[2013] UKFTT 201 (TC)

TC02616a

Appeal number: TC/2011/04137

VAT- overpayment of output tax charged by Appellant to business customer registered for VAT; reimbursement arrangements with HMRC; whether arrangement a binding contract; whether reimbursement arrangements ultra vires; Appellant crediting customer with reimbursement to reduce customer's indebtedness to Appellant; whether reimbursement made "in cash or by cheque"; assessment to recover repaid VAT on grounds of unjust enrichment; whether Appellant unjustly enriched; whether Appellant incurred loss or damage through mistaken assumptions made in his case about the operation of VAT provisions; VAT 1994 s80(1)(3), 80(4A), 80B, 80(3B); VAT Regulations 1995, regulations 43B, 43C, 43G; whether Tribunal has jurisdiction to consider public law remedy.

FIRST-TIER TRIBUNAL
TAX CHAMBER

SYSTEMS ALUMINIUM LIMITED	**Appellant**
- and -	
THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS	**Respondents**

TRIBUNAL: JUDGE J GORDON REID QC, FCIArb
Dr HEIDI POON CA, CTA, PhD

Sitting in public at George House, Edinburgh on 10 and 11 October 2012

Mr J Pentland for the Appellant (Pinsent Masons LLP until 2 October 2012)

Sean Smith QC, instructed by the Office of the Advocate General for Scotland for the Respondents

DECISION

Introduction

1. The principal issue in this appeal raises the question whether the repayment (now said to have been erroneous) by the Respondents ("HMRC") to the Appellant of overpaid output tax, is recoverable from the Appellant on the ground of unjust enrichment. Subsidiary issues relating to alleged abuse of power and the Tribunal's jurisdiction to consider public law remedies have also been raised. The sum in issue amounts to about £682,974. HMRC have issued a Notice of Assessment for the recovery of that sum. The Appellant appeals against that assessment.

2. Until 2 October 2012, the Appellant was represented by McGrigors, solicitors, Glasgow, Manchester and London, and subsequently, following a merger, by Pinsent Masons, solicitors, Manchester, when they withdrew from acting due to lack of funding. They had, by that stage, drafted extensive Grounds of Appeal and produced a detailed Skeleton Argument, setting out the Appellant's views of the facts and the law. They also contributed to the assembly and production of documents and authorities.

3. At the Hearing, which took place at Edinburgh on 10 and 11 October 2012, the Appellant was represented by John Pentland, group finance director of McMullen Group Holdings Ltd. He was also company secretary of the Appellant. The Appellant is a wholly owned subsidiary of McMullen. Mr Pentland, who is not legally qualified, gave evidence and adopted a witness statement prepared by Pinsent Masons. HMRC were represented by Sean Smith QC, on the instructions of the Office of the Advocate General. He led the evidence of William O'Pray, an experienced assurance officer with HMRC who spoke to and amplified a written statement. A Joint Bundle of documents was also produced along with bundles of authorities.

4. Following the notification of the appeal to this Tribunal, the Appellant made a hardship application to which HMRC consented. Accordingly, the sums said to be due have not been paid by the Appellant to HMRC.

Statutory Background

5. S80(1)(b) VATA 1994 allows a taxpayer to claim credit for output tax wrongly brought into account during a prescribed accounting period. S80(3) provides that it is a defence to such a claim if, by so crediting the taxpayer, it would unjustly enrich him.

6. In order to meet that defence a taxpayer may, *inter alia,* make arrangements for reimbursing his customers. Much of the appeal related to such arrangements. However, these *reimbursement arrangements* are disregarded (and thus not a defence) except where they contain certain provisions and are supported by undertakings prescribed by regulations (s80A(1)). S80A(2) provides *inter alia* that

> "….. 'reimbursement arrangements' means any arrangements for the purposes of a claim under section 80 which-
>
> (a) are made by any person for the purpose of securing that he is not unjustly enriched by the crediting of any amount in pursuance of the claim; and
>
> (b) provide for the reimbursement of persons who have for practical purposes borne the whole or any part of the amount brought into account as mentioned in paragraph (b) of subsection (1)…."

7. The relevant regulations are contained in Part VA of the VAT Regulations 1995. Regulation 43A repeats the above definition of reimbursement arrangements but adds *consumers* in parenthesis after *persons* in paragraph (b). By regulation 43B, the reimbursement arrangements are to be disregarded except where they (a) included the provisions described in regulation 43C and (b) are supported by the undertakings described in regulation 43G.

8. For present purposes, the only relevant provision in regulation 43C is

> (c) reimbursement will be made only in cash or by cheque

9. For present purposes, the only relevant undertaking in regulation 43G is

> 2(b) he [sc the claimant] will apply the whole of the relevant amount credited to him, without any deduction by way of fee or charge or otherwise, to the reimbursement in cash or by cheque, of such consumers (sc such consumers whom the claimant has reimbursed or intends to reimburse) by no later than 90 days after his receipt of that amount (except insofar as he has already so reimbursed them).

10. The Appellant has also advanced an argument based on s80(3B) VATA 1994. Broadly, that provision applies for the purposes of s80(3) (HMRC's unjust enrichment defence) where there has been an overpayment of output tax, which for practical purposes has been borne by the taxpayer's customers. In those circumstances s80(3B) provides as follows:-

> "Where, in a case to which this subsection applies, loss or damage has been or may be incurred by the taxpayer as a result of mistaken assumptions made in his case about the operation of any VAT provisions, that loss or damage shall be disregarded, except to the extent of the quantified amount, in the making of any determination –
>
> > (a) of whether or to what extent the crediting of an amount to the taxpayer would enrich him; or
> >
> > (b) of whether or to what extent any enrichment of the taxpayer would be unjust

11. S80(3C) defines the *quantified amount* as meaning

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

12. These provisions require the taxpayer to show loss or damage and raise issues of causation and quantification.

Facts

13. There was little dispute on the facts. The Appellant carries or at least carried on business designing, supplying and installing aluminium windows and curtain walling facades within the United Kingdom construction industry. One of their long-standing customers was FM Construction Ltd ("FMC"). At all material times, FMC was registered for the purposes of VAT. FMC appeared to work principally with the Appellant.

14. Between March 2006 and February 2009, the Appellant supplied such goods to FMC. There were five contracts. Four related to the construction of new residential apartment buildings; the fifth related to the conversion of offices from commercial to residential use. The Appellant invoiced FMC at the standard rate by mistake. The supplies under the four contracts should have been zero-rated. The supplies under the fifth contract should have included VAT at a reduced rate.

15. Latterly, FMC became slow in making payment under these contracts. Their record-keeping deteriorated. They originally used authenticated receipts but subsequently sent payments with compliments slips. The point of the authenticated receipts system is that the receipt would be returned to them duly signed by the Appellant and FMC would use it to validate their input tax claim.

16. Numerous meetings and exchanges of correspondence at managerial and director level took place over the summer and winter of 2008 in relation to FMC's delays in making payment. In February 2009, FMC went into administration. At that stage, FMC owed the Appellant approximately £763,000. Following the administration, the Appellant reviewed the amounts outstanding and discovered the VAT error.

17. In the meantime, the Appellant entered into discussions with FMC's Administrators. The Appellant was contemplating suing the directors of FMC for wrongful trading and was putting pressure on the Administrators. To what precise end is unclear. The amount due to the Appellant exceeded 10% of FMC's total liabilities. This gave the Appellant power to call a meeting of creditors. The Appellant was FMC's largest creditor. HMRC were also unsecured creditors of FMC to the extent of about £150,000 of which about £31,000 related to VAT.

18. By letter dated 7 April 2009 to the Appellant, the Joint Administrator of FMC intimated that it had insufficient property to make a distribution to unsecured creditors. By letter to the Administrators dated 17 April 2009, McGrigors, on behalf of the Appellant, reserved the right to call a meeting of creditors. In the event, the Appellant did not call such a meeting of creditors. There was no evidence of any distribution ever being made to creditors either as part of the Administration process or the subsequent winding up. Following receipt of the Administrators' statutory Report and Proposals dated 3 April 2009, McGrigors raised a number of points on

which they sought clarification. The correspondence does not disclose whether, and if so, how these points were resolved or clarified.

19. By letter to HMRC dated 28 May 2009, the Appellant made a voluntary disclosure and claimed just under £683,000 (there is no dispute on quantum) of overdeclared output tax charged to FMC. For some reason, HMRC did not respond. The Appellant sent reminders in July, August and September 2009. Eventually, an official of HMRC contacted Mr Pentland by telephone.

20. The outcome of that conversation and subsequent communings was that HMRC were prepared to reimburse the Appellant provided that the Appellant undertook to pass on to FMC the sum to be repaid. HMRC sent the Appellant a form of declaration and undertaking with a letter dated 22 September 2009.

21. The letter provided *inter alia* as follows:-

> …………..To prevent unjust enrichment from occurring, we must ensure that the repayment made to you from HMRC, is then forwarded on to your customer.
>
> The attached undertaking must be signed and the form returned to this office before any money will be refunded under the reimbursement scheme.
>
> It is only necessary to sign this undertaking where you accept that you would be unjustly enriched by receiving the refund of the sums overpaid as VAT to (HMRC), but have agreed, for the purposes of the scheme, to reimburse those consumers who for practical purposes bore the amount of money being refunded.
>
> None of the refund can be kept to cover any administrative expenses you may incur in administering the scheme.

22. The letter was accompanied by *NOTES FOR CLAIMANTS ON THE REIMBURSEMENT SCHEME* which included *inter alia* the following:-

> The reimbursement scheme ("the scheme") only applies where you accept that by receiving a refund of sums overpaid as VAT your business would be unjustly enriched at your customers' expense. This is because your customers had for practical purposes paid the VAT charged in error and by not passing the refund back to them your business would benefit as a result.
>
> In such cases a refund of overpaid VAT will only be made if you agree to reimburse those customers in accordance with the terms of the "scheme".
>
> …The existence of the scheme does not affect your right to claim that you would not be unjustly enriched by the refund. Should we reject your claim on the grounds of unjust enrichment, you still have the right of appeal….
>
> ……The scheme's conditions
>
> A refund under the scheme will only be made if you agree to the following:-
>
> (a) Sign an undertaking in the format attached. Once signed it cannot be amended.
>
> (b) All refunds must be made to customers within 90 days.

…………..

> Who are my customers?
>
> Your customers are those persons who have, for all practical purposes borne the burden of the tax.
>
> **The undertaking:**
>
> This undertaking applies to my claim for repayment of overpaid VAT dated 28th May 2009 and totalling £682,983.57
>
> "I, the undersigned, can identify the names and addresses of consumers whom I intend to reimburse. I will repay to these persons, in cash or by cheque, *[or by way of credit to the customer's ledger account]* all the money I receive from (HMRC) without any deduction, for whatever purpose within 90 days of receiving the money and understand that I cannot use the money for any other purpose………….

The words parenthesised in italics were added as described in the following paragraph.

23. By email to HMRC dated 24 September 2009, Mr Pentland pointed out that the reference to *cash or by cheque* was not practical as the Appellant was intending to credit the customer's ledger account with the reimbursement as the balance due to the Appellant was greater than the amount of VAT involved. He proposed the italicised addition referred to in the previous paragraph.

24. HMRC were content with the proposal stating in an email of the same date that:-

> ….What you are proposing is fine. As you are crediting your customer's ledger account & advising them by letter of this new balance, you are in theory repaying your customer the overpaid VAT. As you said your customers (sic) balance will still be in deficit after you have credited their account with the overpaid VAT……….

25. Mr Pentland sent the undertaking (as amended) to HMRC, and, on or about 26 October 2009, the Appellant received from HMRC a cheque in the sum of £682,984. The ledger account of FMC was duly credited with that sum (there was a discrepancy of 43p but this is immaterial). This reduced FMC's indebtedness to about £159,188.78 (below 10% of FMC's total indebtedness). The Administrators were duly informed by the Appellant on or about 6 November 2009. The Administrators responded by letter dated 12 November 2009 to McGrigors stating that they *note your client is reducing their claim in the administration to £159,188.78.*

26. According to Mr Pentland, this greatly reduced the Appellant's influence over the Administrators and its ability to put pressure on them. The nature of that pressure and what effect it might have had on the Administration or on possible claims against the directors of FMC were not explored in evidence and are unknown.

27. The sum of £159,188.78 was further reduced in effect to about £60,000 following the receipt of monies through a sub-contractor of FMC and the return of materials. The legality of those arrangements was not explored. In those

circumstances, the Appellant took the view that it would no longer be worthwhile (in terms of cost compared to risk and possible benefit) pursuing FMC's directors for wrongful trading.

28. At no stage during their discussions with HMRC did the Appellant inform HMRC that FMC was in administration, was insolvent or likely to be insolvent or that it was heavily indebted to the Appellant.

29. Following a routine VAT inspection in August 2010 by Mr O'Pray, HMRC, by letter dated 28 September 2010, informed the Appellant that the sum of £682,984 had been incorrectly repaid. Mr O'Pray also checked HMRC records. These did not enable Mr O'Pray to determine whether FMC was a payment trader and not a repayment trader although there was no indication that they were involved in any *exempt* activities. He checked a report of a previous visit to FMC. From his examination of the information available to him he said (and we accept) that he had no reason to think that FMC had not claimed as input tax the VAT overcharged by the Appellant.

30. A Notice of Assessment was issued on 24 September 2010 in the sum of £682,984 on the basis that the Appellant had been unjustly enriched by the payment in 2009. By letter dated 6 May 2011, HMRC, on review, upheld the decision to assess.

FMC

31. FMC subsequently went into creditors voluntary liquidation. There is no direct evidence whether, FMC claimed as input tax the VAT which the Appellant wrongly claimed from them, and if they did, whether that VAT was set off against FMC's own liability to account for output tax on its own supplies. In the normal course of events, it is reasonable to expect that a trader in the construction industry would claim such VAT as input tax and that they would be given credit for it in their dealings with HMRC.

32. While it is likely that, as a creditor of FMC, HMRC would have received the Administrators' statutory statement setting out their proposals for achieving the purpose of the administration (Insolvency Act 1986 Schedule B1 paragraph 49) and the receipt of form VAT 769 (Notification of Insolvency of a VAT registered trader), the HMRC officials dealing with the reimbursement arrangements were not aware of FMC's insolvency. Had HMRC checked the information available to them, FMC's insolvency would have been revealed. This is clear from an HMRC internal note by Mr O'Pray dated 19 August 2009. The Appellant for its part, did not deliberately refrain from disclosing FMC's financial circumstances to HMRC. They were not asked to provide such information.

Decision

33. There are six main issues.

1 Reimbursement Arrangements

34. HMRC argue firstly that, for practical purposes, FMC did not bear the economic burden of the tax, and secondly reimbursement was not made to FMC in cash or by cheque. Accordingly, the arrangement was not a *reimbursement arrangement* for the purposes of VATA 1994 and the 1995 Regulations and therefore falls to be disregarded.

35. As for the first argument, FMC was not a consumer but a registered trader who made standard rated, and possibly reduced and/or zero rated supplies. It would be expected therefore that in their VAT returns, they would have deducted as input tax the output tax wrongly charged by the Appellant. That would be the ordinary accounting treatment of supplies purchased as a cost component of a business (*Baines & Ernst Ltd v HMRC* [2006] STC 1632 at paragraph 7; see also *C&CE v National Westminster Bank* [2003] STC 1072 at paragraph 17). There is nothing in the evidence to suggest that did not happen. The evidence of Mr O'Pray and our consequent findings of fact recorded above indicate that that is probably what happened. That seems to us to be the fair and reasonable inference on the evidence before us. As FMC have likely recouped the output tax wrongly charged, they are not persons (and they are certainly not consumers) who have for practical purposes or any purposes, borne the whole or any part of the original amount brought into account as output tax that was not output tax due. Accordingly, the reimbursement arrangements carried into effect in 2009 were not reimbursement arrangements for the purposes of VATA 1994 or the 1995 Regulations. These arrangements must be disregarded when considering the unjust enrichment defence.

36. It is no answer for the Appellant to say, as they did, that they had no knowledge of FMC's VAT affairs. They could have attempted to make enquiries of the Administrators. For the reimbursement arrangements to be effective, the Appellant had to establish that they met the statutory criteria. They did not do so. The fact that it might be difficult to identify FMC's VAT circumstances suggest that there will be few situations where reimbursement arrangements can satisfy the statutory criteria where business-to-business transactions are involved, and the proposal is to reimburse another VAT registered business, making standard, and/or reduced rated supplies, rather than identified final or end consumers, as the Regulations expressly seem to contemplate. Moreover, there is no evidence to conclude that HMRC have adjusted, or intend to adjust, any input tax claim made by FMC attributable to the Appellant's erroneous output tax charges. They are not bound to do so. Plainly, HMRC cannot recover the sum reimbursed to the Appellant, *and* adjust FMC's account by disallowing their correlative input tax claim. There is no suggestion of that having been done or even contemplated.

37. As for the second argument, HMRC were content with a modification to the undertaking, which the Regulations did not permit. However broadly one construes

payment *in cash or by cheque,* it does not include crediting a customer's ledger account, which is essentially a running account between traders. It is clear that by authorising the modified undertaking, HMRC misled the Appellant. We consider the consequences of this below. However, the provisions to be included are prescribed by the regulations. HMRC have no discretion to modify them and thus change the law. The undertaking departed from the provision that reimbursement would be made only "in cash or by cheque". Accordingly, for this reason too, the reimbursement arrangements carried into effect in 2009 were not reimbursement arrangements for the purposes of VATA 1994 or the 1995 Regulations. For this separate reason, the arrangements must be disregarded when considering the unjust enrichment defence.

38. The Appellant, in its Skeleton Argument, deployed a submission that set-off was equivalent to a payment in cash under reference to *Spargo's Case* [1873] LR 8 Ch 407, and *Melham Ltd v Burton* [2006] UKHL 6 at paragraph 22. Counsel for HMRC accepted the general principle but submitted that there was no evidence of agreement to set-off. The Appellant, on receipt of the HMRC cheque, simply credited FMC's account and told the Administrators that they had done so. In response, the Administrators simply noted what had been done.

39. We accept that there are equivalents to cash. Thus, electronic payment by the Appellant to FMC through the banking system (BACS, CHAPS or the more modern Faster Payment System) would be equivalent to payment in cash. In those circumstances, the money is deposited in the recipient's account and comes under his control; the recipient is reimbursed. Here, that did not happen. FMC and its Administrators, as HMRC argue, did not at any stage have any control over the sum in question. It is therefore difficult to see how FMC were reimbursed, even momentarily.

40. Set-off or balancing of accounts in bankruptcy or insolvency does not require the consent of the bankrupt or insolvent person. The right to retain and set-off arises as a matter of law and applies where a company is in insolvent administration (*Integrated Building Services Engineering Consultants Ltd v Pihl UK Ltd* [2010] BLR 622 paragraphs 22-27). Accordingly, the absence of agreement does not exclude set-off where one party is insolvent.

41. We have great difficulty in seeing how the statutory criteria are met where set-off is intended to be applied. If a final consumer has a running account with a trader, and has been overcharged output tax, the trader, under the reimbursement arrangements, has to repay the excess tax to the consumer, who for practical purposes has borne the original amount brought into account as output tax that was not output tax due. The effect on the trader is neutral. He simply passes back to the consumer the output tax wrongly charged and accounted for in his return and repaid to him by HMRC. The result should be no different from HMRC simply paying the claiming trader's customer direct. However, the result in this appeal appears to be that FMC's debt to the Appellant has been reduced; FMC have already probably claimed the wrongly charged output tax as input tax and thus benefitted twice over; and the Appellant's overall financial position has also improved by the amount of the reimbursement.

42. If the consumer (as the end-user) is insolvent and set-off is applied, the taxpayer is also immediately enriched. The indebtedness of the insolvent consumer is reduced by the amount of the output tax that was not output tax due. The net assets of the taxpayer are increased by the same amount, because the amount due by his debtor is reduced *pro tanto.* That is not reimbursement as contemplated by VATA 1994 and the 1995 Regulations. The purpose of reimbursement is not to reduce indebtedness but to repay output tax which was not due in the first place. Here, FMC was not the end-user consumer but a trader in a chain of supplies. Furthermore, as the Appellant points out, the result was to reduce very substantially the indebtedness of FMC to the Appellant to below what they regarded as the important figure of 10% of FMC's overall liabilities to its creditors.

43. The Appellant sought comfort from HMRC's practice, in another context, of accepting credit notes as sufficient reimbursement. That practice was no longer in operation in September or October 2009. It cannot, in any event, affect the proper interpretation and application of the relevant statutory provisions.

44. Finally, the Tribunal recalls that the purpose of the statutory reimbursement arrangements is to elide the defence of unjust enrichment. If, as here, the reimbursement arrangements fall to be disregarded, some other basis for eliding that defence must be found if the appeal is to succeed, where, on the face of matters, the Appellant is enriched by the amount of output tax reimbursed. The Appellant here has, in effect, simply kept the money repaid to it by HMRC.

2 Constructive Trust

45. The Appellant briefly argues that it held the cheque received from HMRC on a constructive trust for FMC. We are unclear whether the Appellant contends that Scots law applied to the trust, or whether English law applied; we must therefore assume Scots law applies. What appears to be asserted is that the Appellant applied the trust property for its own benefit. Whether the Administrators, as agent of the beneficiary FMC, would have agreed to this or whether they would be bound to claim it for the benefit of all creditors is also unclear. We do not consider that the necessary ingredients for a trust, actual or constructive, are present (see for example *Joint Administrators of Rangers Football Club Plc, Noters* [2012] SLT 599 at paragraph 33 on constructive declaration and delivery of an asset; see also *Menzies on Trustees* paragraphs 1271 and 1272). While it is at least conceivable that the reimbursement arrangements might have imposed some fiduciary obligation on the Appellant in relation to FMC, the only such obligation we can identify is the obligation to make over the trust property to the beneficiary. That obligation was not fulfilled. We therefore reject this argument.

3 Contract with HMRC

46. The Appellant argues, in the alternative, that the reimbursement arrangements, even if not meeting the statutory criteria, constitute a binding contract between them and HMRC and that the Appellant had a legitimate expectation that they could rely on

such a contract. They also deployed an argument that this Tribunal had jurisdiction to deal with the question of legitimate expectation.

47. This whole argument fails at the first hurdle because the evidence does not establish a contract between the parties. HMRC authorised a repayment on the basis of an undertaking given by the Appellant. It is for the Appellant to make the arrangements for the purpose of securing that it is not unjustly enriched. It is for the Appellant to make arrangements which provide for reimbursement of its customers. It is for the Appellant to see that the arrangements are supported by the necessary undertakings. We do not see how, under the arrangements actually made, HMRC could force the Appellant to accept a cheque and implement the arrangements if the Appellant changed its mind, realising, perhaps, that the whole exercise was pointless because, the Appellant's over-declaration of output tax and FMC's consequently enhanced input tax claim, for practical purposes, cancelled each other out. Likewise, we do not see how the Appellant could have forced HMRC to make payment if, on reflection, on receipt of the undertaking, they came to the same conclusion.

4 Legitimate Expectation

48. The Appellant argues that it had a legitimate expectation to rely on what it describes as a binding agreement. The binding agreement was said to arise from HMRC's general collection and management powers and was therefore *intra vires.* We have already concluded that there was no binding agreement. Accordingly, the legitimate expectation argument does not arise because the basis upon which it was advanced has not been established.

49. However, if there had been a binding agreement, and the legitimate expectation issue had to be considered, there are a number of difficulties with it. First, it is hard to understand how an agreement which does not comply with the prescriptive provisions of the 1995 Regulations can be regarded as *intra vires. Prima facie* therefore it is *ultra vires.* HMRC have no powers to authorise, far less to agree, any reimbursement arrangements for the purpose of enabling the unjust enrichment defence to be elided, where the arrangements did not meet the statutory requirements necessary for such arrangements to have that effect. No amount of managerial discretion can elide the requirements of the relevant part of the 1995 Regulations. The statutory provisions gave HMRC no discretion to do so and their general powers of collection and management under the Commissioners for Revenue and Customs Act 2005 or other legislation do not do so either. What the HMRC official authorising the arrangements considered the extent of HMRC powers to be is not determinative. If what occurred was *ultra vires,* as we consider it was, then, as the Appellant expressly accepts in its Skeleton Argument, the doctrine of legitimate expectation does not apply. We agree (see *Fayed v AG* 77 TC 273 paragraphs 150-154 (OH) and paragraphs 99, 100, 119 (IH)).

50. Second, the argument is described as a public law type argument. There is no dispute on quantum. We were referred to *Oxfam v HMRC* [2010] STC 686 paragraphs 63-76, *Abdul Noor v HMRC* [2011] UKFTT 349 (TCC) paragraphs 16-21 (this decision is under appeal). The Appellant has raised proceedings for judicial

review at the Manchester Division of the High Court of Justice Administrative Court. However, the Upper Tribunal has recently held that the first-tier tribunal has no judicial review jurisdiction (*HMRC v Hok Ltd* [2012] UKUT 363 (TCC) paragraphs 41-43, 56). That decision is binding on us. (See also *Prince & Ors v HMRC* [2011] UKFTT 157 (TC) paragraph 18, 23-24; and *National Westminster Bank* at paragraphs 47-54). This is consistent with the recent observation in the Court of Appeal that *current jurisprudence suggests that the First tier Tribunal, on a statutory appeal ….cannot give effect to public law principles* (*Paul Daniel v HMRC* 2012 EWCA Civ 1741 [21 December 2012], paragraph 14).

51. Tax cases dealing with the question of legitimate expectation have generally been raised as applications for judicial review (see, for example, *R v IRC ex p Preston* [1985] 1 AC 835*; R v IRC exparte MFK Underwriting Agencies Ltd*[1990] 1 AER 91; *R (ex p Bamber) v HMRC* [2005] EWHC 3221 (Admin)), although the question of legitimate expectation has been considered at first-tier tribunal level (eg *Hanover Company Services Ltd v HMRC* [2010] UKFTT 256 (TC) paragraphs 43-48; *CGI Group (Europe) Ltd v HMRC* [2010] UKFTT 224 (TC) paragraphs 5-13, 19, 43, 46-48). The Appellant here, in effect, asks this Tribunal to exercise some sort of supervisory jurisdiction and adjudicate on the fairness of HMRC's conduct. The Tribunal has no power to do so unless authorised by statute (eg Finance Act 1994 s16(4)). For essentially the same reasons, we cannot entertain issues about abuse of power or the fairness of HMRC's conduct insofar as they might be regarded as different from *legitimate expectation* (see *MKF* at page 109-110; 113-114; *Aspin v Estill (Insp of Taxes)* [1987] STC 723 at 726e-f and 727d, where it was held that erroneous advice by the Revenue acted on to the taxpayer's detriment which might have constituted an abuse of power was a matter for which the only remedy was by way of judicial review).

52. Although the Tribunal has no judicial review jurisdiction, we recall that where Convention rights are in issue, the Tribunal, as a public authority, cannot, subject to s6(2) of the Human Rights Act 1998, act in a way which is incompatible with a Convention right. However, no Convention rights have been raised in this appeal.

53. Third, while it is permissible for HMRC to reach agreement or settlement over taxpayers' liabilities (see *IRC v National Federation of Self Employed and Small Businesses Ltd* [1981] 2 WLR 722, and *Al Fayed* paragraphs 35-37 (IH)), that is not what occurred here. We are not concerned with an extra statutory concession (see *Mundays LLP v HMRC* [2012] UKFTT 707 (TC) at paragraphs 61 and 62). This line of authority does not seem to us to be relevant for present purposes.

54. Fourth, there is a further difficulty with the legitimate expectation argument. Mr Smith submitted that the Appellant failed to put all its cards on the table face up, as it ought to have done (*MKF* at page 110-111 and 115). It was submitted that the Appellant should have informed HMRC at the time that FMC was in administration and insolvent. There is some force in this argument; but we do not need to decide the point.

55. Finally, there is a suggestion in *Mundays* at paragraph 68 that, under the Principal VAT Directive, in order to establish a claim based on legitimate expectation, the Appellant would have to show that it relied on the expectation to its detriment. If it is necessary to show detrimental reliance, the Appellant has not done so. We refer to paragraphs 57-59 below. Although the Appellant can say that it changed its position, it was not any worse off. While the Appellant no doubt relied on HMRC's conduct they did not, on our analysis, do so to their detriment.

5 Non-compliant Arrangement

56. The Appellant advanced a further argument to the effect that HMRC have no power to disregard an arrangement which is not a *reimbursement arrangement* as defined in s80A(2). This argument seems to be based on the view that the arrangement entered into did not provide for the reimbursement of persons who have for practical purposes borne the amount being brought into account.

57. This argument cannot be accepted. By entering into the arrangement, the Appellant acknowledged that it would otherwise be unjustly enriched (see paragraphs 20-25 above). Moreover, we have already concluded that the Appellant was unjustly enriched, as was FMC (or perhaps more accurately, their creditors). In effect, HMRC paid to the Appellant a sum which reduced FMC's indebtedness to the Appellant. Both the Appellant and FMC were unjustly enriched. Another way of looking at matters would be to say that in the course of the insolvency of FMC, the Appellant has been granted a preference over the general body of unsecured creditors, to which it would not otherwise normally be entitled.

6 Application of s80(3B) of VATA 1994

58. In correspondence with HMRC (letter 22 October 2010), McGrigors, on behalf of the Appellant, described the detriment which the Appellant had suffered. They said that the Appellant relied on the advice of HMRC to the effect that the undertaking and consequent reimbursement arrangements were acceptable. The repayment reduced FMC's debt to the Appellant to less than 10% of its total liabilities to creditors. The Appellant thereby lost the ability to call a creditors' meeting; this reduced its power to enquire into the business of FMC and exert pressure on the Administrators for a settlement. If HMRC are now correct, then the Appellant gave up its position as a 10%+ creditor for no gain.

59. The loss or damage which may be claimed under s80(3B) must have resulted from mistaken assumptions. The loss or damage is to the business carried on by the Appellant such as the loss of business due to the need to charge higher prices (see *National Westminster Bank* at paragraphs 22 and 28). This raises questions of causation assuming that some mistaken assumption can be identified. Here, it might be said, as the Appellant argues, that the loss or damage was the reduction of FMC's debt by about £684,000 caused by the assumption that the arrangement entered into was *intra vires* and could not be unscrambled. But that loss has to be valued. The Appellant had a claim for a debt against an insolvent company. The Administrators' Report makes it reasonably clear that there would be no distribution to unsecured

creditors. The evidence did not suggest otherwise. Accordingly, the Appellant's claim, whether for £684,000 or £60,000, unfortunately had no value at all. By reducing the claim, they lost nothing.

60. It was also argued by the Appellant that, by reducing the claim, it lost the power to call a creditors' meeting and generally lost the ability to put pressure on the Administrators; they also decided not to pursue the directors of FMC for wrongful trading. Even accepting these assertions, the evidence does not identify what would or might have been the result of these actions. We can make no findings as to what such pressure or a creditors' meeting might have led to. We can make no findings as to whether some sort of action against the directors of FMC would have had reasonable prospects of success or how those prospects might be quantified. The Appellant is, in effect, asserting the loss of a chance, which simply cannot be quantified because there was no evidence to enable us to do so. The lack of evidence on these matters is not really surprising. They raise difficult questions of identifying and assessing prospects of success against individuals whose financial circumstances may be quite unknown.

61. The definition of *quantified amount* in s80(3C) makes it clear that the onus lies on the taxpayer to show that loss has or may be incurred, and to show what that amount is. The Appellant has not discharged that onus. The Appellant has not established that any such mistaken assumptions caused any quantifiable loss. We must therefore reject this argument.

Other Issues

62. The Appellant raised a number of other issues in the Grounds of Appeal but which were not developed in its lengthy Skeleton Argument. We are satisfied that the Notice of Assessment was correctly raised under s80(4A) to which it refers, rather than 80A(4)(a) which relates to implement of reimbursement arrangements. Even if the Notice of Assessment refers to the wrong statutory provision, this does not necessarily invalidate it (*The Boots Company v HMRC* [2008] BVC 2328 paragraphs 118, a retail scheme case in which HMRC decided to repay Boots £3m, then withdrew their decision and issued an assessment for its recovery under s80(4A); the decision was subsequently reversed but the validity of the notice was not discussed in the High Court ([2009] STC 1577) or the Court of Appeal [2010] STC 637).

63. It was also suggested in the Grounds of Appeal, in support of the argument that the Tribunal has jurisdiction to determine whether HMRC's conduct was unfair or an abuse of power, that the Assessment proceeded upon a prior decision (contained in HMRC's letter dated 24 September 2010) within s84(10) of VATA 1994). S84(10) applies where an HMRC decision depends upon a prior decision. Here, the assessment is, in effect, the decision. It does not depend upon a prior decision (*C&CE v National Westminster Bank* at paragraphs 57-60). The assessment is part of, or perhaps the conclusion or result of, a decision-making process. It is the assessment which the Appellant must and does appeal. The statutory basis for such an appeal is s83(t) VATA 1994.

64. Furthermore, we do not consider that our jurisdiction to consider public law issues of abuse of power or administrative unfairness, could or should be determined by whether a taxpayer appeals against a decision or an assessment.

Summary

1. **The reimbursement arrangements carried into effect in 2009 were not reimbursement arrangements for the purposes of VATA 1994 or the 1995 Regulations. These arrangements must be disregarded when considering the unjust enrichment defence.**

2. **Payment in cash or by cheque does not include crediting a customer's ledger account.**

3. **If a consumer is insolvent and set-off is applied, the taxpayer is immediately enriched. The indebtedness of the insolvent consumer is reduced by the amount of the output tax that was not output tax due. The net assets of the taxpayer are increased by the same amount, because the amount due by his debtor is reduced *pro tanto*. That is not reimbursement as contemplated by VATA 1994 and the 1995 Regulations. The purpose of reimbursement is not to reduce indebtedness but to repay output tax which was not due in the first place.**

4. **The necessary ingredients for a trust, actual or constructive, are not present.**

5. **The evidence does not establish a contract between the parties. The legitimate expectation argument which was based on the existence of such a contract, does not arise. Any such contract or binding agreement would have been *ultra vires*. The doctrine of legitimate expectation does not apply where the agreement or contract is *ultra vires.***

6. **The First-tier Tribunal has no judicial review jurisdiction unless expressly conferred by statute.**

7. **By entering into the reimbursement arrangement, the Appellant acknowledged that it would otherwise be unjustly enriched.**

8. **In relation to s80(3B) of VATA 1994 the Appellant has not established that any such mistaken assumptions caused any quantifiable loss.**

Procedure

65. At the conclusion of Mr Pentland's spirited closing submission, it appeared that he was arguing that there was a detrimental change of position response to the claim that the Appellant has been unjustly enriched. Mr Smith for HMRC objected to such submissions on the grounds that they did not feature in the Grounds of Appeal. That

appeared to be correct, although we now note that essentially the same facts were deployed in the Skeleton Argument to support the legitimate expectation argument.

66. After a short adjournment to enable the parties to consider and the Tribunal to decide how to deal with this matter, we resolved, after hearing the parties again, that we should decide all other issues and give the Appellant the opportunity to apply, if it wished to do so, to amend its Grounds of Appeal. If such an application were to be made, and if it were granted, we would allow HMRC and the Appellant to make such further submissions on the change of position argument as they considered appropriate. We would not allow further evidence. Whether the Appellant chooses to make such an application in the light of our findings is a matter for it to decide.

67. We therefore direct that the Appellant is authorised, if so advised, to lodge an application seeking to amend its Grounds of Appeal in such short terms as it considers appropriate; and that within 28 days of the date of the release of this document. If such an application is made, we shall consider what further procedure is appropriate. At present, we have in mind a short hearing to determine whether such an application should be allowed, and, if allowed, to hear there and then such further submissions as may be necessary.

68. The contents of this document should not be regarded as triggering the start of the time for seeking permission to appeal. Whatever the outcome of the procedure envisaged above, a final decision will be issued, incorporating our findings, which will then, or at least will of new, trigger the start of the period within which permission to appeal all aspects of our decision. Hopefully, this will simplify and clarify procedure rather than complicate it.

J GORDON REID QC, FCIArb
TRIBUNAL JUDGE

RELEASE DATE: 10 January 2013