respect of the IPT paid by them. There was, however, no basis for Cresta to appeal under the equivalent provisions to section 83(t) VATA as claims to overpaid IPT were to be made

through the statutory provisions equivalent to section 80 and could only be made by the supplier who paid the VAT/IPT and not by the party that bore it.

127. It appears to us that the Court of Appeal in *Cresta* did not fully reconcile the equivalent provisions to section 84(3) and (8) with those of the equivalent to section 80, see emphasised section of the judgment of Simon Brown LJ in paragraph 125. above and Robert Walker LJ at paragraph 23 (again adapted to refer to the VAT provisions) in which he states:

> "… Any completely satisfying reconciliation of the provisions of [s84(3) and (8) with those of [s80] seems impossible to achieve; all views canvassed in argument seem to involve their own difficulties …"

128. However, and by reference to the judgment of Simon Brown LJ, the Court was comfortable that where sums had been paid to HMRC (or HMC&E) which, as a consequence of litigation, were determined not to have been due in the period prior to 27 July 1989 the predecessor provisions to section 84(8) VATA represented at least a vehicle for reimbursement and, in the case of an appeal bought by the recipient of a supply, the only mechanism by reference to which reimbursement would be secured (through the trust relationship identified in *Williams & Glyn's*).

129. In *Williams & Glyn's,* and at a time when the only means of recovering sums overpaid paid to HMC&E was either under section 40(4) FA72 or by way of error correction on a subsequent VAT return (a route obviously only open to the supplier who had accounted for the VAT in question) the Tribunal stated:

> "… In our view, by section 40 of the Act the legislature has conferred upon these tribunals jurisdiction to hear appeals against decisions of the Commissioners with respect to the tax chargeable on supplies of goods and services. If, on the hearing of such an appeal, a tribunal comes to the conclusion that a decision of the Commissioners was wrong, and that tax alleged by them to be chargeable was not properly chargeable, the Commissioners are, in our view, bound by necessary implication, subject to any decision of a higher court, to give effect thereto. In our view, on any appeal, the Commissioners can only give effect to a decision allowing an appeal by repaying the tax to the supplier or instructing him to take a credit therefor in his next tax return."

130. Resolution of what appeared to the Court of Appeal to be an impossible conundrum now falls to us. HMRC contend that resolution is achieved by limiting the effect of s84(8) vis à vis repayment of the sums paid to HMRC which are determined by the Tribunal as not due to HMRC to situations where there has been no associated or parallel claim to overpaid VAT under section 80 VATA.

131. This is so despite the provisions of section 85A VATA which replaced s84(8) and which now expressly does not limit repayment of sums following a successful appeal to those which have been paid (or deposited) in the circumstances envisaged in section 84(3) VATA.

132. We also note that in *RSPCA* at paragraph 2 Lawrence Collins LJ provides the following summary of section 84(8) VATA:

> "… under s84(8) where on an appeal is it found that the whole or part of <u>any amount paid</u> by the trader is not due or the whole or part of any VAT credit is due to the trader has not been paid, then the amount found to not be due or not have been paid shall be repaid (or as the case may, paid) 'with interest at such rate as the tribunal may determine' …" (emphasis added)

133. He went on to recognise at paragraph 34 that s84(8) requires that the tribunal cannot entertain an appeal unless "the taxpayer has paid all tax due" subject to establishing hardship (which applied only to payments required under section 84(3) and not 84(2) VATA).

134. It is our view that the apparent imprecision in the summary of s84(8) by Lawrence Collins LJ reflects the relevant provisions of section 84 VATA taken as a whole. In the period prior to 1 April 2009 a taxpayer was required to have paid all VAT due generally and in respect of any amount determined by HMRC as due from them even where the amount was disputed. Thus under 84(2) VATA they must have rendered and paid all their VAT returns and, under 84(3) VATA, have paid or deposited the amount determined by HMRC to be due in respect of: an output tax liability dispute (section 83(b)), an assessment to VAT (generally i.e. under declaration of output tax or over claim to input tax) (section 83(p)), a challenge to a the imposition of or assessment to various penalties or surcharges (section 83(n), (q) and (za)), and a requirement to make payment in consequence of a notice of joint and several liability (section 83(ra).

135. In *Emblaze* both at first instance and in the UT the language used to justify the payment of interest is that the taxpayer was "kept out of its money". That too indicates to us that when interpreting the circumstances to which s84(8) applies it is to any circumstance in which a taxpayer is denied the use of money held by HMRC where it is then determined through litigation that the taxpayer was entitled to the money.

136. We therefore consider that s84(8) is not restricted in the way HMRC contend and that it applies to any situation in which on an appeal it is determined that amounts have been paid to HMRC which were not due to them. We consider that the reference to section 84(3) VATA does not preclude that conclusion given the history and historic application of the provision.

137. In the context of an appeal against a section 80 VATA claim, HMRC have a prima facie liability to repay under that section but will not have done so, having rejected the claim and been prepared to litigate that position. Accordingly, s84(8) imposes the mandatory obligation "shall be repaid" in all situations in which tax has been paid. That is to be distinguished from a liability to repay more generally.

138. Given our conclusion we do not need to consider whether the decision by the Appellant to pay the assessments raised in the Contents Dispute and subsequently to then make claims under section 80(1)/(1A) VATA in respect of them makes a difference. Had we needed to do so we would have concluded that it did not make a difference. As HMRC submitted the Appellant had the choice whether to pay and appeal the assessments or, as it chose to do, subsequently make claims against them. We do not accept HMRC's veiled submission that such choice in some way abused the time limits for appeal against an assessment. Section 80(1)/(1A) VATA (at the relevant time) provided for that administrative choice but, as HMRC submitted, there was in effect a jurisdictional choice and the Appellant would have had to abide by the choice it made, even though it may not have appreciated at the time the full ramifications of the choice.

139. On that basis we conclude that the Section 80 Objection is ill founded and does not preclude our exercising our discretion to award interest in respect of appeals bought against a decision rejecting a section 80 VATA claim.

Are the amounts which have been repaid amounts determined as payable by HMRC in respect of an appeal under section 83(b)?

140. In light of our conclusion as to the meaning of "paid" under s84(8) it is not strictly necessary for us to determine the answer to this question. However, we do so for

completeness and because, in our view, it even more clearly confirms that we have a discretion to direct the payment of additional interest.

141. On the hypothesis that in order to have a discretion to pay interest the Appellant must show that the sums repaid were amounts paid pursuant to section 84(3) VATA i.e. they were amounts "which the Commissioners have determined as payable" in connection with an appeal inter alia under section 83(b) and which were thereby required to have been paid in order that the appeal be entertained. We consider that plainly they were.

142. As set out in paragraphs 11. to 29. above each of the Contents, Verandas, Bingo and Gaming Disputes concerned a question as to the liability to VAT of supplies made by the Appellant. The Appellant had calculated its output tax liability and attributed the input tax incurred by it by reference to the provisions of VATA and by reference to guidance issued by HMRC. In each case, by reference to the applicable statutory provisions, HMRC considered the supplies to be standard rated and the Appellant contended otherwise. Claims were made and rejected and assessments issued and paid with claims made against those assessments entirely dependent on each party's respective positions as to the VAT properly chargeable on the supplies in question.

143. We consider that in that context and by reference to the UT judgment in *HBOS plc and others v HMRC* [2023] UKUT 13 (TCC) (***HBOS***) sums accounted for by the Appellant (or paid on assessments) and subsequently reclaimed pursuant to section 80 VATA properly represent amounts determined as payable by HMRC in connection with a dispute brought under section 83(b). As determined in *Cresta* there may be, and here was, a dispute falling within sections 83(b) and (t).

144. *HBOS* concerned the interpretation of s78 and, in particular, whether the opening words: "where due to an error on the part of the Commissioners" was limited to an error by HMRC as a body or included a statutory error. In that case, as here, the taxpayers had accounted for VAT to HMRC in accordance with the domestic statutory provisions. In HBOS the statutory provisions precluded a claim to bad debt relief where there was a retention of title clause. That restriction was subsequently held to be contrary to EU law. Many years after the unrestricted entitlement to bad debt relief arose the taxpayer made claims to bad debt relief. HMRC restricted the taxpayer's entitlement to interest under s78 on the repayments finally made to the period from the date of the claim to the date of repayment. The FTT found the restriction of the period for which interest was payable to have been lawful on the basis that in the period prior to the claim, on the facts, bad debt relief had not been claimed in consequence of a statutory error which could not be considered to be an "error on the part of the Commissioners".

145. At paragraphs 43 – 46 the UT determined that "error on the part of the Commissioners" necessarily included a statutory error as to conclude otherwise left a lacuna which would have precluded a taxpayer who had been held out of sums in consequence of a breach of EU law without remedy in interest and represented an outcome that cannot have been intended by Parliament. The UT concluded:

> "46. In our view the above points do not mean that the words 'on the part of the Commissioners' deem HMRC to have enacted the non-compliant legislation. Rather we consider that Parliament must have recognised when using those words that in so far as a statute concerns matters such as VAT which are within the collection and management powers of HMRC, HMRC is the relevant responsible state body. HMRC's behaviour, whether in acting or omitting to act, will therefore inevitably reflect the requirements and stipulations of the relevant UK legislative provisions. Behaviour on the part of HMRC (whether that is regarded as an act eg taking a payment, or an

> omission, eg failing to repay it) whose source is a provision of non-compliant statutory provision will clearly be something capable of fitting the words 'error on the part of the Commissioners'. That being the case, in our view, whether one articulates the error in terms of the statutory error or the corresponding action or inaction on the part of HMRC should not, and does not, make a difference."

146. In the same way as Parliament was interpreted as regarding an error on the part of the Commissioners to include a statutory error, we consider that VAT payable in accordance with the provisions of domestic law/HMRC's interpretation of it which results in an overpayment of VAT represents an amount "determined as payable by the Commissioners".

147. In order to make a claim under section 80 VATA the Appellant necessarily had to have paid the VAT in dispute, the sums were not repaid to them pending the outcome of the dispute, and it is that VAT which was then repaid to the Appellant after resolution of the litigation. We therefore consider that the amount of tax so paid was an amount determined by HMRC as payable in connection with a dispute concerning the VAT chargeable on a supply which was necessarily paid in order that the appeal be entertained and within section 84(3) VATA.

148. We therefore conclude that the Section 80 Objection does not preclude us from exercising our discretion to pay interest in respect of lines 9 – 17, 21 – 22 and 25 – 27(1) of Appendix 1. The Section 80 Objection would not preclude the exercise of our discretion in respect of lines 18 – 20, 23 – 24 and 27(2) but for the reasons set out above our discretion is excluded by virtue of the Post-1 April 2009 Objection.

OPPORTUNISM

149. Before setting out whether, and on what basis, we exercise our discretion to direct further interest we deal with HMRC's contention that the claims made in respect of the Verandas, Bingo and Gaming Disputes are opportunistic such that we should not exercise our discretion.

150. HMRC accept that as regards the Contents Dispute the Appellant reserved its position on claiming further interest under the settlement agreement and is therefore entitled to invite us to make a further interest payment. They contend that no similar right was reserved when accepting payments made for the other disputes, and though not precluded from making the application, we should, in some unspecified way, look unfavourably on the application.

151. Each of the appeals to which the application for interest has been made were, and remain, open appeals before the Tribunal. Further, and as indicated above, there is no time limit provided under s84(8) or elsewhere in which to make an application for further interest. A delay in bringing the claim could have prejudiced the Appellant had it been unable to bring evidence to satisfy us that a just and appropriate rate of interest exceeded the statutory rate and had that been the case it would have had no one, but themselves, to blame. However, Mr MacMillan produced a through and careful analysis which HMRC accepted regarding the cost of borrowing over the period.

152. Accordingly, we do not consider it relevant that the application of additional interest on the Verandas, Bingo and Gaming Disputes were made on the coat tails of the claim in respect of the Contents Dispute.

EXERCISE OF DISCRETION: LINES 9 – 17, 21 – 22 AND 25 – 27(1)

153. For the reasons set out above at paragraphs 68. – 76. in respect of lines 1 – 8, we exercise our discretion to award additional interest in relation to lines 9 – 17, 21 – 22 and 25 – 26 representing the margin between statutory interest paid and Bank of England base rate

plus 1.5% for the period from when the VAT was paid to HMRC until the date of repayment as shown in Appendix 1.

154. Similarly, we direct interest be payable at the same rate in respect of line 27(1). However, the period for which interest is payable in respect of that decision is from the date on which the tax was paid to the date on which HMRC made the without prejudice payment and issued the recovery assessment. The recovery assessment was issued on 20 April 2011 but we do not have the precise date on which the repayment was made. Interest for the period post 20 April 2011 would have been awarded in respect of the appeal at line 27(2) but for the reasons given we have no discretion as the recovery assessment is a decision which post-dates 1 April 2009.

DISPOSITION

155. For the reasons set out above we determine:

(1) The provisions of section 78 and 84(8) VATA together provide for an adequate indemnity vis à vis the payment of interest for appeals bought in connection with appealable decisions made by HMRC prior to 1 April 2009.

(2) The Section 80 Objection does not preclude the payment of interest in the circumstances of this case.

(3) When determining the rate and period for which interest is due, we are required to adopt the approach endorsed by the High Court in *RSPCA* and the UT in *Emblaze*.

(4) In so doing we consider that for lines 1 – 17, 21 – 22, and 25 – 27(1) additional interest representing the margin between statutory interest paid and Bank of England base rate plus 1.5% as statutory interest is due.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

156. 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.

AMANDA BROWN KC
TRIBUNAL JUDGE

Release date: 29th MAY 2024

APPENDIX 1

	Appeal Reference	Type of Appeal	Consolidated to:	Assessment or Section 80 claim?	Date of assessment or claim	Date of rejection	Date of appeal	VAT periods covered	VAT paid	Date repaid	Gross Interest claimed	Interest paid	Net interest claimed
1	LON/2001/1203	Contents	LON/2000/0765	Assessment	3.7.01 23.10.01		14.11.01	03/01 06/01	£199,362.52	15/12/14	£135,412.81	£58,232.54	£77,180.27
2	LON/2002/0112	Contents	LON/2000/0765	Assessment	31.12.01		8.2.02	09/01	£99,681.26	15/12/14	£64,740.38	£27,566.43	£37,173.95
3	LON/2002/0271	Contents	LON/2000/0765	Assessment	14.3.02		22.3.02	12/01	£99,681.26	15/12/14	£62,839.23	£26,714.35	£36,124.88
4	LON/2002/0462	Contents	LON/2000/0765	Assessment	22.5.02		31.5.02	03/02	£99,681.26	15/12/14	£61,152.40	£25,976.98	£35,175.42
5	LON/2002/0788	Contents	LON/2000/0765	Assessment	14.8.02		9.9.02	06/02	£99,681.26	15/12/14	£59,408.72	£25,231.42	£34,177.30
6	LON/2003/0205	Contents	LON/2000/0765	Assessment	29.11.02		20.2.03	09/02	£99,681.26	15/12/14	£57,589.22	£24,477.67	£33,111.55
7	LON/2003/0323	Contents	LON/2000/0765	Assessment	10.3.03		17.3.03	12/02	£99,681.26	15/12/14	£55,952.48	£23,723.91	£32,228.57
8	LON/2004/1945	Contents	LON/2000/0765	Assessment	29.10.04		26.11.04	06/03- 06/04	£498,406.30	15/12/14	£246,268.64	£104,850.49	£141,418.15
9	LON/2005/0755	Contents	LON/2000/0765	"Decision dated 11 July 2005 that claims to recover VAT in respect of *assessed* amounts for periods from March 2003 to March 2005 would not be processed"	12.6.03 (assessment) 1.7.05 (s.80)	11.7.05	19.7.05	03/03	£99,681.26	15/12/14	£54,358.02	£22,986.54	£31,371.48
10		Contents	LON/2000/0765	"Decision dated 11 July 2005 that claims to recover VAT in respect of *assessed* amounts for periods from March 2003 to March 2005	11.11.04 (assessment) 1.7.05 (s.80)	11.7.05	19.7.05	09/04	£99,681.26	15/12/14	£43,774.00	£18,759.80	£25,014.20

	Appeal Reference	Type of Appeal	Consolidated to:	Assessment or Section 80 claim?	Date of assessment or claim	Date of rejection	Date of appeal	VAT periods covered	VAT paid	Date repaid	Gross Interest claimed	Interest paid	Net interest claimed
				would not be processed"									
11		Contents	LON/2000/0765	"Decision dated 11 July 2005 that claims to recover VAT in respect of *assessed* amounts for periods from March 2003 to March 2005 would not be processed"	10.2.05 (assessment) 1.7.05 (s.80)	11.7.05	19.7.05	12/04	£99,681.26	15/12/14	£42,004.65	£17,757.54	£24,247.11
12		Contents	LON/2000/0765	"Decision dated 11 July 2005 that claims to recover VAT in respect of *assessed* amounts for periods from March 2003 to March 2005 would not be processed	4.5.05 (assessment) 1.7.05 (s.80)	11.7.05	19.7.05	03/05	£99,681.26	15/12/14	£40,492.82	£16,774.38	£23,718.44
13	LON/2006/0601	Contents	LON/2000/0765	"Claim for repayment of the sums *assessed* in periods 06/05 to 12/05 would not be processed"	3.8.05 (assessment) 19.5.06 (s.80)	23.5.06	26.5.06	06/05	£99,681.26	15/12/14	£38,930.04	£15,780.30	£23,149.74
14		Contents	LON/2000/0765	"Claim for repayment of the sums *assessed* in periods 06/05 to 12/05 would not be processed"	15.11.05 (assessment) 19.5.06 (s.80)	23.5.06	26.5.06	09/05	£99,681.26	15/12/14	£37,367.25	£14,843.57	£22,523.68
15		Contents	LON/2000/0765	"Claim for repayment of the sums *assessed* in periods 06/05 to 12/05 would not be processed"	1.2.06 (assessment) 19.5.06 (s.80)	23.5.06	26.5.06	12/05	£99,681.26	15/12/14	£35,844.62	£14,089.81	£21,754.81

	Appeal Reference	Type of Appeal	Consolidated to:	Assessment or Section 80 claim?	Date of assessment or claim	Date of rejection	Date of appeal	VAT periods covered	VAT paid	Date repaid	Gross Interest claimed	Interest paid	Net interest claimed
16		Contents	LON/2000/0765	"Claim for repayment of the sums *assessed* in periods 06/05 to 12/05 would not be processed" [HB/60/560]	28.4.06 (assessment) 19.5.06 (s.80)	23.5.06	26.5.06	03/06	£99,681.26	15/12/14	£34,451.89	£13,352.45	£21,099.44
17(1)	LON/2000/0765	Contents	LON/2000/0765	Section 80	30.6.00	12.7.00	14.7.00	06/97-09/99	*£5,327,366.34*[2]	*15/12/14*	*£6,116,134.50*	*£2,949,666.00*	*£3,166,468.50*
17(2)	LON/2002/0789	Contents	LON/2000/0765	Section 80	13.8.02	23.8.02	4.9.02	03/89-12/92 03/93-06/95	*£5,327,366.34*[3]	*15/12/14*	*£6,116,134.50*	*£2,949,666.00*	*£3,166,468.50*
17(3)	LON/2008/1365	Contents	LON/2000/0765	Section 80	22.1.08	23.5.08	20.6.08	03/89-06/07	*£5,327,366.34*[4]	*15/12/14*	*£6,116,134.50*	*£2,949,666.00*	*£3,166,468.50*
18	TC/2011/09696	Contents	LON/2000/0765	Section 80	13.9.11	27.10.11	11.11.11	09/07-06/08	£496,748.86	15/12/14	£109,923.84	£28,614.93	£81,308.91
19	TC/2013/06544	Contents	LON/2000/0765	Section 80	30.9.12	3.9.13	19.9.13	09/08-03/09 06/09-12/11	£2,081,704.38	15/12/14	£260,405.49	£45,765.97	£214,639.52
20	TC/2009/12645	Contents	LON/2000/0766	Section 80	14.11.08	22.6.09	17.7.09	03/87-09/96	£2,257,236.72	15/12/14	£3,549,030.70	£2,271,852.09	£1,277,178.61
21	LON/2008/1365	Verandas	LON/2000/0765	Section 80	22.1.08	23.5.08	20.6.08	03/89–06/04;	£825,351.00	15/12/14	£728,850.44	£407,186.00	£321,664.44
22	LON/2008/1365	Verandas	LON/2000/0765	Section 80	22.1.08	23.5.08	20.6.08	12/04–06/07;	£283,638.00	15/12/14	£96,180.92	£39,627.00	£56,553.92
23	TC/2011/09696	Verandas	LON/2000/0765	Section 80	13.9.11	27.10.11	11.11.11	09/07-06/08	£151,353.75	07/05/2015	£34,455.10	£13,248.38	£21,206.72
24	TC/2013/09462	Verandas	LON/2000/0765	Section 80	30.9.12	3.9.13	19.9.13	09/08-03/09 06/09-12/11	£1,334,101.86	07/05/2015	£164,204.24		£164,204.24
25	LON/2009/0572	Bingo Participation fees		Section 80	18.12.08	29.1.09	2.3.09	03/06-09/08	£897,167.95	04/05/2010	£121,470.21	£88,686.00	£32,784.21

[2] Aggregate figures for LON/2008/1365, LON/2002/0789, LON/2000/0765.

[3] Aggregate figures for LON/2008/1365, LON/2002/0789, LON/2000/0765.

[4] Aggregate figures for LON/2008/1365, LON/2002/0789, LON/2000/0765.

	Appeal Reference	Type of Appeal	Consolidated to:	Assessment or Section 80 claim?	Date of assessment or claim	Date of rejection	Date of appeal	VAT periods covered	VAT paid	Date repaid	Gross Interest claimed	Interest paid	Net interest claimed
26	LON/2008/2228	Bingo Participation fees		Section 80	14.11.07 14.12.07 31.3.06 30.6.08	2.10.08	17.10.08	03/75-12/02	£2,535,114.09	04/05/2010	£2,002,693.23	£1,360,024.00	£642,669.23
27(1)	LON/2008/2227	Gaming machines		Section 80	19.10.05 9.12.05 30.6.06 30.6.06 14.11.07	2.10.08	17.10.08	12/02-12/05	*£5,620,790.28*	*16/11/20*	*£3,312,543.10*	*£1,665,867.20*	*£1,646,675.90*
27(2)	TC/2011/03844	Gaming machines		Recovery Assessments (ss.80(4A), 78A)	20.4.11		16.5.11	12/02-12/05	*£5,620,790.28*	*16/11/20*	*£3,312,543.10*	*£1,665,867.20*	*£1,646,675.90*

APPENDIX 2

	Appeal Reference	Type of Appeal	Interest payable
1	LON/2001/1203	Contents	Yes margin between statutory interest and 1.5% above base for period from when tax paid to when repaid
2	LON/2002/0112	Contents	Yes margin between statutory interest and 1.5% above base for period from when tax paid to when repaid
3	LON/2002/0271	Contents	Yes margin between statutory interest and 1.5% above base for period from when tax paid to when repaid
4	LON/2002/0462	Contents	Yes margin between statutory interest and 1.5% above base for period from when tax paid to when repaid
5	LON/2002/0788	Contents	Yes margin between statutory interest and 1.5% above base for period from when tax paid to when repaid
6	LON/2003/0205	Contents	Yes margin between statutory interest and 1.5% above base for period from when tax paid to when repaid
7	LON/2003/0323	Contents	Yes margin between statutory interest and 1.5% above base for period from when tax paid to when repaid
8	LON/2004/1945	Contents	Yes margin between statutory interest and 1.5% above base for period from when tax paid to when repaid
9	LON/2005/0755	Contents	Yes margin between statutory interest and 1.5% above base for period from when tax paid to when repaid
10		Contents	Yes margin between statutory interest and 1.5% above base for period from when tax paid to when repaid
11		Contents	Yes margin between statutory interest and 1.5% above base for period from when tax paid to when repaid
12		Contents	Yes margin between statutory interest and 1.5% above base for period from when tax paid to when repaid
13	LON/2006/0601	Contents	Yes margin between statutory interest and 1.5% above base for period from when tax paid to when repaid
14		Contents	Yes margin between statutory interest and 1.5% above base for period from

	Appeal Reference	Type of Appeal	Interest payable
			when tax paid to when repaid
15		Contents	Yes margin between statutory interest and 1.5% above base for period from when tax paid to when repaid
16		Contents	Yes margin between statutory interest and 1.5% above base for period from when tax paid to when repaid
17(1)	LON/2000/0765	Contents	Yes margin between statutory interest and 1.5% above base for period from when tax paid to when repaid
17(2)	LON/2002/0789	Contents	Yes margin between statutory interest and 1.5% above base for period from when tax paid to when repaid
17(3)	LON/2008/1365	Contents	Yes margin between statutory interest and 1.5% above base for period from when tax paid to when repaid
18	TC/2011/09696	Contents	No – post 1 April 2009 Objection applies
19	TC/2013/06544	Contents	No – post 1 April 2009 Objection applies
20	TC/2009/12645	Contents	No – post 1 April 2009 Objection applies
21	LON/2008/1365	Verandas	Yes margin between statutory interest and 1.5% above base for period from when tax paid to when repaid
22	LON/2008/1365	Verandas	Yes margin between statutory interest and 1.5% above base for period from when tax paid to when repaid
23	TC/2011/09696	Verandas	No – post 1 April 2009 Objection applies
24	TC/2013/09462	Verandas	No – post 1 April 2009 Objection applies
25	LON/2009/0572	Bingo Participation fees	Yes margin between statutory interest and 1.5% above base for period from when tax paid to when repaid
26	LON/2008/2228	Bingo Participation fees	Yes margin between statutory interest and 1.5% above base for period from when tax paid to when repaid
27(1)	LON/2008/2227	Gaming machines	Yes margin between statutory interest and 1.5% above base for period from when tax paid to repayment of the claim in 2011
27(2)	TC/2011/03844	Gaming machines	No – post 1 April 2009 Objection applies