Corporation Tax: Effect of receipt by trader or successor to trade of sums in respect of VAT repaid under s80 VATA to representative member of VAT group plus interest paid under s78 VATA. Question of beneficial ownership of sums received and whether "arising from the trade". Application of sections 103 and 106 ICTA 1988. Whether interest payments could be characterised as arising under a "loan relationship" and amounted to a "money debt" for purposes of section 100 FA 1996."

[2013] UKUT 0189 (TCC)
APPEAL NUMBER: FTC/30-33/2012

IN THE UPPER TRIBUNAL
(TAX AND CHANCERY CHAMBER)

Before :

MRS JUSTICE ASPLIN

- -

Between :

(1) SHOP DIRECT GROUP
(2) SHOP DIRECT HOME SHOPPING LIMITED
(3) REALITY GROUP LIMITED
(4) LITTLEWOODS RETAIL LIMITED

Appellants

- and –

THE COMMISSIONERS FOR HM REVENUE AND CUSTOMS **Respondents**

- -
- -

David Goldberg QC and Michael Jones (instructed by **Weil, Gotshal and Manges**) for the Appellants
Malcolm Gammie QC and Elizabeth Wilson (instructed by **the General Counsel and Solicitor to HM Revenue and Customs**) for the Respondents

Hearing dates: 19, 20 and 21 February 2013

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MRS JUSTICE ASPLIN

Mrs Justice Asplin :

1. This is an appeal by Shop Direct Group (SDG), Shop Direct Home Shopping Limited (SDHSL), Reality Group Limited (RGL), and Littlewoods Retail Limited (LRL), (together referred to as the Appellants) from a decision of Judge Berner and Miss O'Neill sitting in the First-tier Tribunal (Tax Chamber) ("FTT"), dated 14 February 2012 (see [2012] UKFTT 128 (TC)) ("the FTT Decision"). The case concerns the corporation tax treatment of sums appearing in the Appellants' accounts which are equal in amount to repayments of overpaid VAT ("VRPs") and interest arising on those repayments ("the IPs") together referred to as "the Sums".

2. The FTT decided that each of the VRPs were trading receipts of existing trades or trades which have discontinued and all were chargeable to corporation tax on the Appellants under Schedule D Case I or VI as the case may be. Further, it decided that all the IPs were properly assessable on the Appellants under Schedule D Case III. Accordingly, the Appellants' appeal against amendments made by the Commissioners for Her Majesty's Revenue and Customs (HMRC) to the corporation tax self assessments of the Appellants for various accounting periods were dismissed.

3. There were eight VRPs and corresponding IPs save in respect of VRP5 in relation to which there was no IP. The appeal relates to each of the VRPs and IPs save for such parts of VRPs 4 and 6 and IPs 4 and 6 which are attributable to supplies made by six companies when they were not members of a VAT group. The extent of those parts of VRPs 4 and 6 and IPs 4 and 6 (the Excluded Parts) is not known or quantified at present. The six companies were Brian Mills Limited, Burlington Warehouses Limited, Janet Frazer Limited, John Moores Home Shopping Service Limited, Littlewoods Warehouses Limited and Peter Craig Limited (the Six Companies). They were received as a result of LRL and SDHSL respectively having a direct entitlement to the repayments and interest rather than as payments received from the representative member of a VAT group in their capacity as members of that group.

4. The Appellants appeal on six bases. It is said that the FTT erred in law:

   i) in holding that the VRPs and, accordingly, the IPs arose from a trade carried on by the Appellants which recorded the relevant sums ("the Sums") in their accounts (**the Source argument**);

   ii) in determining that the Appellants had a beneficial entitlement to the VRPs and IPs as if it were a question of fact instead of a question of law or a question of mixed fact and law and as a consequence erred in concluding that the VRPs and IPs were taxable (**the Beneficial Entitlement argument**);

iii) in holding that SDG was liable to tax under section 103 Income and Corporation Taxes Act 1988 (ICTA) in respect of those parts of VRP2 which related to the trades of GUS plc, Kay & Company and Abound Ltd in circumstances in which the FTT also held that the rights to those parts of VRP2 had been retained by those companies **(the SDG Retention argument)**;

iv) in construing the asset sale agreement between SDG and SDHSL dated 28th October 2005 (the 2005 Agreement) as ineffective to transfer to the latter such rights as SDG had to VRP2 and IP2 **(the SDG Construction argument**);

v) in construing section 103 ICTA as imposing a charge to tax on any person receiving a particular sum regardless of whether that person formerly carried on the trade to which the sum related (**the s103 argument)**;

and lastly,

vi) in holding that IP6 was taxable on LRL as interest under Case III Schedule D and in holding that the remainder of the IPs were payments of interest and in holding that such interest fell within the loan relationship rules, **(the Interest arguments**).

5. In essence, the Appellants contend that the effect of the original payment of VAT and the consequent receipt of the VRPs and IPs through VAT groups, with the result that only the representative member was entitled to the receipt of the VRPs and IPs, is that the source of the Sums is not a trade, nor can it be established as a matter of law or fact that the Appellants as recipients of the Sums as opposed to the VRPs and IPs themselves were beneficially entitled to the Sums. Equally, in relation to the IPs they contend that the IPs cannot be characterised in a way which renders them assessable to corporation tax. Lastly, as a result of a number of transactions, in the case of VRPs and IPs 2 and 5, the Appellants contend that the Sums cannot be treated and taxed as post cessation receipts.

6. HMRC's case in response is simple. It is said on their behalf that the FTT made findings of fact which were open to it, and its decision that the VRPs and IPs thereon were chargeable receipts of the respective Appellants was the inevitable result of applying the correct legal test to those facts.

7. More particularly, HMRC contends that the FTT rightly held that each repayment was a receipt of the respective Appellants (consistent with the Appellants' accounts); that each repayment arose from the trade of those against whom the VAT had been wrongly charged ("the real source"); and that the Appellants were the persons properly charged under Schedule D Case I or VI, as the case may be as the FTT found at [135] and [146]. In particular HMRC submits that:-

   i) Part of VRP1, part of VRP3, part of VRP5, and the whole of VRP7 and 8 are chargeable under Schedule D Case I for the reasons given by the FTT at [134-135];

   ii) The remainder of VRP1 and of VRP3, and the whole of VRP4, and VRP6 are chargeable under Schedule D Case I by virtue of section 106(2) of the ICTA as the FTT found at [146];

   and

   iii) VRP2 and the remainder of VRP5 are chargeable under Schedule D Case VI by virtue of section 103 ICTA, as post-cessation receipts as the FTT found at [146].

8. HMRC's case in relation to the effect of VAT groups is that the function and role of the representative member in any group is essentially a question of evidence as the FTT found at [27] and [30]. The only necessary implication from section 43 Value Added Tax Act 1994 (VATA) is that the representative member has authority to act as against HMRC as if it had made supplies and received consideration actually made by and belonging to the member to give effect to its limited authority. This it is submitted, is consistent with the FTT's findings in relation to the arrangements of group members at [30-35].

Basis of Appeals from the FTT

9. Appeals from the FTT to the Upper Tribunal are restricted to a point of law by virtue of section 11(1) of the Courts, Tribunals and Enforcement Act 2007. As Etherton LJ pointed out at paragraph 36 of his judgment in *MJP Media Services Limited v Commissioners for her Majesty's Revenue and Customs, [2012] EWCA Civ 1558* it is also well established that an appeal may be made on a finding of fact which was perverse in the sense that no person acting judicially could properly have reached the finding in question.

The Facts

10. The facts are and were largely agreed and were set out in an agreed statement of facts. They were set out at paragraph 7 of the FTT Decision and in the appendices to it. For the purposes of this appeal they can be summarised as follows.

11. The First Appellant, SDG appealed in relation to amendments to its corporation tax returns for the period 1 April 2004 to 31 March 2005, the period 1 April 2005 to 30 April 2005 and the period 31 January 2007 to 30 January 2008. Its appeal relates to two VRPs and two IPs. VRP1 was in the sum of £15,686,929 and the related interest IP1 was in the sum of £1,328,993. The payments were made between February and June 2005. VRP2 was in the sum of £124,963,600 and IP2 in relation to it was £174,828,209. Those payments were made on 19 September 2007.

12. The Second Appellant, SDHSL appealed in relation to amendments to its corporation tax returns for the period 1 May 2004 to 30 April 2005, the period 1 May 2006 to 30 April 2007 and the period 1 May 2007 to 30 April 2008. Its appeal relates to VRP3 of £7,740,298 received in January 2005 and the related IP3 of £832,628 received in two instalments in February 2005. Its appeal is also concerned with VRP4 in the sum of £52,141,416 and the related IP4 of £78,395,858 paid in August 2007.

13. The Third Appellant, RGL appealed against assessments for the period 1 April 1997 to 31 March 1998 and the period 1 April 1998 to 31 March 1999. Its appeal relates to VRP5 of £83,604,357 made in May 1998 in relation to which there is no corresponding IP.

14. The Fourth Appellant, LRL appealed against amendments to its corporation tax returns for the period 1 January 1995 to 31 December 1995, the period 1 May 1997 to 30 April 1998, the period 1 May 1998 to 30 April 1999 and the period 1 May 2001 to 30 April 2002. The appeal relates to VRP6 in the sum of £14,782,382 which was paid in two instalments on 22 November 1995 and 20 December 1995 and statutory interest of £20,527,859 (IP6) paid in two instalments on 27 December 1995 and 12 January 1996.

15. The repayments of VAT arose in a number of ways. For example, VRPs 5 and 7 arose in respect of overpaid VAT by HMRC attributable to the wrongful charging of VAT on a supplier's debtor balances as at 28 February 1997, when the standard method of calculating gross takings was withdrawn (see *R v HMRC ex parte Littlewoods Home Shopping Group Limited [1998] STC 445*). VRP6 was a repayment in respect of overpaid VAT by HMRC attributable to the wrongful charging of VAT by HMRC on debtor balances, outstanding in respect of credit sales, when: (i) the increase in the rate of VAT from 8% to 15% occurred in 1979; and (ii) the increase in the rate of

VAT from 15% to 17.5% occurred on 1 April 1991 (see *CCE v Grattan [1995] STC 651)*. In other cases, the repayments of VAT arose from the incorrect treatment by HMRC of commission earned by agents on orders placed for third parties. Previously, the commission was treated as consideration for the provision of services by the agent but following litigation in 2004 it was accepted as a discount from the selling price of the goods, thereby reducing the company's VAT liability. HMRC had previously refused payment of the claim on the basis that it was caught by the three year cap on refunds introduced in 1996 but two Court of Appeal decisions in 2006 decided that the cap was introduced unlawfully and therefore claims for earlier years were effectively unrestricted. HMRC implemented the Court of Appeal decisions by issuing a Business Brief in August 2006 inviting companies to seek repayment of claims previously rejected under the three year cap.

16. In the majority of cases, the original suppliers were in VAT groups and accordingly, the VAT overpaid and in turn, the repayments were made to the representative member of that group and not to the supplier itself or any successor to its trade. Therefore, in the majority of cases, the Sums in the Appellants' accounts were re-directed to each of them. It is contended therefore, that the Sums are different in character from the VRPs themselves and that it cannot be said that the recipients, some of which are successors to trades and in one case, an entity which had ceased trading at the time of the receipt, were either beneficially entitled to the VRPs or a fortiori to the IPs or that the source of the Sums was the trade.

17. The matter is complicated further by a number of business transfers. The trade transfers relevant to SDHSL and LRL were set out in diagrammatic form at Appendix 2 to the FTT Decision and are contained in Appendix 1 to this judgment. In essence, the trades of the Six Companies were each transferred to LRL on 1 January 1993. On 1 November 2002, Littlewood Ltd (LL) and its subsidiary companies were acquired by LW Investments Ltd. Thereafter, by an agreement dated 30 April 2003, the trade of LRL was transferred to SDHSL, with effect from 4 May 2003. Prior to 4 January 1987 the Six Companies had been registered for VAT separately and this results in the portions of VRP4 and VRP6 and the respective IP4 and IP6 which are the Excluded Parts.

18. The trade transfers relevant to SDG and RGL were set out at Appendix 3 to the FTT Decision and are at Appendix 2 to this judgment. In summary, on 1 June 1991, the trade of SDG, then known as John Noble Ltd was transferred to RGL which was known as GUS Home Shopping Ltd until 28 November 2000. Furthermore, GUS plc transferred part of its trade to RGL by an agreement dated 1 April 1996. On 1 April 1997, the trades of Abound Ltd and Kay & Company Ltd were also transferred to RGL. Thereafter, on 25 November 2000, RGL transferred its trade to SDG. On 27 May 2003, March UK Ltd acquired RGL, Kay & Co Ltd, Abound Ltd and SDG from GUS plc. Lastly, on 28 October 2005, SDG transferred its trade to SDHSL and on 25 October 2006, LW Corporation acquired SDG from March UK Ltd. For the sake of simplicity, I have omitted a number of company name changes from this summary.

19. The complexities of the VAT groups and registrations are set out at paragraphs [30] – [38] of the FTT Decision. Suffice it to say for the purposes of the appeal those details are not in dispute.

FTT's Decision in more detail

20. In summary, the FTT found that:

i) the "true source" of each of the VRPs was the trade in the course of which the original overpayments of VAT arose and accordingly the VRPs were trading receipts arising out of those trades: FTT Decision at [134]. The repayments were to compensate for depletions in the trading results of the various companies whose trading supplies had given rise to the VAT overpayments and the payments were directed to those companies or their successors, save in the case of the payment of VRP2 to SDG which retained the right to the payment on the transfer of its trade to SDHSL. The payments restored amounts which would have been brought in as trading profit if there had been no overpayments of VAT: FTT Decision at [131].

ii) the VRPs and IPs received by the representative member of the relevant VAT group were transferred to the Appellants not by way of gift but were transferred to the persons beneficially entitled: see FTT Decision at paragraphs [34-35], [60], [67], [71], [74], [79], [81] and [129].

iii) such rights as GUS plc, Kay & Company and Abound had to repayment of VRP2 and IP2 were not transferred to RGL in April 1997 see FTT Decision [43-44], [60-62] and [133];

iv) the transfer made by SDG to SDSHL by way of the 2005 Agreement, expressly excluded any rights to VRPs or IPs and in particular any rights that it might have to VRP2 by virtue of the 25 November 2000 agreement: see FTT Decision at [48].

v) where a trade is discontinued without a transfer of the right to post cessation receipts, any receipt of those sums are taxable under Case VI by virtue of section 103: see FTT Decision at [143].

vi) in relation to IP6, the payment had the essential quality of recurrence and, accordingly, was interest taxable under Case III of Schedule D: FTT Decision [155] and [156]. In relation to the other IPs the question was whether they could be characterised as interest arising under a loan relationship by virtue of section 100 Finance Act 1996 (FA 1996) and whether the representative members were obliged to make the repayments to the Appellants as a result of

their entitlements which amounted to a "money debt" for the purposes of section 100: see FTT Decision at [159] and [160].

Relevant tax principles

21. The accounting periods to which the Sums relate, spread over the period from 1 January 1995 to 30 April 2008. Although there were inevitably, certain legislative changes over that time, I adopt the same approach as that used in the FTT Decision, namely, whilst noting those changes that are material, I shall refer to only one version of each statutory provision. In each case the reference is to provisions in force before the Corporation Tax Act 2009.

22. Section 6 ICTA provides that corporation tax shall be charged on the profits of companies and under section 8, a company is chargeable to corporation tax on all its profits wherever arising. Furthermore, as a result of section 12 ICTA, corporation tax is assessed and charged for any accounting period of a company on the full amount of the profits arising in the period. Section 18 ICTA as it applied for tax year 1995–96 sets out the relevant provisions relating to Sch D, Cases I, II and III:

> "(1) The Schedule referred to as Schedule D is as follows:—
>
> SCHEDULE D
>
> Tax under this Schedule shall be charged in respect of—
>
> (a) the annual profits or gains arising or accruing—…
>
> (ii) to any person residing in the United Kingdom from any trade, profession or vocation, whether carried on in the United Kingdom or elsewhere, …
>
> (b) all interest of money, annuities and other annual profits or gains not charged under Schedule A, C or E, and not specially exempted from tax.
>
> (2) Tax under Schedule D shall be charged under the Cases set out in subsection (3) below, and subject to and in accordance with the provisions of the Tax Acts applicable to those Cases respectively.
>
> (3) The Cases are—

> Case I: tax in respect of any trader carried on in the United Kingdom or elsewhere …
>
> ……
>
> Case III: tax in respect of—
>
> (a) any interest of money, whether yearly or otherwise, …
>
> …….
>
> Case VI: tax in respect of any annual profits or gains not falling under any other Case of Schedule D and not charged by virtue of Schedule A, C and E."

23. The Case III set out above is relevant only to the issue of the taxation of IP 6. The FA 1996 introduced a separate code for loan relationships. From the tax year 1996–97, and accordingly for all other interest payments which are the subject of this appeal, this resulted in the substitution of a different Case III of Schedule D for corporation tax purposes. The applicable Case III in those circumstances is:

> "Case III: tax in respect of—
>
> (a) profits and gains which, as profits and gains arising from loan relationships, are to be treated as chargeable under this Case by virtue of Chapter II of Part IVof the Finance Act 1996; …"

24. The remainder of the interest arguments arise post the FA 1996. Section 81(1) FA 1996 sets out what is meant by a 'loan relationship' for the purposes of corporation tax:

> "Subject to the following provisions of this section, a company has a loan relationship for the purposes of the Corporation Tax Acts wherever—
>
> (a) the company stands (whether by reference to a security or otherwise) in the position of a creditor or debtor as respects any money debt; and
>
> (b) that debt is one arising from a transaction for the lending of money."

25. Section 81(2) FA 1996 provides that a 'money debt' is a debt which is, or has at any time been, one that falls, or that may at the option of the debtor fall to be settled either

by the payment of money, or by the transfer of a right to settlement under a debt which is itself a money debt.

26. Section 100 FA 1996 is also relevant:

> "100 Interest, and exchange gains and losses, on debts etc not arising from the lending of money
>
> (1) For the purposes of the Corporation Tax Acts, a company has a relationship to which this section applies in any case where—
>
> (a) the company stands, or has stood, in the position of a creditor or debtor as respects a money debt;
>
> (b) the money debt is not one which arose from a transaction for the lending of money (so that, in consequence of section 81(1)(b) above, there is no loan relationship); and
>
> (c) the money debt is one—
>
> (i) on which interest is payable to or by the company; or
>
> (ii) in relation to which exchange gains or losses arise to the company;
>
> and references to a relationship to which this section applies, and to a company's being party to such a relationship, shall be construed accordingly.
>
> (2) Where a company has a relationship to which this section applies—
>
> (a) this Chapter shall have effect in relation to the interest payable under, or the exchange gains or losses arising to the company from, the relationship as it has effect in relation to interest payable under, or (as the case may be) exchange gains or losses arising to the company from, a loan relationship to which the company is a party; but
>
> (b) the only credits or debits to be brought into account for the purposes of this Chapter in respect of the relationship are those relating to the interest or (as the case may be) to the exchange gains or losses;
>
> and, subject to paragraph (b) above, references in the Corporation Tax Acts to a loan relationship accordingly include a reference to a relationship to which this section applies."

27. To a significant extent the VRP payments related to overpayments of VAT in trades that had ceased to be carried on by the companies engaged in the trades at the time the VAT was repaid. The relevant provisions concerning receipts after a discontinuance of trade, and the provisions that apply where rights to payments were transferred are contained in section 103 and section 106 ICTA, which provide (so far as material):

> "103 Receipts after discontinuance: earnings basis charge and related charge affecting conventional basis
>
> (1) Where any trade, profession or vocation the profits of which are chargeable to tax under Case I or II of Schedule D has been permanently discontinued, tax shall be charged under Case VI of that Schedule in respect of any sums to which this section applies which are received after the discontinuance.
>
> (2) Subject to subsection (3) below, this section applies to the following sums arising from the carrying on of the trade, profession or vocation during any period before the discontinuance (not being sums otherwise chargeable to tax)—
>
> (a) where the profits for that period were computed by reference to earnings, all such sums in so far as their value was not brought into account in computing the profits for any period before the discontinuance, and
>
> (b) where those profits were computed on a conventional basis (that is to say, were computed otherwise than by reference to earnings), any sums which, if those profits had been computed by reference to earnings, would not have been brought into the computation for any period before the discontinuance because the date on which they became due, or the date on which the amount due in respect thereof was ascertained, fell after the discontinuance …
>
> . . . . . .
>
> 106 Application of charges where rights to payments transferred
>
> (1) Subject to subsection (2) below, in the case of a transfer for value of the right to receive any sum to which section 103, 104(1) or 104(4) applies, any tax chargeable by virtue of either of those sections shall be charged in respect of the amount or value of the consideration (or, in the case of a transfer otherwise than at arm's length, in respect of the value of the right transferred as between parties at arm's length), and references in this Chapter, except section 101(2), to sums received shall be construed accordingly.
>
> (2) Where a trade, profession or vocation is treated as permanently discontinued by reason of a change in the persons

> carrying it on, and the right to receive any sum to which section 103 or 104(1) applies is or was transferred at the time of the change to the persons carrying on the trade, profession or vocation after the change, tax shall not be charged by virtue of either of those sections, but any sum received by those persons by virtue of the transfer shall be treated for all purposes as a receipt to be brought into the computation of the profits of the trade, profession or vocation in the period in which it is received."

28. By virtue of s 110(2)(a), for s 103 purposes any reference to the permanent discontinuance of a trade includes a reference to any event which, under section 337(1) ICTA, is to be treated as equivalent to the permanent discontinuance of a trade. Mr Goldberg QC referred me to section 337(1) which provides as follows:

> "Where a company begins or ceases to carry on a trade, or to be within the charge to corporation tax in respect of a trade, the company's income shall be computed as if that were the commencement or, as the case may be, discontinuance of the trade, whether or not the trade is in fact commenced or discontinued."

29. Section 42 of the Finance Act 1998 is also relevant. It contains provisions, regarded as essentially codifying then existing law, concerning the relationship between tax on trading profits and accounts. This extract shows s 42(1) as originally enacted, and as amended by the Finance Act 2002 with effect from 24 July 2002:

> "For the purposes of Case I or II of Schedule D the profits of a trade, profession or vocation must be computed [on an accounting basis which gives a true and fair view] [2002: in accordance with generally accepted accounting practice], subject to any adjustment required or authorised by law in computing profits for those purposes."

30. The relevant provisions in relation to VAT groups is to be found at sections 43, 78 and 80 of VATA. They are as follows:

> " 43 Groups of companies
>
> where under the following provision of this section any bodies corporate are treated as members of a group, any business carried on by a member of the group shall be treated as carried on by the representative member, and –

> any supply of goods or services by a member of the group to another member of the group shall be disregarded; and
>
> any [supply which is a supply to which paragraph (a) above does not apply and is a supply] of goods or services by or to a member of the group shall be treated as a supply by or to the representative member; and
>
> . . . . . .
>
> and all members of the group shall be liable jointly and severally for any VAT due from the representative member.
>
> . . .
>
> 78. Interest in certain cases of official error
>
> (1) Where, due to an error on the part of the Commissioners, a person has –
>
> (a) accounted to them for an amount by way of output tax which was not output tax due from him and which they are in consequence liable to repay to him . . . .
>
> . .. .
>
> then, if and to the extent that they would not be liable to do so apart from this section, they shall pay interest to him on that amount for the applicable period, . . .
>
> …….
>
> 80. Recovery of overpaid VAT
>
> (1) where a person has (whether before or after the commencement of this Act) paid an amount to the Commissioners by way of VAT which was not VAT due to them, they shall be liable to repay the amount to him. . . . .
>
> (7) Except as provided by this section, the Commissioners shall not be liable to repay an amount paid to them by way of VAT by virtue of the fact that it was not VAT due to them."

Grounds of Appeal

(i) The Source Argument

31. Whilst accepting that both trades and loan relationships are taxable sources, the Appellants argued before the FTT that the source of the VRPs and IPs was the statute and not the trade. Mr Goldberg QC submitted four propositions in that regard:

i) Where there is a statutory right to a sum of money and money is received pursuant to that right, the source of the money is the statute and not something else.

ii) Whilst it is accepted that some receipts of a trader which are not directly derived from his basic trading activities may be regarded as trading receipts, in order for that to be so they must be paid to the trader for some specific trading purpose.

iii) Where a recovery is attributable to a trading activity in an earlier period, and the profits of that earlier period have been correctly computed, it is inherently unlikely that the recovery can be taxed in a later period as a receipt of a trade.

and

iv) Just because a sum is included in a company's accounts, it does not follow that it is liable to tax.

32. In relation to proposition (1) Mr Goldberg QC on behalf of the Appellants relied in particular upon *Davis v Powell [1977] STC 32, Drummond v Austin Brown [1984] STC 321 and FJ Chalke Ltd & Anr v Revenue and Customs Commissioners [2009] STC 2027* in support of the proposition that it was sections 78 and 80 VATA which were the respective source of the IPs and VRPs. The FTT's consideration of those submissions is recorded in the following way:

> "[99] Mr Goldberg referred us to Davis (Inspector of Taxes) v Powell [1977] STC 32, [1977] 1 WLR 258, a case on capital gains tax. There a tenant farmer surrendered his lease of agricultural land in consequence of a notice to quit from his landlord. The landlord paid him statutory compensation for disturbance under s 34 of the Agricultural Holdings Act 1948. The tenant was assessed to capital gains tax on the compensation on the ground that it was a capital sum derived from an asset, namely the lease, and in particular was received in return for the surrender of rights.
>
> [100] In the High Court, on appeal from the general commissioners, Templeman J held that the compensation was not derived from an asset. He said ([1977] STC 32 at 35, [1977] 1 WLR 258 at 260):
>
> 'What is said in this case is that the taxpayer had a lease and that lease was an asset; it was property of some form. He disposed of that asset by accepting the notice to quit which was given and by getting out, and he derived a capital sum from the asset when he did so. The capital sum was the amount of the compensation under s 34, which, as I have said, was £591. It does not seem to me that the compensation paid under s 34 is

> derived from the asset, namely the lease. It is not derived from an asset at all: it is simply a sum which Parliament says shall be paid for expense and loss which are unavoidably incurred after the lease has gone.
>
> [101] Drummond (Inspector of Taxes) v Austin Brown [1984] STC 321, [1985] Ch 52, was another case concerning capital gains tax. There the taxpayer gave up possession of certain business premises of which he was the tenant, and received compensation under section 37of the Landlord and Tenant Act 1954. The taxpayer was assessed to capital gains tax on the footing that the payment constituted a capital sum derived from an asset (the lease) or, alternatively, that it was compensation for the loss of an asset. It was held by the Court of Appeal, following Davis v Powell, that the taxpayer's right to compensation on the termination of the lease was not derived from the lease. Giving the judgment of the court, Fox LJ said ([1984] STC 321 at 324, [1985] Ch 52 at 59):
>
> 'In our opinion the £31,384 was not derived from the lease. The word “derive” suggests a source. The right to the payment was, in our view, from one source only, namely the statute of 1954. The lease itself gives no right to such a payment. It was the statute, and the statute alone, which created the right to the payment. The statute simply created an entitlement where none would otherwise have existed. And in creating that entitlement it did [2012] SFTD 723 at 754 not require that any provisions were to be written into the lease. Thus, there is no deeming provision which would in any way require one to treat the lease as being the source of the entitlement.
>
> [102] Mr Goldberg also took us to the headnote of FJ Chalke Ltd v Revenue and Customs Comrs [2009] EWHC 952 (Ch), [2009] STC 2027, where, in a claim for compound interest on repayment of overpaid VAT, it was held that s 80(7) was clear and unambiguous in providing that the only basis on which HMRC were liable to repay overpaid VAT was by means of a claim under s 80(1). It left no room for the co-existence of other remedies for the recovery of overpaid VAT from HMRC. The interest claimed, whether simple or compound, could only be interest in respect of the VAT which was overpaid and which had been repaid, namely interest on the principal sums.”

33. The FTT did not accept this argument. It expressed its conclusions as follows:

> “[103] Except in the case of RGL, the amounts that are the subject of these appeals do not derive directly from HMRC, but were paid by, or at the direction of, the representative member which was itself entitled to be paid both the principal sums in

respect of overpaid VAT, and interest on those sums. Payments made by, or on behalf of, the representative member do not have as their source the statute under which the payments have been made to the representative member.

[104] RGL, on the other hand, received VRP 5 from HMRC as representative member of the relevant group. If Mr Goldberg's first proposition is correct, it would mean that the source of the payment would not be the trades of Kay & Company, Abound and RGL itself, but only the statutory provision under which VRP 5 was paid, namely s 80(1) VATA.

[105] We do not accept this proposition. The question is not under what legal machinery the payment is made, but what the payment was in substance for. The source of the right to the payment is part of the matrix of facts which will provide the answer to that question, but it is not itself decisive. That much, we consider, is clear from London & Thames Haven Oil Wharves Ltd v Attwooll (Inspector of Taxes) (1966) 43 TC 491, [1967] Ch 772, to which Mr Gammie referred us.

[106] That case concerned the question whether a payment of compensation for loss of use of a fixed asset used in the taxpayer's trade was chargeable to tax under Case I of Sch D as a revenue receipt. The principles to be applied were explained by Diplock LJ in the Court of Appeal ((1966) 43 TC 491 at 515, [1967] Ch 772 at 815-816)

'I start by formulating what I believe to be the relevant rule. Where, pursuant to a legal right, a trader receives from another person compensation for the trader's failure to receive a sum of money which, if it had been received, would have been credited to the amount of profits (if any) arising in any year from the trade carried on by him at the time when the compensation is so received, the compensation is to be treated for income tax purposes in the same way as that sum of money would have been treated if it had been received instead of the compensation. The rule is applicable whatever the source of the legal right of the trader to recover the compensation. It may arise from a primary obligation under a contract, such as a contract of insurance, from a secondary obligation arising out of non-performance of a contract, such as a right to damages, either liquidated, as under the demurrage clause in a charter-party, or unliquidated, from an obligation to pay damages for tort, as in the present case, from a statutory obligation, or in any other way in which legal obligations arise. But the source of a legal right is relevant to the first problem involved in the application of the rule to the particular case, namely, to identify what the compensation was paid for. If the solution to the first problem is that the compensation was paid for the failure of the trader to receive a sum of money, the second problem involved

> is to decide whether, if that sum of money had been received by the trader, it would have been credited to the amount of profits (if any) arising in any year from the trade carried on by him at the date of receipt, that is, would have been what I shall call for brevity an income receipt of that trade. The source of the legal right to the compensation is irrelevant to the second problem. The method by which the compensation has been assessed in the particular case does not identify what it was paid for; it is no more than a factor which may assist in the solution of the problem of identification. I will not again traverse the cases. They seem to me to be directed to the solution of one or other of these two problems, which are not always distinguished in the judgments. In the course of these judgments, different metaphors and similes (appropriate no doubt to the particular facts of the case) have been used. But I do not think that any of these conflict with the rule as I have expressed it.
>
> [107] In this case s 80 VATA operates to provide a means whereby overpayments of VAT may be recovered. That is a relevant factor in identifying why the payment has been made. The payment is made by virtue of the statute, but that does not determine the underlying source. That can only be determined by the answer to the further question, which is what in substance the payment is for. We do not consider that the cases on capital gains tax can assist the analysis, so clearly set out by Diplock LJ."

34. Mr Goldberg contends that in reaching that decision, the FTT erred in law. He says that the right to receive VRPs and IPs pursuant to sections 43 and 80 VATA was vested in the relevant representative member of the VAT group at the time. As a result, the receipt was entirely separate from any trade and was payable pursuant to section 80 VATA alone. He emphasised the importance of section 80 VATA as the source of the VRPs by reference to paragraphs 64 – 72 of the judgment of Henderson J in *FJ Chalke Ltd & Anr v Revenue and Customs Commissioners [2009] STC 2027*, a case in which the claimants claimed that Community law required overpaid VAT to be repaid with compound interest. At paragraphs [68] and [72] Henderson J held:

> "[68] The combined effect of all these provisions is in my judgment enough to make it crystal clear that the s80 regime for the recovery of overpaid VAT was intended by Parliament to be both exclusive and exhaustive where the circumstances are such as to fall within the scope of the section. . . .
>
> . . . . .
>
> [72] The significance of this point, in my view, is that since s80 (as I have held) provides an exclusive regime for recovery of the overpaid VAT, any right to recover interest on the

> repayment as a matter of domestic law must likewise be found within the confines of the statutory scheme, that is to say either in, or through , s78 . . ."

35. Mr Goldberg also drew attention to the fact that just as Fox LJ noted in relation to the Landlord and Tenant Act 1954 in *Drummond v Austin Brown* at 324 (which was contained in the extract from his judgment set out at [101] of the FTT Decision) section 80 VATA does not contain a deeming provision which would require one to treat the original trade as the source of any payment.

36. He submitted that in fact, there was no link whatever between a payment received under section 80 and a trade. He says that the requirement that HMRC pay the representative member of a VAT group, even if the representative member has changed since the VAT or purported VAT was originally paid and the VAT group itself is differently owned, shows that the trade is an irrelevance and the source of the payment is the statute.

37. Mr Goldberg says therefore, that in their conclusion at [105] – [107] the FTT when placing reliance upon *London & Thames Haven Oil Wharves Ltd v Attwooll* overlooked the irrelevance in this case of the trade to the receipt under section 80 VATA. He submitted that in that case, had there been no trade there would have been no receipt whereas in this case, the trade was not essential to the receipt at all.

38. Mr Gammie on behalf of HMRC pointed out that it is only the first question posed by Diplock LJ in the *Attwooll* case to which the FTT referred at [106] with which Mr Goldberg takes issue. He points out that Mr Goldberg accepts that, if Diplock LJ's first problem is resolved in a way which links the payment to the trade, the second issue would be resolved against the Appellants. He says that quite clearly the repayments of VAT were to make good the respective holes in trading profits. There is no question that they arise from the statute itself.

39. In this regard, he submitted that in the same way as Lord Asquith found in *Purchase v Stainer's Executors 32 TC 367,* that Leslie Howard acted for money and not for contracts and that, accordingly, the payments received were receipts of his profession, in this case, the VRPs and IPs and the Sums would not have been paid other than to make good the hole in trading receipts created by the original VAT overpayments.

40. He also submitted that, although a receipt must emanate from a taxable source, it is not necessary, as Mr Goldberg would have it, that the recipient has property in the receipt. Mr Gammie says that the activity of conducting the trade can be enough. In

this regard, he referred me to section 59 ICTA which provides that income tax under Schedule D "shall be charged on and paid by the persons receiving or entitled to the income in respect of which the tax is directed by the Income Tax Acts to be charged".

41. In order to supplement his argument both before the FTT and on appeal, Mr Goldberg put forward his second proposition which was that whilst he accepted that some receipts of a trader which are not directly derived from his basic trading activities may be regarded as trading receipts, in order for that to be so they must be paid to the trader for some specific trading purpose.

42. In *IRC v Falkirk Ice Rink Ltd [1975] STC 434* for example, the voluntary payment was to cover the additional cost of curling in a particular season and was paid because of the fear that otherwise the facilities might not continue to be made available. In *Smart v Lincolnshire Sugar Co Ltd 20 TC 643* a subsidy was paid pursuant to statute in relation to sugar manufactured from beet grown in Great Britain. The subsidy was payable in weekly advances and was only repayable in certain circumstances. It was held that in view of the business nature of the sums they were trading receipts to be taken into account in the year in which they were received.

43. Having analysed a number of authorities including *Smart v Lincolnshire Sugar Co Ltd* and *IRC v Falkirk Ice Rink Ltd* on which Mr Goldberg and Mr Gammie relied, the FTT rejected Mr Goldberg's second proposition at paragraphs [117] to [119] in the following terms:

> "[117] In looking at those relevant circumstances, Lord Emslie considered that the fact that the payment was voluntary was neutral. He went on to conclude ([1975] STC 434 at 441, 51 TC 42 at 49–50):
>
> 'In spite of the fact that there was no agreement between the taxpayer company and the club requiring the club to make any such payment to the taxpayer company and that the payment was not in respect of services rendered by the taxpayer company to the club in the past and that the taxpayer company gave no undertaking in return for the donation, I am of opinion that the payment was made in order that the taxpayer company might use it in their business, and that in substance and in form it was a payment made to a trading company artificially to supplement its trading revenue from curling and in order, in the interests of the club and its members, to preserve the taxpayer company's ability to continue to provide curling facilities in the future. In its quality and nature this payment was of a business nature. It was accordingly a trading receipt in the hands of the

> taxpayer company and the question of law should be answered in the negative.'
>
> [118] Mr Goldberg submitted that the important point in Falkirk Ice Rink was that the voluntary payment was made by a customer. We accept this, but the derivation of the payment is not decisive of its nature. What is important is the quality and nature of the receipt.
>
> [119] We conclude from this that we are unable to accept Mr Goldberg's second proposition. There is no rule that, in order to be trading receipts, sums not directly derived from his basic trading activities must be paid for a specific trading purpose. The only principle is that one must have regard to the character of the receipt, and the purpose of the payment, or the motive of the payer, is relevant only in so far as it bears upon that question. All the relevant circumstances must be taken into account. We accept Mr Goldberg's submission that in Smart the fact that the payments were required by the statute to be used in the business was decisive, but that is not the principle to be derived from that case or from any of the other authorities."

44. Mr Goldberg submits that at [119] the FTT erred in the way in which it formulated its supposed rule. He says the proposition is that where the source of a payment is not the trade, it will not be treated as if it were unless it is linked to the trade. He says that in the case of payments made under section 80 there is a divorce between the trade and the right under section 80. He prayed in aid the fact that for example, VRP1 and 2 totalled approximately £140m and were received by SDG. That company's supplies to which any repayment could relate were in the region of only £12.8m.

45. Furthermore, in the case of RGL which received VRPs and IPs in its capacity as the representative member of a VAT group, he contends that the true source of the Sums was the happenstance that RGL happened to be the representative member of the group at the material time, combined with the statutory rights under section 80.

46. He submitted that unlike the circumstances in *Smart v Lincolnshire Sugar Co Ltd* it cannot be said that the VRPs or IPs were intended to supplement trading receipts or that the recipients suffered a loss as a result of the original overpayments. They were paid by and to a representative member which itself may or may not have been trading. He also reiterated his submissions in relation to *Murray v Goodhews [1978] STC 207* which the FTT dealt with at [109]. In particular he drew attention to the passage in the judgment of Buckley LJ at 213 b-e:

> "In my opinion a perusal of these authorities leads to the conclusion that every case of a voluntary payment, ... must be considered on its own facts to ascertain the nature of the receipt in the recipient's hands. All relevant circumstances must be taken into account. These may include the purposes for which the payer makes the payment, or the terms, if any on which it is made, as for example in the *Falkirk* case, where the payment was made for the purposes of its being applied in the recipient's business in the future . . . .or the payment may be merely in the nature of a testimonial or a solatium which, although it recognises the value of past services, is not paid specifically in respect of any of those services, or of expected future services, . . . I stress that it is the character of the receipt in the recipient's hands that is significant; the motive of the payer is only significant so far as it bears, if at all, on that character."

47. Mr Goldberg submitted that the Sums paid to the Appellants should be categorised as solatium, paid neither recognising the value of past services nor specifically in respect of those services.

48. With regard to Mr Goldberg's second proposition, Mr Gammie also referred me to the *Falkirk Ice Rink* case and in particular, to the judgment of the Lord President, Lord Emslie at page 47:

> "Not every receipt by a trader in the course of his business is a trading receipt in the income tax sense and whether a particular payment to a trader is to be regarded as a trading receipt is one which must be answered in each case in which the question arises in light of all the relevant circumstances."

In this case, he says the relevant circumstances are clear.

49. Mr Goldberg's third proposition under this head was rejected at paragraphs [120-127] of the FTT Decision. The proposition is that where a sum is attributable to trade in an earlier period it is inherently unlikely that it will be chargeable to tax in a later period. This is relevant here because the supplies were made many years before the amounts now being assessed. In particular Mr Goldberg says that the FTT was wrong in relation to VRP5 at [146(5)]. He says that in relation to its conclusions for the purposes of the post cessation receipts, it is assumed that the receipt is earned in the earlier period but in relation to VRP5 the opposite assumption is applied.

50. In this regard, in addition to the authorities to which the FTT were referred and which were analysed at [120] – [126] of its decision, Mr Goldberg referred me to the speech of Lord Radcliffe in *Owen (H.M Inspector of Taxes) v Southern Railway of Peru Ltd 36 TC 602* at 641:

> ". . .As I understand the matter, the principle that justified the attribution of something that was in fact received in one year to the profits of an earlier year, as in such cases as *Isaac Holden & Sons Ltd v Commissioners of Inland Revenue 12 TC 768* and *Commissioners of Inland Revenue v Newcastle Breweries Ltd 12 TC 927*, was just this, that the payments had been earned by services given in the earlier year and therefore a true statement of profit required that the year which had borne the burden of the cost should have appropriated to it the benefit of the receipt. The principle is clearly stated in the speech of Lord Simon in *Commissioner of Inland Revenue v Gardner Mountain and D'Ambumenil Ltd 29 TC 69* at page 93:
>
> "In calculating the taxable profit of a business on Income Tax principles . . . services completely rendered or goods supplied, which are not to be paid for till a subsequent year, cannot, generally speaking, be dealt with by treating the taxpayer's outlay as pure loss in the year in which it was incurred and bringing in the remuneration as pure profit in the subsequent year in which it is paid, or is due to be paid. In making an assessment to Income Tax under Schedule D the net result of the transaction, setting expenses on the one side and a figure for remuneration on the other side, ought to appear (as it would appear in a proper system of accountancy) in the same year's profit and loss account, and that year will be the year when the service was rendered or the goods delivered . . ."

51. Mr Goldberg submitted that the profits in the respective accounts for the previous years were correct. Furthermore, he says that the VRPs and a fortiori the Sums cannot be said to derive from trading in the years they were received. In this regard, he referred me to *Gallagher v Jones [1993] STC 537* and in particular to a passage in the judgment of Nolan LJ at 560D:

> " . . . The accepted qualification on the primacy of correct accountancy treatment has usually been described, as Pennycuick J described it, by saying that the treatment must comply with the statutory provisions. This, of course, reflects the fact that income tax is a creature of statute. But there are also references in the cases to income tax principles, such as Lord Reid's invocation of the "non-statutory principle" that neither profit nor loss should be anticipated. With great respect I would suggest that this might equally be described as a

> restatement in a particular context of the statutory rule, in s60 of the Income and Corporation Taxes Act 1988, that tax shall be charged "on the full amount of the profits or gains of the year" - no more and no less. But whatever the context of the expression "the principles of income tax law" may be I conclude, as did Pennycuick J, that the law does not enable or require us to ascertain the profit of a trade on the a basis divorced from the principles of commercial accountancy."

52. He also pointed out that the situation under consideration in *Pertemps Recruitment Partnership Ltd v Revenue and Customs Commissioners [2011] STC 1346* was entirely different because the sums in question all arose from trading activity in the year of assessment. Here he says, there is no challenge to the profit in the earlier accounting years, the Sums are just an oddity and do not arise from a trade at all.

53. In relation to the third proposition, Mr Gammie pointed to the Excluded Parts of VRPs 4 and 6 and IPs 4 and 6 in relation to which there is no appeal. He says that they are examples of Sums received in later accounting periods which Mr Goldberg does not contend should not be taxed in those later periods as receipts of the particular trades. By way of example, he also referred to the judgment of Lord Simonds LC in *Purchase v Stainer* at 411 where he made clear that the source of the payments was the professional activity of the actor. He went on:

> "If in all the circumstances it was not possible to bring the sums into account in the years in which they were earned, as I will assume to be the case, the result is not to change the character of the payment but to exhibit that some professional earnings may escape the Income Tax net."

Mr Gammie submitted that had the taxpayer, the actor Leslie Howard not died, there would have been no question but that the profits arising from his profession in earlier years would have been brought into tax when received in the later accounting periods.

54. Mr Goldberg's last proposition under this head is that just because a sum appears in a company's accounts it does not follow that the company is liable to corporation tax on it. At paragraph [128] of its decision the FTT concluded, Mr Goldberg says, quite rightly, as follows:

> "[128] We referred earlier to our views on the meaning of section 42 FA 1998. On this basis, we accept that the mere fact that sums have been included in the appellants' profit and loss accounts, it does not follow that they are liable to tax. As we have found, the threshold question whether a receipt is a trading receipt must first be determined. The accounting

> treatment is an element of that enquiry, but it is not determinative."

55. This conclusion is based upon the decision in *Tapemaze Ltd v Melluish [2000] STC 189*. In that case, Hart J held at 202g –h:

> "I am not therefore, persuaded that the Crown is right to start from the proposition that because the payments were originally received in the course of trade the subsequent appearance in the company's profit and loss account of a sum in respect of profit which can be related to those receipts necessarily means that that sum has the character of profits from the trade for corporation tax purposes. . . . .
>
> In my judgment, both the beginning and the end of the inquiry should be to consider the source of the profit which has been properly recognised as income in these accounts. . . ."

56. However, Mr Goldberg says that the FTT erred in treating the Sums which appeared in the accounts of the various Appellants as if they were the same as the VRPs themselves whereas there was no basis upon which it could properly find that the Sums were the VRPs and IPs in question because the FTT was wrong to find that each of the Appellants was beneficially entitled to the sums received. I deal with the issue of beneficial entitlement under a separate head below.

57. Furthermore, in relation to the IPs he submitted that all but IP6 were subject to the law as amended by the FA 1996 which requires them to be money debts. However, he says none of them arose in such a way and accordingly, cannot be taxed. In this regard, he referred me to Chitty at 26.008 and *Jervis v Harris [1996] Ch 195* at 202g at which Millett LJ endorsed the passage from Chitty:

> "The law of contract draws a clear distinction between a claim for payment of a debt and a claim for damages for breach of contract. The distinction and its consequences are set out in Chitty on Contracts 27th ed (1994) vol 1, p 1046, para 21-031. As there stated, a debt is a definite sum of money fixed by the agreement of the parties as payable by one party to the other in return for the performance of a specified obligation by the other party or on the occurrence of some specified event or condition; whereas damages may be claimed from a party who has broken his primary contractual obligation in some way other than by failure to pay such a debt."

58. Mr Goldberg submits therefore, that none of the Appellants had any rights against HMRC from which the IPs arose and accordingly, they cannot fall within the definition. In any event, he submits that if, which is not accepted, they did have such a right, the IPs are not money debts. I will return to the latter issue under the sixth ground of appeal, namely the Interest Arguments.

59. In this regard Mr Gammie referred me to *Pertemps Recruitment Partnership Ltd v Revenue and Customs Commissioners [2011] STC 1346* in more detail. In that case, the taxpayer carried on business as a recruitment agency. Customers were invoiced on a regular basis. However, payments received by the taxpayer might not be reconciled to a particular invoice and in some cases they could not be reconciled. The majority of such unreconciled payments were set off against another liability of the customer or were repaid. However a minority were eventually released to the taxpayer's profit and loss account. If a customer could show that it had made an overpayment in error, the taxpayer would refund it even if it had been transferred to a balance sheet account or had been released to the profit and loss account. The issue on the appeal to the Upper Tribunal was whether sums paid by Pertemps' customers to Pertemps by mistake formed part of the "profits or gains arising or accruing . . . from [Pertemps'] trade" within s18(1)(a)(ii) ICTA so as to be subject to corporation tax.

60. In particular, Mr Gammie drew attention to the following paragraphs of the judgment of Arnold J:

> "[65] Counsel for HMRC emphasised Lord Emslie's statement [in the *Falkirk Ice Rink* case] that the fact that the payment was voluntary was neutral and Lord Cameron's statement that this was a factor to be taken into account, but not a major factor. She submitted that this again showed that it was not necessary for a receipt to be a trading receipt that the recipient was legally entitled to it. I agree.
>
> [66] Counsel for Pertemps submitted that the decisive factor in that case was the purposes of the payment. That is true, but it does not alter the fact that the taxpayer was not legally entitled to the money and yet it was held to be a trading receipt. Counsel for Pertemps emphasised the rather unusual facts of the case, and in particular the very close relationship between the club and the taxpayer, suggesting as I understand it that it was an exceptional case. In my judgment those particular factual circumstances are immaterial to the present issue.
>
> . . . . . .

[79] Returning to Pertemps' argument summarised at [31] above, I do not accept it for the following reasons. First, as counsel for HMRC pointed out, there is no requirement in s18(1)(a)(ii) of ICTA that the trader be legally entitled to the receipt making up the profits. Secondly, Greene MR did not say that there was such a requirement in Morley v Tattersall. It is true that he held that the money was the client's money, and that it follows from this that Tattersall was not legally entitled to it; but it does not follow that legal entitlement is a sine qua non for a trading receipt. Thirdly, I consider that the review of the authorities above, and in particular Comr of Income Tax v Savundranyagam, Simpson v Reynolds and IRC v Falkirk, shows that legal entitlement is not a prerequisite. Fourthly and most fundamentally, the fact that a payment is made in circumstances such that the payer has a restitutionary claim to repayment of that sum does not mean that the recipient is not legally entitled to receive it. On the contrary, the recipient is legally entitled to receive and keep the money unless and until a claim for repayment is made. That is why no one suggests that Pertemps has done anything wrong in keeping the money mistakenly paid by its customers.

. . . . .

[84] Finally, counsel for Pertemps argued that the purpose of the mistaken payments in the present case was not such as to make them trading receipts, in contrast with the payments in cases such as IRC v Falkirk. I disagree. On the facts found by the tribunal, the mistaken payments derived from the business relationship between Pertemps and its customers, were made by the customers in the belief that they owed money to Pertemps for services supplied by Pertemps and were an unavoidable incident for Pertemps' trade. Having regard not only to the nature of the payments (money which upon receipt became Pertemps'), but also their purposes (money paid for the reasons I have just stated), the tribunal was entitled to conclude that they were trading receipts.

. . . . .

[86] On this basis, she argued that, since Pertemps' profits as stated in its accounts included the mistaken payments, and those accounts gave a true and fair view and were in accordance with generally accepted accounting principles, the

> mistaken payments were properly to be regarded as trading receipts.
>
> . .. .
>
> [91] As to the merits of the argument, it seems to me that this point lends additional support to the tribunal decision, but is not conclusive on its own."

61. In reply in this regard, Mr Goldberg submitted that there are three relevant streams of authority. The first is that to which *Davis v Powell* and *Drummond v Austin Brown* belong. The source of the payment was the statute and there was no question of the source of the receipt being the trade. The second strand or stream is where whether the receipt is pursuant to statute or agreement, the payment is linked to a trading purpose such as in *Falkirk* and *Sugar*. The third is where the receipt is by way of compensation for loss of trading profits such as in *Attwooll*.

62. He says, however, that there is no fourth strand which would cover the present situation which he says is one in which the payment is pursuant to statute and there is no link between the statute and the trade. He says that, in fact, the present case is covered by the first strand. The payment is pursuant to statute and it could just as well stay with the representative member of the VAT group. There is no reference or need for a trading purpose or for the payment to make good a hole in trading profits. In addition, he says that the recoveries in this case were wholly extraordinary and not in the nature of those considered in the *Tapemaze* or the *Pertemps Recruitment* cases.

63. The FTT in my judgment were right to conclude that section 80 was merely the legal machinery by which the payment was made and that the underlying source of the payment is to be determined by asking what in substance the payment was for. I also agree with its conclusion that the source of the repayments is the original trades by which the overpayments of VAT were generated being paid either to the supplier or the successor to the trade.

64. Repayments under section 80 arise as a result of the statutory fiction contained in section 43 VATA which applies to VAT groups. By virtue of section 43, the original supplies were treated as if they were a supply by or to the representative member, although the members of the group remain jointly and severally liable for any VAT due from the representative member. It is the representative member which makes the initial overpayment and under section 80 is entitled to the repayment. Nevertheless, in my judgment, the repayment arises not from statute but as a result of the original overpayment which itself arose from the trade. The repayment under section 80 is

expressly described in that section to be in respect of VAT which was not due and provides that the Commissioners shall be liable to "repay the amount to him." The repayment is of the overpaid or mistakenly paid VAT. It is not a freestanding payment by virtue of the statute. Given the clear wording of the section there is no need for the kind of deeming provision found in the Landlord and Tenant Act 1954 to which reference was made in *Drummond v Austin Brown*.

65. In my judgment, there can be no correlation between such a repayment of that which ought not to have been paid and the circumstances under consideration in the CGT cases such as *Davis v Powell* and *Drummond v Austin Brown*. In those cases, the compensatory payments were provided for under the Agricultural Holdings Act 1948 and the Landlord and Tenant Act 1954 respectively. Had the statute not created a right to compensation in certain circumstances, it would not otherwise have existed. The situation here where the VAT was originally paid in relation to the trade and is repaid, is in my judgment, entirely different. There is a clear link between the repayment to be made under the section and the original overpayment which arose from the trade itself. Without the trade which gave rise to the overpayment of VAT no payment would be made by HMRC. In my judgment, it is the overpayment and ultimately therefore, the underlying trade which gave rise to the VRPs.

66. In such circumstances, in my judgment, the statute itself cannot be characterised other than as the mechanism by which the repayment is made to the representative member. What is more, as the FTT pointed out at [103] save in the case of RGL, the appeals do not relate to sums derived directly from HMRC but from sums paid to the respective Appellants by or at the direction of the current representative member of the relevant VAT group, to which each of the Appellants or its predecessor belonged.

67. Mr Goldberg says that the trade is irrelevant and the FTT should not have placed reliance upon the analysis in *Attwooll*. In my judgment, the onward transmission of the repayment by the current representative member of the VAT group which for administrative ease receives the repayment from HMRC, to the trader or successor to the trade by which the original overpayment was generated, cannot strip the repayment of its nature or character. The onward transmission by the representative member is just that and is rendered necessary by the statutory fiction of the VAT group. The answer to Diplock LJ's first question, what was the payment for, remains the same. I accept Mr Gammie's submissions in this regard.

68. It follows that in my judgment, the FTT's conclusion in relation to the source of the IPs was also correct. As the FTT set out at [102], the interest claimed could only be interest in respect of the VAT which was overpaid and which had been repaid, being interest on the principal sums. Henderson J's decision in *FJ Chalke Ltd & Anr v Revenue and Customs Commissioners* is not inconsistent with such a conclusion. In

that case, he decided that the statutory regime for the recovery of overpaid VAT and the interest upon it was exhaustive. That does not affect the source itself.

69. I shall now turn to the remainder of Mr Goldberg's propositions and the strands to which he referred. The second proposition dovetails with his second strand, namely that there may be receipts of a trader which are not directly derived from his basic trading activities but which are regarded as trading receipts, but in order for that to be so they must be paid to the trader for some specific trading purpose. This is Mr Goldberg's second strand in which he says that whether the payment arises from statute or agreement, in order to be a trading receipt it must be linked to a trading purpose such as in *IRC v Falkirk Ice Rink* or *Smart v Lincolnshire Sugar*. It also encompasses Mr Goldberg's third strand of authority which is *Attwool* in which the receipts were taxed because they represented compensation for loss of trading profits.

70. Once again, in my judgment, the FTT was correct to reject Mr Goldberg's proposition. As Lord Emslie pointed out in the passage in the *Falkirk Ice Rink* case, to which the FTT referred at [117] what is important is the quality and nature of the receipt. As Buckley LJ emphasised in *Murray v Goodhews* and the FTT pointed out at [119], it is necessary to take account of all of the relevant circumstances including the character of the receipt and the purpose of the payment. I have already found that neither the existence of the statutory mechanism in respect of VAT groups nor the onward transmission of such repayments creates a disjunct between the repayment and the original trade. In this case, the FTT found that the payments were directed to the original traders or the successors to those trades. Accordingly, I reject Mr Goldberg's submission that the character of the receipts was one of solatium being divorced from the trade.

71. I also consider the FTT's conclusion in relation to Mr Goldberg's third proposition which is at [127] to be correct. It was as follows:

> "[127] We agree with Mr Gammie that there is nothing in the decided cases that supports Mr Goldberg's third proposition. As Hart J said in Tapemaze, the starting point and the end point is the source of the profit, and there is no inherent likelihood or unlikelihood of the result that can be based on the fact that a recovery is attributable to a trading activity in an earlier period. The question is whether the actual receipt or accrual arose from the trade."

72. The fact that both the VRPs and the IPs were very large does not render them extraordinary in any way or different in essence from the subject matter under consideration in either the *Tapemaze* or the *Pertemps* cases. Furthermore, as Mr

Gammie pointed out, if Mr Goldberg's third proposition were correct, it would be inconsistent with the decision not to appeal in relation to the Excluded Parts of VRPs 4 and 6 and IPs 4 and 6. It would also lead to the conclusion that, prima facie, all sums received after a considerable delay are not taxable which cannot be correct. As Mr Gammie submitted in relation to the circumstances in *Purchase v Stainer*, had the actor Leslie Howard not died, there would have been no question but that the profits arising from his profession in earlier years would have been brought into tax when received in the later accounting periods. In my judgment, neither the payment by the representative member nor the delay in receipt can alter the nature and source of the payment itself.

73. Mr Goldberg's fourth proposition was accepted by the FTT at [128]. I deal below with Mr Goldberg's further contention that the FTT nevertheless erred in treating the Sums in the accounts of the Appellants as the same as the VRPs and IPs themselves because the Appellants were not beneficially entitled to the Sums.

74. Suffice it to say at this stage, I accept Mr Gammie's submission that when determining whether a payment is a trading receipt it is necessary to consider all the circumstances and as the extracts from *Pertemps Recruitments* to which I referred at paragraph 60 demonstrate, the fact that the recipient is not legally entitled to the payment is not determinative.

(ii) Beneficial Entitlement

75. The findings at paragraphs [129], [155] and [159] of the FTT Decision to the effect that all of the Appellants except for RGL had a beneficial entitlement to the relevant VRPs and IPs is challenged on the basis that such a finding is one of law or, at least, mixed law and fact whereas the FTT treat it purely as a matter of fact. Further, or in the alternative, it is said that there was no basis for the factual finding and, accordingly, it is within the four corners of *Edwards v Bairstow*, in the sense that no persons acting judicially could properly have reached such a finding.

76. As I have already mentioned, it is accepted that this argument does not apply to the Excluded Parts of VRPs 4 and 6 and IPs 4 and 6.

77. In summary, Mr Goldberg submits that:

i) RGL was the only representative member of a relevant VAT group and there was no evidence before the FTT as to the manner in which equalisation payments may have been made by members of such groups to the representative member from time to time;

ii) in any event, save to a very limited extent such intra group equalisation payments cannot have been made by the Appellants in this case because they were not suppliers;

iii) even if they had made such payments it would have not given them any rights vis a vis the representative member;

iv) there is no evidence of any arrangements as to what was to happen in relation to overpayments of VAT by the representative member;

v) there were no findings by the FTT that any of the Appellants entered into or became entitled to the benefit of contracts giving them any right to recover any VRP or IP from the party entitled to receive it;

and

vi) it is known that all and any rights to VRP2 and, accordingly, IP2 attributable to supplies made by GUS plc, Kay and Company and Abound Ltd were retained by those companies, and, accordingly, in law, the Appellants cannot have been beneficially entitled to the relevant VRPs and IPs.

78. In addition, Mr Goldberg made specific submissions in relation to each Appellant and the chain of rights in relation to each VRP and the FTT's Decision in that regard, to which I shall return.

79. The Appellants stress therefore, that in order to be liable to corporation tax, each of the Appellants had to be beneficially entitled to the Sums which appear in their respective accounts. In this regard, Mr Goldberg referred me to section 8 ICTA which makes reference to a company being chargeable to corporation tax on all its profits wherever arising. He contrasted this with section 59(1) of that Act which provides that income tax shall be charged under Schedule D on persons "receiving or entitled to the income" and drew particular attention to section 59(4) which provides that sub-sections (1) to (3) shall not apply to corporation tax. He also noted that the same wording is adopted in sections 8 and 245 Income Tax (Trading and Other Income) Act 2005.

80. Mr Gammie on behalf of HMRC submitted that section 8 ICTA in reality amounted to a tax on profits. As I have already mentioned, he also drew my attention to paragraph 79 in the judgment of Arnold J in the *Pertemps Recruitment* case to which I have referred at paragraphs 59 and 60 above. Arnold J held that there was no requirement that the trader be legally entitled to the receipts in question and the fact that the payment was made in circumstances in which the payer has a claim in restitution to repayment does not mean that the recipient is not legally entitled to receive it or that it was not a trading receipt. In this regard, Mr Goldberg pointed out that Arnold J was not considering section 8 ICTA.

81. In summary, it was argued both before the FTT and the Upper Tribunal that but for VRP5, the Sums were received by members of a VAT group from the representative member and that there was no basis upon which it could be properly determined that the recipient companies were beneficially entitled to those payments.

82. Mr Goldberg emphasised that the Appellants had all been members of a VAT group albeit that the group of which they were members was not always the same. He pointed out that it is the representative member of the group which has all the rights against and responsibilities to HMRC as a result of section 43 VATA. In particular, he pointed to section 43(1)(b) VATA: it was the representative member of the VAT group which is treated as having made any supplies for VAT purposes.

83. He also referred both before the FTT and on the appeal to *Thorn plc v Customs and Excise Commissioners (No 15283),* a decision of the VAT Tribunal in which it was decided that the representative member acts in a statutory capacity and is not a fiduciary or an agent for the members of the group. As the FTT sets out at [24] of its Decision, the argument in *Thorn* was whether an assessment could be made on a successor representative member which was not the representative member when the supplies were made. The tribunal decided that where a group subsists the expression "representative member" applies to whichever company is currently undertaking that role.

84. Accordingly, Mr Goldberg submitted that where the VAT which was not in fact due was paid by a representative member of a VAT group, the VRPs and IPs payable pursuant to sections 78 and 80 VATA were quite properly paid and were due to the representative member and not to the underlying members of the VAT group. He drew particular attention to section 80(7) which provides that except as provided by section 80, the Commissioners are not liable to repay any VAT which was not in fact due.

85. Only RGL was a representative member of a VAT group and therefore, he submits the other Appellants cannot have been beneficially entitled to the relevant VRPs and IPs and therefore cannot be liable to tax upon the Sums they received from the then representative member of the VAT group to which they belonged. He says therefore, that the finding that they were beneficially entitled is insupportable.

86. He also draws attention to the fact that SDG transferred the whole of its trade to SDHSL by the 2005 Agreement. He says that the FTT wrongly interpreted that agreement and on a true construction, SDG parted with all and any rights which it had

to VRP2 and IP2. Accordingly, he says there is no basis upon which SDG could have been beneficially entitled to those payments and accordingly, it cannot be taxed on them. That is a matter to which I will return.

87. He went on to submit that within such a group suppliers will often make VAT equal payments to the representative member of an amount equal to the VAT which would have been due from them if they had not been a member of the group. In this case, he says, such payments cannot have been made because the Appellants were not suppliers and in any event, the fact that a supplier has made a VAT equal payment does not, of itself, give the supplier any rights at all.

88. He says that there is no evidence of any arrangements as to what was to happen if, as here, overpayments of VAT were made by the representative member, there is no finding by the FTT that any of the Appellants or the suppliers entered into, or became entitled to the benefit of contracts giving them a right to recover from the person entitled under VATA to any repayment of overpaid VAT or any payment of interest and it is known that all and any rights to VRP2 and IP2 were attributable to supplies by GUS, Kay and Company and Abound Ltd and were retained by those companies.

89. Having considered the submissions in relation to section 80 VATA and *Thorn*, the FTT expressed its conclusions in relation to the point of principle, in the following way:

> "[26] Mr Goldberg invited us to conclude from this that, although the representative member has statutory rights and duties, it does not have any common law rights and duties. In particular, he argued, it [sic] activities did not give it common law rights or obligations to the other members of the VAT group. Mr Gammie argued that all that Thorn could be taken to have decided in this respect was that the effect of the statutory provision is not to give rise to a legal capacity in the nature of those set out in s 73(5).
>
> [27] We agree with Mr Gammie. We accept, as he argued, that the statutory regime imposed by s 43 does not inhibit the relationship as between the representative member and other group members regarding contributions from one to another, or as regards amounts recovered by the representative member and then accounted for to the members of the group. What rights in this respect exist between the representative member and other group companies is a question to be determined in the circumstances and on the available evidence in each case."

90. The FTT went on to consider the evidence available as to the arrangements between group members and to conclude that the payments by representative members to the Appellants were not by way of gift. The matter was dealt with at [32] to [35]:

> "[32] In our view, within a group, when payments are made there may be no clarity as to the legal status of those payments at a particular time, or whether they are made by reference to specific legal rights. But that does not mean that, as between members of a group, payments that are made in the absence of an identifiable right are necessarily in the nature of gifts. We do not regard the inter-company payments to which Mr Griffin referred in his statement as gifts from the operating companies to the representative member. We had no other evidence as to the manner in which the GUS group operated its treasury function. Where no identifiable right exists, but a payment is made, it will often be the case that such a payment recognises an obligation, on the one hand, and an entitlement on the other.
>
> [33] We agree with the submission of Mr Gammie that the obvious way in which groups of companies will approach the issue of accounting for VAT is for the companies that (ignoring the group fiction) make the supplies to fund the payment of VAT by the representative member, and to account for those payments in their own individual accounts. The corollary to that is that repayments of overpaid VAT will be expected to flow in the opposite direction. For all purposes other than VAT, the group companies are individual companies in their own right, and, if they operate in a commercial manner, would be expected to ensure that any depletion of their assets as a consequence of the overpayment of VAT would be redressed by receipt of the corresponding repayment.
>
> [34] In the case of the payments of amounts equal to part of VRP 1 and IP 1 by GUS plc to SDG, at the direction of March UK, we find that these were not gifts by GUS plc, but a payment in recognition of the position, accepted as between independent parties acting at arm's length, that the right to the repayments belonged to SDG. That acceptance can be explained only by the fact that the repayments related to the supplies made in the trade of SDG and the trade of RGL which was transferred to SDG on 25 November 2000.
>
> [35] We find also that the payments made by LL to SDG were not in the nature of gifts. There is no evidence of the repayments of VAT to LL being regarded as an asset of LL. They were not treated as such in LL's accounts. Nor is there any evidence that LL chose to give away amounts equal to the relevant part of VRP 1 and IP 1 rather than investing those amounts by way of equity or loan or making distributions. If these amounts had been paid to SDG by way of gift, we would expect to have seen clear evidence in the accounts of LL of

> ownership of the relevant sums, and minutes showing the making of a gift or capital contribution. The natural implication is that LL as the representative member immediately passed the payment to SDG as the company accepted by the group to be entitled to it, as beneficial owner, and we so find."

91. The FTT's ultimate conclusions in this regard are in the following form:

> "[129] In our view, applying the principles we have derived from the authorities, the VAT repayments received by each of the appellants were trading receipts. We have found in each case that the appellants were beneficially entitled to the payments, and that those payments were not made by way of gift.
>
> [130] We have concluded that the fact that the payments in respect of overpaid VAT were made by HMRC to the representative member (or to an agent on behalf of the representative member) under the statutory provisions of s 80 VATA does not mean that the receipt, even in the case of VRP 5, cannot be a trading receipt. The fact that those payments are required to be made by a statutory provision relating to overpaid VAT is a relevant factor in determining what the payments were for, both when made by HMRC, and also when made by the relevant representative member.
>
> [131] We are required, in determining the character of the receipts, to take account of all relevant circumstances. Having regard to the statutory derivation of the payments, the underlying reasons why overpayments of VAT had arisen, and the transfers of trades within the groups, we conclude that the payments were to compensate for depletions in the trading results of the various companies whose supplies had given rise to the VAT overpayments, and the payments were directed to the companies that were carrying on those trades or had succeeded to them, save only for the case the payment of VRP 2 to SDG which, as we have found, retained the right to that payment on the transfer of its trade to SDHSL. The payments restored amounts which would have been brought in as trading profit if there had been no overpayments of VAT. The character of the receipts in the hands of each of the appellants was accordingly, in our view, that of trading receipts.
>
> [132] There is, as Pertemps confirms, no requirement that a trader should be legally entitled to the receipts which make up the traders' profits. Thus, even if, contrary to our finding that SDG and RGL were beneficially entitled to VRP 2 and VRP 5 respectively, there might be some doubt as to the legal rights retained by GUS plc, Kay & Company and Abound in respect

> of VRP 2 and VRP 5, no competing claim to those payments was made, and there is, in our view, no reason on the facts in relation to VRP 2 why the payment should not be treated as a trading receipt in the hands of SDG, nor in relation to VRP 5 why the payment should not be treated as a trading receipt of RGL. Those receipts nevertheless would bear the character of trading receipts. Any competing claim might, as noted by Hart J in Tapemaze, have affected the issue of whether there was a profit of a revenue nature to be recognised, but not the question whether there was a trading receipt.
>
> [133] We agree of course with Mr Goldberg that Pertemps cannot in any respect override Morley v Tattersall, which was distinguished in that case. But we do not agree with his submission that this case is closer to Morley v Tattersall. In that case the auctioneers were never beneficially entitled to the moneys they received in a fiduciary capacity for their clients. That was in contrast to the position in Pertemps, where the mistaken payments were the property of Pertemps, albeit that the customers had a right of restitution. We have found in each case that the appellants were beneficially entitled to the VAT repayments. That was the case even in relation to SDG's receipt of VRP 2 and RGL's receipt of VRP 5, where we have found that any rights that were retained by GUS plc, Kay & Company and Abound were not rights against SDG, in the case of VRP 2, or RGL in the case of VRP 5 and that any claim by those companies against SDG or RGL would have to have been made in restitution.
>
> [134] In our view, in each case the true source of each of the VAT repayments was the trade in the course of which the original overpayments of VAT arose. The VAT repayments were, accordingly, trading receipts arising out of those trades."

92. Mr Goldberg now submits that given that VATA itself does not create rights between group members, whether to demand monies to meet VAT to be paid to HMRC or as to any repayment and interest coming into the hands of the representative member, such rights as exist must arise from the general law. Such a right is a matter of law and there was no basis upon which the FTT could have decided as a matter of law, or as a matter of mixed fact and law, that the Appellants, save for RGL, were beneficially entitled to the respective Sums.

93. In this regard, Mr Gammie submitted that before the FTT the burden had been on the Appellants to prove that they were not beneficially entitled to the Sums in their respective accounts. In this regard, he drew attention to the fact that the Appellants had withdrawn their witness statements shortly before the hearing before the FTT and it was not for them now to say that there was no evidence.

94. He said that where there is an unexplained payment from A to B, it is assumed that there was an antecedent liability. In this regard, he referred in passing to *Welch v Seaborne 1816 1 Stark 474, Carey v Gerrish (1801) 4 Esp 9* and *Seldon v Davidson [1968] 1 WLR 1083*. He said that *Seldon v Davidson* at least, was authority for the proposition that where A seeks repayment from B for monies which A alleges was a loan, if B contends that the payment was a gift, the onus is on B to prove it.

95. He emphasised that the Appellants have not explained how they received the Sums, other than as a result of an obligation and why else the respective representative members and in the case of VRP2 and IP2, Weil, Gotshal and Manges (Weil) paid the Sums to them immediately. Furthermore, despite the size of the amounts involved, no other company has claimed the amounts paid to SDG or to any of the other Appellants. Nor he points out, is it explained why March UK Ltd would otherwise have directed the payment of VRP2 to SDG. In this regard, he also drew attention to the fact that March UK Ltd had written to HMRC stating that SDG had a right to the payment.

96. Lastly, he submitted that each of the Appellants have accounted for the respective Sums as part of their profits and it was for them to adduce evidence to show that they were not entitled and that the Sums were not making good a hole in previous trading profits of the Appellant's trade or were otherwise subject to the post cessation argument.

97. Accordingly, he submitted that the FTT had dealt with the issue quite properly as a mixed question of fact and law at [32] [34] and [35] and were perfectly entitled to come to the conclusion which they had.

98. In response, Mr Goldberg submitted that if Mr Gammie is right, that there is a presumption that where A pays B he does so because the sum is owed, it must be assumed in this case that, where the supplier in a VAT group made payments to the representative member of the VAT group in respect of VAT paid by that representative, the payment was a loan and that any subsequent payment by the representative member to the supplier in respect of overpaid VAT was the repayment of the loan. If that were the case, he says, it follows that the supplier is not entitled to the VRP itself but only to a repayment of the debt and the transactions of lending and repayment are outside the scope of the trade.

99. He also says that Mr Gammie's authorities do not support him at all. In this regard he referred me to paragraph 1313 in volume 49 of Halsbury's Laws of England at which it is stated:

> "The mere payment of a sum of money or a cheque is not evidence of the creation of a loan; nevertheless there is a prima facie obligation to repay in the absence of circumstances giving rise to a presumption of advancement."

Cary v Gerrish and *Welch v Seaborn* are quoted as authorities for the first proposition and *Seldon v Davidson* is quoted as authority for the second.

100. Mr Goldberg also referred me back to the letter of 4 October 2006 from March UK Limited to GUS plc quoted at [18] of the FTT Decision, in which it was stated that VAT repayments belong to and were to be paid over to the companies purchased by March from GUS plc. Mr Goldberg emphasised that in consideration for the agreement dealing with the repayments arising from the demerger within GUS plc, consideration of £1 was paid by March UK Ltd to GUS and Home Retail Group of which Argos Limited had become a subsidiary. In my judgment the payment of consideration of £1 was purely to put the enforcement of the arrangement in relation to the redirection of the repayments after the demerger beyond doubt.

101. In addition, the Appellants produced a table which summarised the position in relation to each of the VRPs as follows:

i) A Sum in respect of VRP 1 was recorded in the accounts of SDG. In relation to part of VRP1, GUS plc was the company entitled to the receipt under section 80. There was no evidence of any contract and, accordingly, no basis for any restitutionary claim.

ii) A Sum in respect of VRP2 was recorded in the accounts of SDG, the company having been entitled to receive the repayment under section 80 being Argos Ltd. The contracts for the transfer of the trades for Kay & Company, Abound Ltd and GUS could prevent SDG from being beneficially entitled to a large part of Sums equal to VRP2.

iii) A Sum in respect of VRP3 and VRP4 (but for the Excluded Part) was recorded in the accounts of SDHSL, the company having received the section 80 repayment being LL. There was no evidence of any contract between SDHSL and LL and accordingly no basis for any restitutionary claim.

iv) A Sum in respect of VRP5 was recorded in the accounts of RGL, RGL having been the company entitled to receipt of the repayment under s80 VATA. [See

(ii)]. Once again it is submitted that accordingly there was no basis for a restitutionary claim.

v) Sums in respect of VRP6, 7 and 8 (but for the Excluded Part of VRP6) were recorded in the accounts of LRL having been received pursuant to section 80 by LL. There was no evidence of any contractual relationship and no basis for a restitutionary claim.

102. Mr Goldberg's detailed submissions in this regard, were as follows.

(i) + (ii) VRPs 1 and 2

103. The Sums representing VRPs 1 and 2 were both received by SDG. VRP1 was an agents' commission repayment ("ACR"). It was paid to GUS, March and LL and had been paid by RGL, March and LL as representative members. It related to supplies by RGL and SDG. The FTT found at [13] that the Sum was paid to SDG by GUS and LL and at [29] that it was paid at the direction of March. The conclusions in relation to entitlement are at [30] – [35].

104. Mr Goldberg submits in relation to VRP1 that there was no evidence of any contract between RGL and GUS and accordingly, there is no basis for a finding that SDG was beneficially entitled to the Sum.

105. His challenge to the FTT's conclusions in relation to VRP2 is more complex. In particular, in relation to SDG, Mr Goldberg contends that despite finding correctly at [39] to [44] and [53] that the contractual chain leading to SDG's acquisition of its former trade did not include rights to substantial parts of VRP2 and IP2, the FTT found, he says erroneously, at [146(2)] that SDG was assessable on the whole of those amounts under section 103. In this regard, he drew particular attention to [61] at which the FTT found that "March UK regarded SDG as entitled ... SDG accordingly received VRP2 and IP2 as beneficial owner."

106. He also drew attention to the 2005 Agreement by which SDG transferred the whole of its trade to SDHSL. In this regard, the Appellants contend that the FTT at [45] to [48] wrongly interpreted that agreement. It is submitted that on a true construction of the 2005 Agreement, SDG parted with all and any rights which it had to VRP2 and IP2. Accordingly, it is said that SDG cannot have been beneficially entitled to those payments. In this regard, Mr Goldberg also attacks the reliance by the FTT upon certain documents and its findings as a result. I assume that his criticism goes as far as to contend that there was no basis for such findings which were "*Edwards v Bairstow*" unreasonable.

107. In any event, it is said that at [15] to [18] and [49] to [58] the FTT relied on documents including a document which became known as the Argos Deed in support of its finding that SDG was beneficially entitled to VRP2 and IP2. In this regard, Mr Goldberg says that SDG was not a party to the Argos Deed and neither was SDHSL which was the party with the relevant rights at the time. Accordingly, the FTT was wrong to place any weight or reliance upon the Argos Deed when determining the issue of beneficial interest in VRP2 and IP2.

108. I deal with the s103 argument, the SDG retention argument and the SDG construction arguments separately below. At this stage, I intend to deal with the broader issue of beneficial entitlement.

(iii) VRPs 3 and 4

109. VRP3 was paid to LL as representative member and was an ACR. It related to supplies by LRL and SDSHL. The FTT found at [65] that LRL's business was transferred to SDSHL on 4 May 2003 and that the rights if any to VRPs were transferred under that agreement. With regard to VRP3, at [67] it found that the payment of the Sums by LL to SDSHL was not by way of gift but were paid to SDHSL as the company carrying on its own trade and that of LRL from which the supplies had been made which gave rise to the overpayments. The FTT found that within the group, SDHSL was beneficially entitled to those payments.

110. With regard to VRP4, part relates to the trade of the Six Companies and is an Excluded Part in relation to which there is no appeal. Part also arose as a result of supplies by LRL itself. The FTT dealt with the matter at [68] to [71]. The whole of the trades of the Six Companies had been transferred to LRL on 1 January 1993 and the whole of the home shopping business of LRL was later transferred to SDHSL. VRP4 was received by Weil as agent for LL and recorded in SDHSL's accounts. The FTT found that the payment was made to SDHSL as the company carrying on its own business and as successor to the Six Companies, the payment was not a gift and SDSHL was beneficially entitled to it.

(iv) VRP 5

111. VRP5 was paid to RGL as the relevant representative member of the VAT group. The VAT had been overpaid by Kay in respect of supplies by Kay, Abound and RGL. The FTT found at [73] that as a result of trade transfers in 1997 to RGL, the rights of Kay and Abound to repayments of tax had not been transferred to RGL. Paragraph [74] is in the following form:

> "[74] Nevertheless, our analysis of the position of VRP 2 in relation to SDG is equally applicable to the position of VRP 5 and RGL. Any rights to VRP 5 that were retained as at 1 April 1997 by Kay & Company and Abound on the transfers of their

> respective trades and assets to RGL could not at that time have been rights against RGL. The Kay & Company agreement merely excluded those rights from the sale and did not impose any obligation on RGL, by way of indemnity or otherwise, to make payments in those respects to Kay & Company, and we infer that the same was true for the Abound agreement. It was entirely consistent therefore for the group to have considered that RGL was entitled to the payments, not only as a matter of mechanics as the representative member, but as the company carrying on its own business and as successor to the businesses of Kay & Company and Abound against which the VAT had been wrongly charged. No claims were made by Kay & Company or Abound, and if such claims had been made they would, in our view, have to have been restitutionary claims. RGL accordingly properly treated the payment as belonging to it and brought it into account as an exceptional item within cost of sales in its profit and loss account. We find that RGL was entitled to VRP 5 as beneficial owner of that amount, and not merely as representative member."

The FTT's conclusions both in relation to VRP2 and VRP5 were contained in [133] which is set out at paragraph 91 of this judgment.

112. It is Mr Goldberg's submission that in the light of the finding that the rights were retained, RGL can only have become beneficially entitled if it were as a result of a subsequent arrangement which would fall within s106(1).

(v) VRPs 6, 7 and 8

113. The sums in respect of VRPs 6, 7 and 8 and the related IPs were all recorded in the accounts of LRL. The sums were paid to LL. It is accepted that part of VRP6 related to excess VAT paid by the Six Companies to which they were entitled and therefore, is an Excluded Part. In relation to VRP6, the FTT found at [76] – [79] that the overpaid VAT was attributable to the wrongful charging of VAT on debtor balances, outstanding in respect of credit sales on increases in the VAT rate and that they were paid to LRL by LL as successor to the trades of the Six Companies. In relation to VRPs 7 and 8, the FTT found at [80] that they were paid to LL as representative member in respect of supplies made by LRL and were paid by LL to LRL. At [81] the FTT concluded that these payments were not by way of gift "but were paid to LRL in respect of its own trade from which the supplies which gave rise to the VAT repayments had been made." As a result, it concluded that LRL was beneficially entitled to those payments.

114. Mr Goldberg submits that there is no basis upon which the FTT could properly have concluded that LRL had any entitlement versus LL to VRPs 6, 7 and 8 and,

accordingly, there was no basis upon which it could find that the payments by LL were not a gift.

Conclusions

115. As I have already mentioned, in my judgment, the fact that the representative member of a VAT group has the statutory obligation to pay VAT to HMRC, and the concomitant right to receive any repayment, does not preclude the existence of a relationship between the members of the group who remain jointly and severally liable for the VAT under section 43 VATA. The FTT dealt with this quite properly at [27] and in relation to VRP1 and IP1 at [32] to [35] to which I referred at paragraphs 90 and 91 above.

116. Although there was and remains a paucity of evidence available, in part, I infer, as a result of the withdrawal of witness statements by the Appellants, the FTT went on to determine, as a mixed question of law and fact, whether each Appellant was entitled to the Sums received. For example, the position in relation to VRP1 and IP1 was dealt with at [32] to [35] to which I referred at paragraph 90 above. In the case of each VRP, but for VRP5 which was paid directly to RGL as representative member, the FTT found that the receipt of each Sum was not by way of gift.

117. As the FTT pointed out, there was no clarity as to the legal status of any inter VAT group payments or whether the receipts of the Sums were made with reference to any specific legal rights. In the absence of any indication whatsoever that the Sums were received by way of gift, the FTT was entitled to find that each Appellant was entitled to each respective Sum. In my judgment, in all the circumstances of each VRP, the FTT was entitled to conclude as it did at [32] in relation to VRP1, that as between commercial entities operating at arms length, it was likely that payment recognised an obligation and an entitlement in the payee.

118. The conclusion in the case of each VRP and IP (but for VRP5 in relation to which it is accepted that the recipient RGL was beneficially entitled) is supported by the absence of any board minutes or resolutions consistent with gifts having been made, the fact that if gifts of such considerable sums had been made, questions of breach of fiduciary duty and ultra vires might well have arisen and the fact that no challenge was made by any other company in relation to any of the Sums. In my judgment, the FTT's decision notwithstanding the lack of evidence of a formal contractual relationship, does not amount to an error of law.

119. It follows, therefore, that in my judgment, the FTT was entitled to draw the appropriate inferences from the limited evidence which was available to it. Otherwise, Mr Goldberg's analysis would lead to a situation in which any former member of a VAT group would be able to withhold evidence as to the details of the intercompany arrangements and contend that, as a result of the statutory rights of the representative member under section 80, the members of the VAT group were not entitled to any sums in respect of repayments.

120. Furthermore, I consider that the principles in *Seldon v Davidson,* to which Mr Gammie referred me, support the approach adopted by the FTT. In that case, the claimant claimed the return of a sum of money that she alleged she had lent to the defendant. The defendant admitted receipt but contended that it had been a gift. There were no circumstances to give rise to a presumption of advancement. The judge at first instance ruled that the burden of proof was on the defendant and that the defendant should begin. In the Court of Appeal it was held that the payment of money prima facie imported an obligation to repay it and that the judge was right to place the onus upon the defendant to prove the facts which he alleged showed that it was not repayable and had in fact been a gift. At 1088 B Willmer LJ held:

> "Payment of the money having been admitted, prima facie that payment imported an obligation to repay in the absence of any circumstances tending to show anything in the nature of a presumption of advancement."

It would have been open to the FTT to have inferred that in the absence of a presumption of advancement in favour of the representative member of a VAT group, there is an obligation upon the representative member to repay VAT overpayments to the relevant members of the Group or their successors. In any event, I agree with the findings at [32] and [33], which are set out at paragraph 90 of this judgment.

121. It follows from what I have set out above that in my judgment, the FTT neither erred in law, nor made findings of fact which fall within the principle of Edwards v Bairstow in relation to VRPs 1 and 3-8 and the respective IPs. I will deal with VRP2 and IP2 separately.

122. In particular, given the facts and matters set out at [28] to [31] which are not in dispute, in my judgment, the FTT was entirely justified in its findings in relation to VRP1. As the FTT put it at [34]

> "[34] In the case of the payments of amounts equal to part of VRP 1 and IP 1 by GUS plc to SDG, at the direction of March UK, we find that these were not gifts by GUS plc, but a

> payment in recognition of the position, accepted as between independent parties acting at arm's length, that the right to the repayments belonged to SDG. That acceptance can be explained only by the fact that the repayments related to the supplies made in the trade of SDG and the trade of RGL which was transferred to SDG on 25 November 2000."

123. The same is true in relation to VRPs 3 and 4 paid to SDHSL and the payments from LL to LRL in relation to VRPs 6, 7 and 8. There is no dispute but that the original overpayments were as a result of supplies by LRL or in the case of VRP6, in part, as a result of supplies by the Six Companies (which are not the subject of an appeal.) In my judgment, in the circumstances, there is neither an error of law nor a finding of fact which is "*Bairstow* unreasonable".

124. I will address VRP2 and IP2 under the heading of SDG Retention and Construction and Mr Goldberg's submission in relation to RGL and VRP5 under the heading of section 103.

(iii) The SDG Retention Argument

125. I will now turn to VRP2 and IP2 to which the SDG Retention and the SDG Construction Grounds are relevant. Mr Goldberg submitted that part of the rights to VRP2 and, accordingly, IP2, generated from the GUS trades, had been retained by transferor companies and, therefore, SDG could not have had a beneficial interest in that part of the Sum representing VRP2 to which the retention related (the SDG Retention Argument). Mr Goldberg referred me to an extract from Section 14 of HMRC's Fleming Guidance relating to VAT groups. Under the heading "13. Who can claim?" it provides as follows:

> "13.1 General
>
> The only person who is entitled to make a claim, whether under section 80 of the VAT Act 1994, or under section 25 of the VAT Act and regulation 29 of the VAT Regulations 1995 is:
>
> the person who (1) accounted for the output tax or (2) incurred the input tax in the course and furtherance of his taxable activities; or
>
> a person to whom the right to make the claim has been assigned or transferred by that person.
>
> . . . . ."

Mr Goldberg submitted, therefore, that just in the same way as the rights under section 80 VATA can be assigned or transferred they can also be retained. This proposition was not disputed by Mr Gammie on behalf of HMRC and I accept it as correct.

126. Mr Goldberg then took me to the Agreed Statement of Facts which had been before the FTT, in order to show that save for £200,000 the overpayments of VAT which gave rise to VRP2 and IP2 were made in relation to trades carried on at different times by GUS, Kay & Company, Abound Ltd and RGL. Accordingly, the effect is that it is agreed that the supplies that gave rise to £124,763,000 of VRP2, were made by companies other than SDG.

127. It was also agreed that the trades carried on by GUS, Kay & Company and Abound Ltd were transferred to RGL at various times before 1 April 1997. On 25 November 2000, RGL transferred the trade to SDG and, on 28 October 2005, SDG transferred it to SDHSL. Furthermore it was agreed that none of the overpayments which resulted in VRP2 and IP2 was actually made by SDG because it was never a representative member of a relevant VAT group.

128. In fact, VRP2 and IP2 were paid to Weil as agents of Argos Ltd which was then the representative member of the relevant VAT group. The FTT also found at [59] and [62] that, in addition, Weil acted as agent for SDG. Mr Goldberg says that this finding is contrary to the Statement of Agreed Facts and is wrong. Although there is a letter dated 4 October 2006 from Michael Seal in his capacity as a director of Littlewoods Shop Direct Group Limited to HMRC in which it is stated that Weil are appointed irrevocably as agent for that company for the purposes of receiving any VAT Repayments, there was no evidence either before the FTT or on appeal to support a finding that Weil acted as agent for SDG. Nevertheless, in my judgment the FTT's error in this regard does not detract from or render its conclusions incorrect.

129. The FTT found at paragraphs [38] to [43] that the transfer of the GUS trades was made on terms which prevented RGL from acquiring any rights to receipt of VRP2 and IP2 as far as they related to supplies made by those companies. Mr Goldberg has no complaint with those findings or with the FTT's conclusion at [44] as follows:

> "[44] The trade of RGL was transferred to SDG on 25 November 2000, as we have described earlier. According to our finding above, this transfer, although it otherwise included all the assets of the trade of RGL, did not include the rights to VRP 2 and IP 2 which had been reserved to GUS plc, Kay & Company and Abound. It did, however, include RGL's own rights in respect of supplies made in the period from 1 April 1996 to 30 September 1996."

130. The terms upon which RGL transferred its trade to SDG were not before the FTT nor were they available on the hearing of the appeal. However, it is said that, with regard to VRP2 and IP2, it is clear that RGL cannot have transferred that which it did not have.

131. On behalf of the Appellants it is said, therefore, that, having found at [41] - [44] that the rights to VRP2 and IP2 had been reserved to GUS plc, Kay & Company and Abound in 1997 and had not been transferred with the trades to RGL, the FTT erred in holding, nevertheless, that SDG was beneficially entitled to the entirety of the Sums representing VRP2 and IP2. Its conclusions in this regard are at [61] and [133]. I have already set out [133] at paragraph 91 above. For completeness, I set out [61] here:

> "[61] March UK regarded SDG as entitled to the payment in respect of the overpayments, and consequent depletions in the assets of, the trades formerly carried on by SDG, including those transferred by GUS plc, Kay & Company, Abound and RGL. Any rights to VRP 2 and IP 2 that were retained as at 1 April 1997 by GUS plc, Kay & Company and Abound on the transfers of the respective trades and assets to RGL could not at that time have been rights against RGL, which became the representative member of the group only on 7 August 1997, nor were they rights against SDG. Furthermore, whilst on 1 April 1997 it would have been Kay & Company that had the right, as representative member at that time, to repayment from HMRC of VRP 2, it had ceased to be representative member on 6 August 1997 and no longer had that right at the time of the repayment itself. At the time of the repayment, the only right that GUS plc, Kay & Company and Abound could have had in that respect was a right against the then representative member, Argos Ltd. Any claim by any of those companies against SDG would therefore have to have been a claim in restitution. SDG accordingly received VRP 2 and IP 2 as beneficial owner at the time of receipt and was entitled to bring those payments into its own accounts as an exceptional item in relation to VAT and related interest."

132. In my judgment, the conclusions reached at [61] and [133] are not inconsistent with the FTT's finding that the rights to receive the repayments in respect of VRP2 and VRP5 were not transferred to RGL and onward to SDG. By the time that VRP2 and IP2 were repaid, Argos Limited was the representative member of the relevant VAT group and, as the FTT recorded at [61], any rights which the companies in question may have had were rights against Argos Limited. No doubt it was for that reason that they each entered into Deeds of Discharge and Release in order to enable the

repayment of VRP2 to be made to Weil as agent for Argos Limited, for onward transmission to SDG. As the FTT found, if those companies had any entitlement as against SDG it would have been in the form of a claim in restitution. In fact, they made no such claim at any stage despite being aware of the considerable size of VRP2. In the light of the analysis in *Pertemps* and *Morley v Tattersall*, to which the FTT referred at [121]-[123] and [132] and [133], it is clear that a claim to restitution is insufficient to render the receipt by the person against whom such a claim could have been brought as one which is outside the scope of a corporation tax charge. Accordingly, in my judgment, the FTT was justified in its conclusion in this regard.

(iv) The SDG Construction Argument

133. Mr Goldberg points out that even if SDG had any rights to VRP2 and IP2 it transferred its trade to SDHSL by virtue of the 2005 Agreement. That transfer took place before the beginning of the accounting year in which the Sums representing VRP2 and IP2 were recognised in SDG's accounts.

134. It appears from the agreed facts that the Sums equal to VRP2 and IP2 were directed to SDG by March UK Ltd.

135. The Appellants contend that the construction placed upon the 2005 Agreement at paragraphs [45] – [48] of the FTT Decision was wrong. Those paragraphs are in the following form:

> "[45] By an agreement dated 28 October 2005 the trade of SDG was transferred to SDHSL (then called Littlewoods Home Shopping Ltd). By cl 2.2 of that agreement it was provided that:
>
> 'The Assets comprised in the sale and purchase hereby agreed are all of the undertaking and the assets of the Vendor used wholly or mainly in the Shop Direct Home Shopping Business at the Effective Date including the Vendor's right and title, such as it has, in the following:
>
> …
>
> 2.2.8 all the Vendor's rights against third parties which relate to the Shop Direct Home Shopping Business or the Assets …'
>
> [46] The expression 'Assets' is itself a defined term. Clause 1.1 provides that assets means:
>
> 'all the Vendor's rights and title in the undertaking and the assets owned by the Vendor and used wholly or mainly in the Shop Direct Home Shopping Business as more particularly described in clause 2.2 as reflected in the management accounts

> of the Vendor for the period ended 28 October 2005 excluding for the avoidance of doubt the Excluded Assets.'
>
> [47] Mr Goldberg submitted that this agreement transferred all of SDG's remaining rights to VRP 2 and IP 2 to SDHSL, so that SDG did not, after 28 October 2005, when it ceased to trade, have any such rights. Mr Gammie argued that the agreement expressly excluded such rights, because the assets had to be reflected in the management accounts of SDG for the period ended 28 October 2005. Given that VRP 2 was brought into account only in 2008, the only conclusion is that management accounts would not have reflected the right to VRP 2.
>
> [48] We do not have the benefit of the management accounts. Our own construction of the agreement is that it was important for the relevant assets to be identified in the management accounts, and that only assets that were so identified would have been transferred to SDHSL. This is because the consideration for the transfer of the assets was the assumption by the purchaser of the liabilities, and it was agreed that SDG would owe SDHSL, as an interest-free loan, repayable on demand, an amount equal to the excess of the liabilities over the book value of the assets. We agree with Mr Gammie that the management accounts must be considered not to have included the value of the VAT repayments, and consequently no book value would be attributable to such a right. In our view, SDG would not have wished to incur indebtedness to SDHSL whilst at the same time transferring to SDHSL assets which, because they were not included in the management accounts, would not have reduced the amount of that indebtedness. Accordingly, we conclude that such rights as SDG had to payment of VRP 2 and IP 2 were retained by it and not transferred to SDHSL."

136. Mr Goldberg repeats his argument that, on a true construction of the 2005 Agreement, SDG parted with all and any rights which it had to VRP2 and IP2. Accordingly, he says that at all material times SDG cannot have been beneficially entitled to VRP2 and IP2 because it was SDHSL which was so entitled. He submits that if as he accepts it is unlikely that any figure for future tax recoveries were included in the management accounts, nevertheless, it does not mean that they were not 'reflected" in those accounts and, accordingly, were within the definition of "Assets" and the terms of clause 2.2.8.

137. In addition to the definition of "Assets" in the 2005 Agreement, he also drew my attention to the definition of "SDHSL's Business" in clause 1.1 which is in the following form:

> "the home shopping catalogues business carried on by the Vendor as at the Effective Date including the web sites, and the Properties and including assets relating to the production of the home shopping catalogues."

138. Further, in addition to clause 2.2.8 to which the FTT referred at [45], Mr Goldberg drew attention to clause 2.2.5 which is in the following form:

> "all the book and other debts arising out of or attributable to the operation of Shop Direct Home Shopping Business owed to the Vendor at the Effective Date"

139. He submits that together with clause 2.2.8, the terms of the 2005 Agreement were such as to transfer everything to SDSHL and that the definition of "Assets" created no limitation upon that. He also drew attention to clause 2.3:

> "If following Completion it comes to the Purchaser's attention that, any asset or shareholding which immediately prior to Completion formed part of the Shop Direct Home Shopping Business, other than the Excluded Assets, has not been transferred to, or has not vested in, the Purchaser and remains held by the Vendor and the Purchaser give the Vendor written notice of the same, the Vendor shall transfer or procure the transfer of such asset to the Purchaser on terms that no further consideration is payable."

140. Although Mr Goldberg accepted that the actual provisions with which this aspect of the appeal is concerned are materially different, he relied upon *Rust Consulting v PB [2012] EWCA Civ 1070* together with the application of the well known principles of construction/interpretation set out in *Rainy Sky SA v Kookmin Bank [2011] 1 WLR 2900* and *Investors Compensation Scheme Ltd v West Bromwich Building Society and Ors [1998] 1 WLR 896* in support of the contention that the terms of the 2005 Agreement should be construed to transfer the right to VAT recoveries to SDSHL both as a result of the definition of "Assets" and in the light of the provisions taken as a whole.

141. He says that when determining at [48] that the rights to the VAT repayments were not transferred to SDSHL by the 2005 Agreement, the FTT failed to take proper account of clause 2.3 and 2.2.8 and otherwise properly to construe the 2005 Agreement.

142. In this regard, Mr Gammie made the general point that it was an agreed fact that the reclaims had been made in June 2003 and VRP2 was worth £125m in round terms and IP2 was £175m odd. He says that given the importance of those claims, it may well have been thought appropriate to keep them back from the 2005 Agreement and it is to be noted that SDHSL has not made a claim to such large sums but on the contrary March UK Limited had written to HMRC asserting that SDG had a right to it.

143. Mr Goldberg also drew attention to the FTT's reliance at [15] to [18] and [49] to [58] on various documents including the Argos Deed in support of its conclusion in relation to beneficial entitlement. As I have already mentioned, in this regard he says that neither SDG nor SDHSL was a party to it and so no weight can be attached to it. As I have already mentioned he also says that the FTT was wrong to conclude that when receiving VRP2 Weil acted as agent for SDG with which I agree.

144. The Argos deed was dealt with by FTT at [49] to [58] in the following way:

> "[49] During the hearing HMRC produced some further documentation which, Mr Gammie submitted, demonstrated that the right to the payment of VRP 2 and IP 2 could not have been transferred to SDHSL. The documents comprised a deed of discharge and release ('the Argos deed') dated 12 September 2007 addressed to HMRC and executed by Experian Finance plc (formerly GUS plc) and Argos Ltd (companies not connected to the appellants), and extracts from some minutes of board meetings of certain companies in the appellant group, namely SDG, RGL, Kay & Company, Abound and Littlewoods Company Director Ltd.
>
> [50] The Argos deed refers to a request that had been made to make payments in accordance with Business Brief 113/06 to SDG, including amounts which HMRC had accepted, subject to final resolution of the Fleming and Condeì Nast appeals (see Fleming (t/a Bodycraft) v Revenue and Customs Comrs, Condeì Nast publications Ltd v Revenue and Customs Comrs [2008] UKHL 2, [2008] STC 324, [2008] 1 WLR 195), had been overpaid by companies which were at the relevant times members of the Argos VAT group. The deed records that HMRC had agreed to make the relevant payment to SDG on condition that it received an undertaking from SDG to repay the amount in certain circumstances, backed by a bank guarantee,

and releases from Experian and Argos, and also from RGL, Kay & Company and Abound, which companies, the deed recites 'HMRC have been informed became entitled to receive from HMRC any repayment pursuant to the [relevant repayment claims] when the GUS home shopping business was sold to March UK …'. The board minutes of the various companies show that deeds of discharge and release consistent with the condition under the Argos deed were approved and authorised to be executed, but we did not see any evidence of those deeds themselves.

[51] The board minutes of SDG refer to the undertaking from that company in favour of HMRC, and the bank guarantee. They also make reference to a deed of appointment whereby WGM was to be appointed as agent of SDG to receive the relevant payment. All these documents were considered and approved for execution by SDG.

[52] We have found, on our construction of the agreement for the transfer of SDG's trade to SDHSL, that SDG retained such rights to VAT repayments as it had at that time, which would exclude the rights which were retained by GUS plc, Kay & Company and Abound. We are not persuaded that the reference to companies, including Kay & Company and Abound, becoming entitled to receive certain payments from HMRC is indicative of the creation of an entitlement only at the stage of the sale of the home shopping business. The Argos deed says nothing about the entitlement of those companies as against other companies, including Argos Ltd and March UK. It deals only with the entitlement to receive payments from HMRC which, as we have seen, as a statutory matter could be paid only to the representative member. What this deed appears to demonstrate is that HMRC had been persuaded that it could pay WGM as agent for SDG, and that HMRC had agreed this course but only if it had protection against claims that might otherwise be made by companies claiming to be themselves entitled.

[53] To the extent that the Argos deed tells us anything, we consider that it supports our analysis of the agreements for the transfers of the trades of Kay & Company and Abound to SDG, and the transfer of the trade of SDG to SDHSL. The deed recognises rights in Kay & Company and Abound, but does not refer to any such rights in SDHSL.

[54] Mr Goldberg also referred us to a passage in Littlewoods Retail Ltd v Revenue and Customs Comrs [2010] EWHC 1071 (Ch), [2010] STC 2072, which relates to the assignment to SDG by representative members of the GUS plc group of claims to compound interest. Those assignments were made on 6 May 2008, so after the payments of VRP 2 and IP 2 (see

[20]). Mr Goldberg argued that this demonstrated that the parties themselves considered that such an assignment was necessary, and that SDG at the time of VRP 2 and IP 2 did not have the right to those payments. We do not consider that the fact of these assignments assists the appellants. All they show is that the group recognised, as was common ground in that case (see [22]), that where a representative member had paid the tax, that company was the correct claimant as a matter of law. It is evident, however, that the group itself was of the view, in common with the position it had adopted in relation to VRP 1 and IP 1, and VRP 2 and IP 2, that the real beneficiary, as between members of the group, was SDG, and that it was right therefore for the claims to be assigned to SDG. In our view, therefore, this supports a conclusion that SDG was, as far as the group was concerned, entitled to the relevant payments.

[55] We earlier considered, in relation to VRP 1, the agreement dated 27 May 2003 whereby GUS plc sold a number of companies, including SDG, to March UK. We explained how this resulted in GUS plc receiving VRP 1 from HMRC, the acceptance by GUS plc and March UK that the VAT repayments belonged to the relevant acquired companies and the arrangements made whereby VRP 1 was paid by GUS plc to SDG by direction of March UK.

[56] Following that sale there was a proposal for the GUS group to be split, with GUS plc going into a separate and independent group from the ARG companies (including Argos Ltd). This would have resulted in the VAT repayments being made by HMRC to the new representative member, within the ARG group, and no longer to GUS plc. The arrangements for payment by GUS plc would no longer operate.

[57] That was the background to the letter agreement dated 4 October 2006 between March UK, GUS plc and Home Retail Group plc ('HRG'), the putative holding company of Argos plc, to which we referred earlier. As well as confirming the earlier agreement that the rights to VAT repayments and associated interest belonged to the March UK acquired companies, the letter agreement obliged HRG to procure that Argos Ltd would irrevocably appoint WGM (the lawyers) as its agent to receive VAT repayments, and to pay the amount to March UK. March UK agreed to repay to HMRC any amount found to have been paid in error. Subsequently, on 9 October 2006, a deed poll was entered into by Argos Ltd and HRG appointing WGM as agent to receive the relevant VAT repayments and related interest. This arrangement was notified by Argos Ltd to HMRC by fax dated 10 October 2006.

[58] VRP 2 and IP 2 were paid to WGM on 19 September 2007. That date is shortly after the date of the Argos deed, and

> we conclude therefore that the payment was made after the Argos deed had been executed and the other conditions had been satisfied."

145. During the hearing before the Upper Tribunal a number of further documents were produced. They included Deeds of Release and a letter relating to the receipt of VRPs and IPs by SDG which was confidential.

146. In my judgment, the FTT was correct in its construction of the 2005 Agreement. In the light of Mr Goldberg's acceptance that the management accounts were unlikely to have contained reference to future tax recoveries, for the purposes of the definition of "Assets" in the 2005 Agreement, it is difficult to give any weight to his submission that they would, nevertheless, have reflected them. Furthermore, in my judgment, neither the definition of "SDHSL's Business" nor clause 2.2.5 takes the matter any further.

147. Furthermore, although clause 2.3 creates a mechanism by which assets which were not transferred could subsequently be so, if appropriate notice were given, in my judgment, such a provision does not carry the matter much further. To the extent that it does, in my judgment, it is consistent with the retention of beneficial interest in SDG, unless and until notice is given and the particular asset or, in this case, Sum, is demanded.

148. If one construes the 2005 Agreement as a whole, in my judgment, it did not transfer the rights to VRP2 and IP2 to SDHSL. As Mr Gammie points out, had it done so, given the enormity of the amounts at stake, one would expect a serious claim to have been made to the Sums by SDHSL. In my judgment, it was also permissible to take account of the Argos Deed and the Deeds of Release to which I was referred, despite the fact that SDG and SDHSL were not parties to them. They were nevertheless relevant background.

(v) Post cessation receipts – the ss103 and 106 argument

149. At [135] of its decision, the FTT decided that, where the trading receipts arose from a trade carried on by the recipient itself, at the time of the original supplies which gave rise to the overpayments of VAT, the recipient was taxable under Case 1 of Schedule D to the extent that the receipt gave rise to profits in its accounts. This applied to VRP1 paid to SDG (£12.6m in respect of supplies made by SDG), VRP3 paid to SDHSL (£1.6m in respect of supplies made by SDHSL), VRP5 paid to RGL (£49.8m in respect of supplies made by RGL) and VRPs 7 and 8 paid to LRL as to the whole.

150. In relation to the other payments, it was necessary to consider sections 103 and 106 ICTA. These are the post cessation provisions brought in as a result of *Purchase v Stainer's Executors 32 TC 367* and *Carson v Cheyney's Executors 38 TC 240* which were to the effect that where a trade which was the source of an income had ceased, and an amount of income arose after the trade had ceased, those receipts could not be taxed.

151. The submissions and relevant case analysis in relation to the post cessation receipts was set out at paragraphs [135] to [147] of the FTT Decision. As the reasoning is detailed, I will set it out in full:

> "[138] Mr Goldberg argued that s 103 could apply only to charge the person who had carried on the trade. We do not agree. As Mr Gammie submitted, s 103 does not refer to any particular person on whom the charge is to be levied; it is a charge on the relevant sums to which the section applies, and taxes the receipt of those sums. It is clear, and the historical background of the Stainer's Executors and Cheyney's Executor cases confirms, that personal representatives of a trader may be taxed on post-cessation receipts arising from the discontinued trade of a deceased trader, who will not themselves have carried on the trade. Furthermore, s 103(3) expressly excludes sums received by a person 'beneficially entitled' to them. This in our view indicates that the person to be charged on the sums received is the person entitled to the receipt of the relevant sums, whether or not that person has formerly carried on the trade.
>
> [139] Section 106 makes special provision where rights to receipts within s 103 are transferred. Section 106(1) deals with the position where the right to receive the relevant sum has been transferred for value. In such a case tax is charged, not on the amount of the sum received, but on the amount or value of the consideration, or market value, if the transfer is not at arm's length. It was common ground that s 106(1) had no application to these appeals.
>
> [140] Section 106(2), on the other hand, is relevant. That applies where the trade is treated as permanently discontinued by reason of a change in the persons carrying it on, and the right to receive the sum to which s 103 would otherwise apply is transferred to the persons carrying on the trade after the change. In those circumstances s 103 does not apply. No person can be charged on the relevant receipts under s 103. Instead, any sum that is received by the persons carrying on the trade is brought into the computation of the trading profits in the year in which it is received.

[141] Where there is a transfer within s 106(2), the effect is two-fold. First, s 103 does not apply. This means that no Case VI charge can arise on the receipt, or on the value of the transfer of the right under s 106(1); s 106(1) is expressed to be subject to s 106(2). Absent s 106, the successor trader would have been liable under Case VI on the receipts of the relevant sums as described in s 103. The effect of s 106(2) is to convert that Case VI charge into a charge under Case I on the receipt as part of the computation of the successor's profits.

[142] Section 106(2) has two effects, and in our view each of them is independent of the other. If there is a transfer to the successor trader, the effect is that s 103 does not apply, and that is the effect whether or not the amount is received by the successor trader so that it is brought into account in the trading profits of the successor. The charge on the successor is dependent on the successor receiving the relevant sum. If that sum is received by another person, and cannot be treated as received by the successor, that other person cannot, in our view, be charged under s 103. Although Mr Gammie argued that there was nothing to prevent such a person being charged under s 103, we do not agree. It is s 106(2) itself, which provides that tax may not be charged under s 103 if the right to receive the relevant sum has been transferred to a successor trader.

[143] We have reached this conclusion, we have to say, with some hesitation. The effect is that, where a trade has discontinued without a transfer of the right to post-cessation receipts, any recipient of those sums arising from the former trade is taxable under Case VI by virtue of s 103. As we have found, this is not confined to receipts by the original trader. On the other hand, where there has been such a transfer, our construction of s 106 is that s 103 must be excluded, and a tax charge can only arise under Case I if the recipient of the relevant sum is the successor trader. A receipt by any other person escapes taxation. Whilst that appears to create a gap in the post-cessation rules, albeit one that is likely to arise only in unusual circumstances, we nevertheless conclude that this is the proper construction of s 106(2).

[144] We are conscious also that, in construing s 106(2) in the way we have, we are departing from the description of that provision given by the special commissioners in Rafferty v Revenue and Customs Comrs [2005] STC (SCD) 484(at paras 95 and 96). We were not referred to Rafferty, but in that case the special commissioners drew attention to the purpose of s 106(2) being to preclude the same receipts being brought into computations of profits twice, both on the transferor, under s 103 or s 106(1), and on the transferee as a trading receipt, and

to determine that the charge to tax on such receipts falls on the transferee. But the special commissioners then went on to say that s 106(2) provides that tax is not chargeable if the transferee of the trade brings the sums into computation of its profits, and that the transferor is not taxable if he transfers the right to receive the sums to his successor in the trade who pays tax on the same sums.

[145] We are unable to construe s 106(2) so as to provide for the same degree of conditionality. In our view, s 103 is excluded by s 106(2) only if the trade is treated as permanently discontinued by reason of a change in the persons carrying it on and if the right to receive the relevant sum is then transferred to the persons carrying on the trade. There is, in our view, no further condition that the successor brings that sum into its computation or pays tax on that sum, although s 106(2) provides that the successor will do so on a receipts basis.

[146] We turn now to apply these principles to each of the VAT repayments which are not within those that are taxable on general principles under Case I of Sch D.

(1) VRP 1. Certain of the supplies to which VRP 1 relates were made by RGL. We have found that the whole of RGL's trade, together with all rights and entitlements, was transferred to SDG. Section 106(2) applies. In consequence SDG is liable under Sch D, Case I on that part of VRP 1 which derives from RGL's trading.

(2) VRP 2. VRP 2 was paid to LW Corporation, the amount being recognised as a receivable in SDG's accounts. There was, for s 103 purposes, a receipt of this sum, to which SDG was beneficially entitled, after SDG had ceased to trade following the transfer of its trade to SDHSL. We have found that SDG retained the right to payment of VRP 2, and did not transfer it to SDHSL. Consequently, s 106(2) does not apply in relation to the transfer of the trade to SDHSL. Section 103 accordingly applies. That part of the VRP 2 that relates to the trades of SDG itself and RGL is correctly assessed on SDG under Case VI by virtue of s 103.

We have found that the rights of GUS plc, Kay & Company and Abound to VRP 2 were not transferred to RGL, and cannot therefore have passed to SDG. In relation to those transfers, therefore, s 106(2) does not apply. Section 103 does apply. That part of VRP 2 that relates to the trades of GUS plc, Kay & Company and Abound is correctly assessed on SDG under Case VI by virtue of s 103.

> (3) VRP 3. The transfer of the home shopping business of LRL to SDHSL carried with it all rights to that part of VRP 3 which related to the supplies of LRL. That part of VRP 3 is accordingly to be brought into account under Case I by virtue of s 106(2).
>
> (4) VRP 4. VRP 4 related to the trades of the six companies and LRL. LRL succeeded to the trades of the six companies, with the right to VRP 4, and LRL transferred the home shopping business, along with its rights to VRP 4, to SDHSL. VRP 4 is therefore taxable under Case I by virtue of s 106(2).
>
> (5) VRP 5. Part of VRP 5 related to the trades of Kay & Company and Abound which were transferred to RGL. We have found that the rights of Kay & Company and Abound to VRP 5 were not thereby transferred to RGL. Section 106(2) does not apply, but RGL is correctly assessed to the relevant part of VRP 5 under Case VI by virtue of s 103.
>
> (6) VRP 6. The supplies giving rise to the repayment were made by the six companies to whose trades and assets, including the right to VRP 6, LRL succeeded. LRL is accordingly correctly assessed on VRP 6 under Case I by virtue of s 106(2).
>
> [147] In summary, we have found that all the VAT repayments are trading receipts, either of existing trades or trades that have discontinued, and all are taxable under Sch D, Case I or Case VI as we have described."

152. Mr Goldberg submits that the FTT was right in its conclusions at [142]-[145] but wrong in the way it applied them at [146]. He says that, once section 106(2) applies, section 103 is thereafter always excluded.

153. He also says that the FTT's conclusions at [43] and [52], that such rights as GUS plc, Kay & Company and Abound had in April 1997 to the repayment of what became VRP2 and IP2 were not transferred to RGL along with the respective trades and by inference, that section 106(2) was not engaged on the transfers to RGL, are difficult to square with its conclusions at [60] and [61] that SDG nevertheless had rights. He says that for the rights to be in SDG there must have been a transfer to which section 106(1) would apply and the application of s106(1) would oust the application of s103 once and for all.

154. He also emphasised that in order to be taxable, the person taxed must have a species of property in the receipt in question but that this cannot be said of SDG in relation to

the greater part of VRP2 and IP2. He referred me to a short passage in the judgment of Viscount Dunedin in *Leeming v Jones (HM Inspector of Taxes) 15 TC 333* at 359 to the effect that profits and gains for the purposes of Case VI means profits and gains in the same way as specified in the other cases. He also drew my attention to the judgment of Lord Denning MR in *Scott (HM Inspector of Taxes) v Ricketts 44 TC 303*. The case concerned whether the sum of £39,000 paid to an auctioneer and estate agent was taxable under Case VI. The payment was made because it was believed that the auctioneer had some sort of right in a site in which he was involved as part of negotiations on behalf of a client. Lord Denning referred to Case VI as a sweeping up provision. He concluded at *321I to 323A:*

> "The Judge seems to have thought that, as the payment was made under a contract, that was enough to bring it within Case VI. I cannot agree with him. It must be a contract for services or facilities provided., or something of that kind. The present case is rather like Leeming v Jones 15 TC 333. If the sum was taxable at all, it was taxable as part of the profits of Mr Ricketts's trade or profession. Once that is negatived, it becomes simply a sum received in compromise of a disputed claim; whether legal or moral makes no difference. I think that this case does not fall within Case VI."

155. Lastly, he referred me to a passage in the judgment of Pennycuick J in *Dickinson (HM Inspector of Taxes) v Abel 45 TC 353*. The case was concerned with whether £10,000 received by a farmer and paid by would be purchasers of land in which the farmer had no interest, on the basis that it would be paid if the land in question was purchased for £100,000 was taxable under Case VI. It was common ground that the sum was only taxable if it was paid pursuant to an enforceable contract. On the facts, Pennycuick J concluded that there was nothing but a conditional promise made without valuable consideration.

156. It is Mr Gammie's submission that where the successor company takes a transfer of the book debts they become part of the successor's trade. If that successor company then ceases to trade before the debts are received, they become post cessation receipts of that successor trade and, despite the application of section 106(2) in the first place, they are post cessation receipts of the successor company and taxed as such under section 103 when they are received by the successor after it has ceased to trade. He says therefore, that they are post cessation receipts in this case in SDG and that the application of section 106(2) along the way does not have the effect of ousting section 103 in all circumstances altogether. This was the FTT's conclusion at [146(2)].

157. HMRC contends that section 103 charges tax on post cessation receipts by whomsoever received so long as they are *sums arising from the trade*. This Mr Gammie says is the natural meaning of the words used. This he says applies,

therefore, to VRP2 and part of VRP5 in the hands of SDG and RGL respectively. The Sums received arose from the trade against which the VAT was overcharged. Mr Gammie says that this also makes sense given that section 106(1), for example, was designed to modify section 103 where a sum within section 103 is received by a debt factor and section 106(2) addresses the situation where the sum is received by a trader who has succeeded to the business. In both cases, therefore, he says, it is significant that the sub-section caters for circumstances in which persons who may never have carried on the original trade receive the payment in question.

158. In essence, therefore, it is said that sub-sections 106(1) and (2) refine section 103. Section 106(1) addresses sales of the rights to receive post cessation receipts by accelerating the section 103 charge and adjusting its quantum. Mr Gammie says that section 106(1) applies to transfers "for value". He says accordingly, that there is no evidence that there was a transfer for value to SDG and, accordingly, s106(1) is completely irrelevant.

159. Section 106(2), he says, deals with successions where the right to repayment is transferred at the time of the succession. However, he says that it moderates the charge to tax if and only if the successor is carrying on the trade at the time of receipt. It does this by switching the charge from Case VI to Case I. Section 106(2) also prevents double taxation by dis-applying section 103 where the trader brings the receipt into his trading profits: see e.g., *Rafferty v R & C Comrs* [2005] STC (SCD) 484. This, he says, is the extent of section 106(2).

160. In other words, the "trade" to which section 106(2) refers is an existing trade which *was* carried on by the transferor, which *is* now being carried on by the successor, which is *treated as* discontinued for tax, and which has a profit and loss account. Absent such a trade, Mr Gammie says that section 106(2) does not apply. He says that no other interpretation of section 106(2) is sustainable since it would create a "gap" (where none should exist) for cases where the right was transferred with the trade, but the successor ceased to trade before the receipt. In other words, Mr Gammie disagrees with the FTT's conclusion that it reached at [143] with some hesitation that where there has been a transfer s106 excludes s103 and a tax charge can only arise under Case I if the recipient of the relevant sum is the successor trader and a receipt by any other person escapes taxation.

161. In reply Mr Goldberg submitted that in effect it was being argued that X can be charged to corporation tax if he receives Y's profits. He submitted that on the contrary, for section 103 to apply, three conditions are necessary. First, there must be a person with a receipt. Secondly, it is necessary to identify the capacity in which that person holds the receipt and thirdly, it must be possible to say that the receipt is from the carrying on of the trade by that person before the trade was discontinued. He asks rhetorically – who would be liable if there were a chain of transfers? He says it is

wrong to suggest that the debts merge into the successor trade. Rather the successor is entitled to them by virtue of the transfer.

162. He says HMRC is also wrong because sections 103-106 comprise an entire code. The original trader is taxed in respect of post cessation receipts under section 103 and transfers are dealt with under section 106. There is no intermediate situation.

163. As I have already decided, the FTT were entitled to determine as they did that the rights attributable to the GUS trades were retained on the transfer of the business to RGL. Equally, I have also concluded that the FTT were right to conclude that SDG retained what rights it had to VRP2 and IP2 at the time of the 2005 Agreement with SDHSL. Equally, in my judgment, the FTT were entitled to determine that there was no transfer of the rights relating to the GUS trades to SDG. Accordingly, as had been agreed before the FTT, in my judgment, s106(1) was and is irrelevant. As there was no transfer and no transfer for value, on the facts, section 106(1) had no application.

164. In addition, on the facts as found, in relation to that part of VRP2 and IP2 which related to the GUS trades, section 106(2) did not apply either. In the circumstances, there was nothing to prevent the operation of section 103 in the way the FTT described at [142]. Equally, as I have decided that the FTT was entitled to decide that rights to VRP2 and IP2 were retained in 2005, there is nothing to prevent the operation of section 103 with regard to the remainder of the Sum representing VRP2 and IP2.

165. Accordingly, the FTT did not need to express its views albeit with hesitation as to the application of section 106(2) and section 103 where there is more than one transfer because the issue did not arise on the facts.

166. In this regard, nevertheless, I should add that I have some sympathy with Mr Gammie's concerns as to the gap which would be created were the FTT's conclusions correct. Had it been necessary, I would have decided that sub-sections 106(1) and (2) are to be construed in a way which limits the effect of section 103, only to the extent to which the circumstances in the sub-sections apply. It seems to me that there is nothing to prevent section 103 from operating when the transferee receives a receipt after it has ceased to trade. In this regard, I accept Mr Gammie's submission that section 106(2) is intended to prevent double taxation on both transferor and transferee but it does not go so far as to regulate all the circumstances which may apply to the transferee's trade thereafter. If that trade is discontinued, the right transferred will be treated in the same way as any other sum arising from the trade received after the discontinuance.

(vi) Interest

167. There was no statutory interest paid by HMRC to RGL in respect of VRP5. All Sums equivalent to statutory interest were received by SDG, SDHSL and LRL directly and, in the case of SDG, indirectly from the representative member which had received the statutory interest payments from HMRC under section 78 VATA. The FTT found that each Sum representing an interest payment was taxable in the hands of each relevant Appellant. In the case of LRL, it found that IP6 was taxable under Case III as it stood before the introduction of the loan relationship rules and, in all other cases, the IPs were taxable under Case III as it applies for corporation tax on the basis that the interest payments are profits or gains arising from loan relationships under FA 1996.

168. The FTT's conclusions in this regard were in the following form:

> "[155] We have held that the VAT repayments made to each of SDG, SDHSL and LRL were made in respect of entitlements that existed between the relevant group companies. We have found that these payments were not made by way of gift, but that, in each case, the recipient was beneficially entitled to the payments. In the same way, the recipients were entitled to be paid, and were paid, amounts equal to the statutory interest received by the representative members from HMRC. As between the representative member and the recipient company that payment has the quality of income, and it has been calculated on the principal amount of the relevant VAT repayment at the statutory rate of interest over the period for which the VAT was repayable. That has the essential quality of recurrence, and we find accordingly that the payments of the IP amounts were interest.
>
> [156] That, we think, disposes of the payment of IP 6 to LRL. That payment is taxable under Case III of Sch D.
>
> [157] The position of the other payments of interest depends on an analysis of the loan relationships provisions in FA 1996. It is common ground that the interest was not payable on a debt arising from a transaction for the lending of money. There was accordingly no 'loan relationship' within the meaning of section 81 FA 1996. The question, therefore, is whether the interest paid to the relevant appellants can be assimilated to interest arising on a loan relationship by virtue of s 100 of that Act.
>
> [158] For s 100 to apply, it is necessary that the appellant in each case stands in the position as creditor as respects a money debt and that the money debt is one on which interest is payable to the appellant. The expression 'money debt' is itself defined by s 81(2). For these purposes it is essentially a debt which falls to be settled by the payment of money.

> [159] We consider that, in the case of each of SDG (in relation to IP 1 and IP 2), SDHSL (in relation to IP 3 and IP 4) and LRL (in relation to IP 7 and IP 8), the payments were of interest. We have found that the VAT repayments were made, not by way of gift from the representative member, but because within the group the appellant companies were entitled to those payments. That entitlement gave rise to an obligation at the relevant time for the representative members to make the VAT repayments to the appellants. The making of those payments in respect of the entitlements we have found existed at the time is, in the light of our finding that they were not made by gift, evidence of the discharge of the obligations of the representative members in this respect. That, in our view, amounts to a money debt for the purpose of s 100.
>
> [160] The interest payments were calculated on the amounts due in respect of the VAT repayments, that is to say on the amounts of the money debts, and by reference to the period for which the VAT was repayable. It is of no consequence that these amounts did not accrue over the entire period that the VAT remained overpaid; they were nevertheless calculated at the relevant time by reference to that period. The interest accordingly arose from the money debt that was discharged on the making of the VAT repayment.
>
> [161] Accordingly, we find that all the interest payments were properly assessable on the appellants under Case III of Sch D."

169. Mr Goldberg submits that, as there was no basis for the finding that the Appellants (but for RGL) were beneficially entitled to the Sums in respect of the respective VRPs, they cannot have been owed a money debt and, accordingly, none of the Sums in respect of IPs recognised in their accounts can be taxed as interest or as a profit on a loan relationship. He says that, rather than ask whether the Sums were a gift, the right question to ask was whether each Appellant had an enforceable right to the VRPs and, accordingly, the related IPs, Sums equal to which were in their accounts. He says that, the answer is "no". Accordingly, he says, those sums in the case of LRL cannot be taxed as interest and, in the case of the other Appellants, there can have been no money debt for the purposes of section 100 FA 1996.

170. Mr Gammie submitted that no error of law was made. He stated that under section 78 VATA, the IPs were payable as compensation for being kept out of the VRPs over a period of time, were income in the Appellants' hands and are properly described as income despite being paid as a lump sum. In this regard, he took me to the speech of Viscount Simon in *Riches v Westminster Bank Limited [1947] AC 390* at 396 as follows:

> "The appellant contends that the additional sum of 10,028l, though awarded under a power to add interest to the amount of the debt, and though called interest in the judgment, is not really interest such as attracts income tax, but is damages. The short answer to this is that there is no essential incompatibility between the two conceptions. The real question, for the purposes of deciding whether the Income Tax Acts apply, is whether the added sum is capital or income, not whether the sum is damages or interest."

At 398 Viscount Simon added:

> "Mr Grant advanced a further argument that the added sum was not in the nature of "interest" in the sense of that express in the Income Tax Acts because the added sum only came into existence when the judgment was given and from that moment had no accretions under the order awarding it. . .. . but I see no reason why, when the judge orders payment of interest from a past date on the amount of the main sum awarded (or on a part of it) this supplemental payment, the size of which grows from day to day by taking a fraction of so much per cent per annum of the amount on which interest is ordered, and by the payment of which further growth is stopped, should not be treated as interest attracting income tax. It is not capital. It is rather the accumulated fruit of a tree which the tree produces regularly until payment."

171. Mr Gammie also drew attention to the closing words of section 78 VATA itself which state that it is "interest . . . on that amount" in the sense of the overpaid VAT. He says that the FTT was right therefore, in the analysis it applied to the amounts equal to the IPs paid to the Appellants, set out at [155]. In other words, he says, the Sums in respect of IPs paid by the representative member to the Appellants were monetary compensation for being kept out of money and as such were interest. He concluded that, therefore, there was no error in the FTT's conclusion at [156] in respect of IP6 paid to LRL.

172. As to the remainder of the IPs made after the introduction of FA 1996, he says that each of the Appellants is treated as being party to a loan relationship and the interest is treated as being payable under section 100 FA 1996. In this regard, he submits that the FTT was correct to decide at [159] that section 100 applied because the Appellants had stood in the position of creditor in relation to a money debt because within the VAT group they were entitled to the Sums and accordingly, the interest payable on them. Accordingly, he says that the FTT's conclusions at [159] and [160] do not contain an error of law.

173. In reply, Mr Goldberg emphasised that whether one is considering the legislation before or after the changes to Case III as a result of FA 1996, in order to be taxable it is essential that the person taxed has a proprietary right to the interest in question and on the basis of the facts in this case, that cannot be the case.

174. In my judgment and in the light of what I have already found in relation to the FTT's decision with regard to beneficial interest and the SDG Construction Argument, the FTT's conclusions in relation to interest are correct.

175. As HMRC submits, these appeals concern interest payments made by HMRC in respect of overpaid VAT. The relevant provision is section 78 VATA which provides monetary compensation to the taxpayer for being kept out of his money over a period of time. Such a sum is income in the hands of the recipient, and is properly described as interest, notwithstanding that it is paid as a lump sum and by way of compensation: *Westminster v Riches* [1947] AC 390 at 409-410 per Lord Simonds. As the FTT found at [160] "*It is of no consequence that these amounts did not accrue over the entire period that the VAT remained overpaid; they were nevertheless calculated at the relevant time by reference to that period*".

176. As the FTT decided at [155], in my judgment, the same analysis applies to the interest on the repayments made by the representative member to the Appellants. As persons entitled to the Sums in respect of the VRPs, the Appellants were paid, and were entitled to be paid, amounts equal to the statutory interest thereon. In other words, in the hands of the Appellants, the payments from the representative members were monetary compensation for being kept out of their money over a period of time, and as such, were interest. That is the case, on the facts, whether the Appellant is the original trader, a successor to the trade and the right to repayment, or (as the FTT found in the case of SDG and RGL) entitled to the repayment as between the group companies, and to the interest thereon. As the FTT rightly held at [156], "*that disposes of the payment of IP 6 to LRL. That payment is taxable under Case III of Schedule D*".

177. I find Mr Goldberg's criticism of the FTT's reliance on the payments not being by way of gift and his formulation of the question in terms of an enforceable right to be artificial. In my judgment, it is implicit in the finding of beneficial entitlement that each Appellant had sufficient right to the payments.

178. As for the other interest payments made after the introduction of Chapter II Part IV FA 1996, Mr Goldberg says that they cannot be shoe horned into the "loan

relationship" provisions and therefore, are not chargeable to corporation tax under Schedule D Case III as a result of section 18(1)(b) ICTA and section 18(3A) ICTA.

179. The FTT held at [159] that section 100 applies because the Appellants have stood in the position as creditor in relation to a money debt for the purposes of section 100(1)(a) and (b), and interest is payable "*on*" that debt (being the amount equal to the interest under section 78 VATA): section 100(1)(c). Accordingly, the FTT found that the interest payments were calculated on the amounts of the money debts and by reference to the period for which the VAT was repayable and the interest arose from the money debt that was discharged on the making of the VAT repayment: [160].

180. In the light of the finding that each of the Appellants was beneficially entitled to the Sums received and my rejection of Mr Goldberg's reformulation of the question of entitlement for the purposes of determining whether each Appellant was in the position of a creditor in respect of a money debt for the purposes of section 100, it follows that, in my judgment, the FTT did not err in law in its conclusion that section 100 applied. A money debt is defined, for the purposes of section 100, in section 81(2), inter alia, as a debt to be settled by the payment of money. In my judgment, the payment of the Sums as a result of the beneficial entitlement of each of the Appellants is sufficient for this purpose.

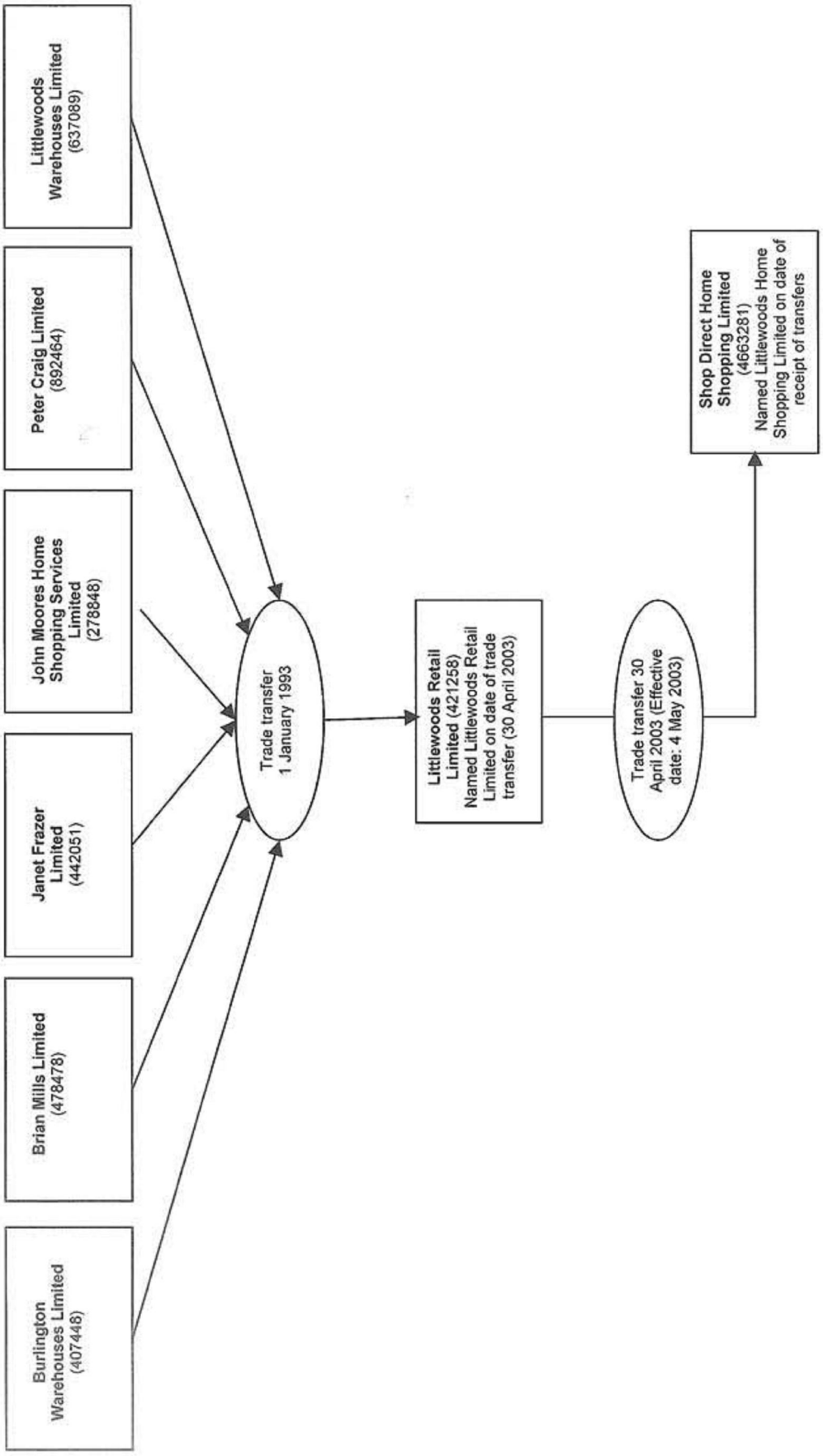
181. It follows that the appeal is dismissed.

MRS JUSTICE ASPLIN

UPPER TRIBUNAL JUDGE

RELEASE DATE: 19 APRIL 2013

Appendix 1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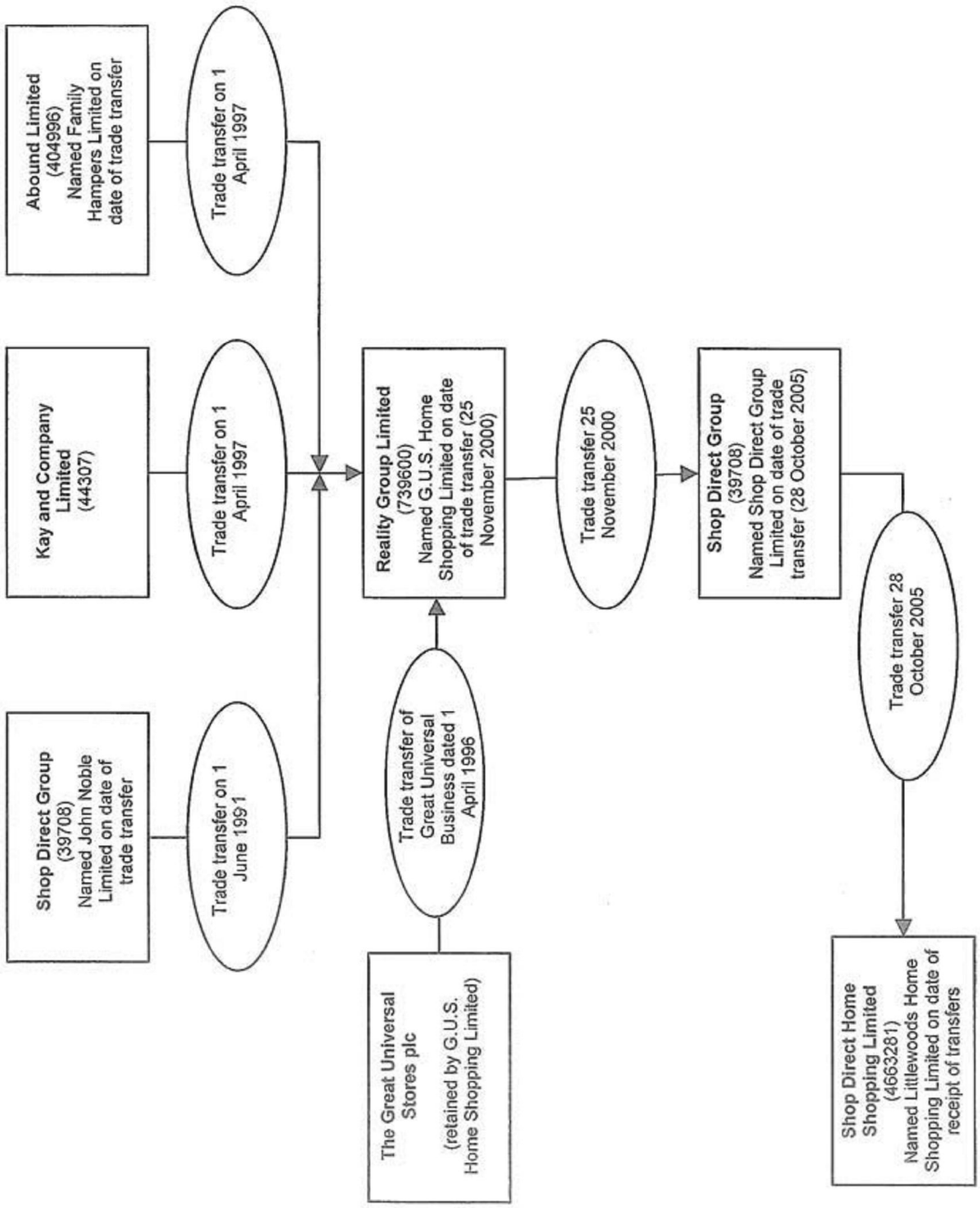
Peter Craig Limited (892464)
John Moores Home Shopping Services Limited (278848)
Janet Frazer Limited (442051)
Brian Mills Limited (478478)
Burlington Warehouses Limited (407448)
Trade transfer 1 January 1993
Littlewoods Retail Limited (421258) Named Littlewoods Retail Limited on date of trade transfer (30 April 2003)
Trade transfer 30 April 2003 (Effective date: 4 May 2003)
Shop Direct Home Shopping Limited (4663281) Named Littlewoods Home Shopping Limited on date of receipt of transfers

Appendix 2


Abound Limited (404996) Named Family Hampers Limited on date of trade transfer
Trade transfer on 1 April 1997
Kay and Company Limited (44307)
Trade transfer on 1 April 1997
Shop Direct Group (39708) Named John Noble Limited on date of trade transfer
Trade transfer on 1 June 1991
Trade transfer of Great Universal Business dated 1 April 1996
The Great Universal Stores plc (retained by G.U.S. Home Shopping Limited)
Reality Group Limited (739600) Named G.U.S. Home Shopping Limited on date of trade transfer (25 November 2000)
Trade transfer 25 November 2000
Shop Direct Group (39708) Named Shop Direct Group Limited on date of trade transfer (28 October 2005)
Trade transfer 28 October 2005
Shop Direct Home Shopping Limited (4663281) Named Littlewoods Home Shopping Limited on date of receipt of transfers