Neutral Citation: [2025] UKFTT 00865 (TC)

Case Number: TC09583

FIRST-TIER TRIBUNAL
TAX CHAMBER

Location: Taylor House, London

Appeal reference: TC/2023/09477

SOFT DRINKS INDUSTRY LEVY – whether refusal of claim to tax credits effective – yes – whether there is a power to assess in such circumstances – in part – whether the assessments raised are correct – in part.

Heard on: 27 and 28 May 2025
Judgment date: 17 July 2025

Before

TRIBUNAL JUDGE AMANDA BROWN KC
HELEN MYERSCOUGH

Between

MILLENNIUM CASH & CARRY LTD

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Tristan Thornton of TT Tax

For the Respondents: Joshua Carey of counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs

DECISION

INTRODUCTION

1. This is the first appeal to come before the Tribunal concerning the Soft Drinks Industry Levy (**SDIL**).

2. The appeal is brought by Millennium Cash & Carry Ltd (**Appellant**) against the decisions of HM Revenue and Customs (**HMRC**) dated 23 December 2022 to deny SDIL credit (**Entitlement Decision**) and assess the Appellant for SDIL in the sum of £127,857.60 (**Assessments**) (together **Decisions**). The principal dispute between the parties centres on whether HMRC has the power to assess under Schedule 8 Finance Act 2017 (**FA17**) where HMRC have determined that there is no entitlement to SDIL credit.

3. For the reasons set out below we have allowed this appeal in part. We determine that the amount due from the Appellant on the Assessments is £76,995.12.

BRIEF OVERVIEW OF SDIL

4. SDIL was introduced with effect from 6 April 2018. It is a levy applied to UK produced or imported soft drinks containing added sugar. Its introduction was announced in the March 2016 Budget, and it came into force from April 2018. The levy is paid to HMRC by either the packager for drinks produced in the UK or the importer for drinks produced overseas. No levy is charged on soft drinks containing less than 5g of sugar per 100ml. It was charged at 18p per litre on soft drinks containing between 5g and 8g of sugar per 100ml (lower band rate) and at 24p per litre on soft drinks containing more than 8g of sugar per 100ml (higher band rate).

5. SDIL was introduced and was central to the 2016 childhood obesity strategy. Its primary aim was to incentivise soft drink reformulation to lower sugar recipes. This was reflected in the design of the regime which provided that manufacturers were given two years between the levy's announcement and implementation to allow them to reformulate before it became active. Further the tiered structure was targeted at the highest sugar brands and incentivised sugar reductions.

6. Producers and importers of soft drinks liable to the charge to SDIL are required to register with HMRC and are subsequently liable to report and pay SDIL on the drinks produced or imported for consumption in the UK. As SDIL is intended to tax consumption, SDIL credit can be claimed in specified circumstances where the liable drinks are exported from the UK or where the chargeable soft drinks are lost or destroyed.

RELEVANT LEGISLATION

The SDIL regime

7. As this is the first SDIL case we set out the relevant parts of the statutory regime comparatively fully.

FA17

8. Section 25 - SDIL:

> "… (2) The Commissioners are responsible for the collection and management of soft drinks industry levy."

9. Section 31 – Charge to SDIL

> "(1) The charge to soft drinks industry levy arises on a chargeable event which occurs on or after 6 April 2018. …"

10. Section 33 – Chargeable event: soft drinks imported into the UK:

"(1) This section applies where chargeable soft drinks are imported into the United Kingdom. …

(3) A chargeable event occurs, in relation to imported chargeable soft drinks, on first receipt of the soft drinks by a relevant person (the "first recipient").

(4) The "first receipt" of imported chargeable soft drinks is the first occasion on which the soft drinks are delivered to a place in the United Kingdom which is a relevant person's place of business …

(5) "Relevant person" means a person who carries on a business involving the sale of chargeable soft drinks.

(6) The reference in subsection (5) to the sale of chargeable soft drinks includes a reference to: (a) sale by wholesale…"

11. Section 35 – Liability to pay the levy:

"… (2) Where the charge to soft drinks industry levy arises on a chargeable event within section 33(2)… the relevant person who is the first recipient is liable to pay the amount charged."

12. Section 39 – Tax credits

"(1) The Commissioners may by regulations make provision in relation to cases where, after a charge to soft drinks industry levy has arisen in relation to chargeable soft drinks (a) the soft drinks are exported from the United Kingdom …

(2) The provision that may be made is provision:

(a) for the liable person to be entitled to a tax credit in respect of any soft drinks industry levy charged on the soft drinks that fall within subsection (1)(a) …

(b) for the tax credit to be brought into account when the person is accounting for soft drinks industry levy due from the person for the prescribed accounting period or periods.

(3) Regulations under this section may include provision:

(a) for any entitlement to a tax credit to be conditional on the making of a claim by the liable person, and specifying the period within which and the manner in which a claim may be made;

…

(f) for the withdrawal of a tax credit where any requirement of the regulations is not complied with;

(g) about adjustments of liability for soft drinks industry levy in connection with entitlement or withdrawal of entitlement to a tax credit in prescribed circumstances; …

13. Section 52 - payment, collection and recovery:

"(1) The Commissioners may by regulations make provision about the payment, collection and recovery soft drinks industry levy.

(2) Regulations under subsection (1) may:

(a) require persons who are or are liable to be registered under this Part to keep accounts for the purposes of the levy in the specified form and manner;

(b) require persons who are or are liable to be registered under this Part to make returns for the purposes of the levy;

(c) make provision for determining the periods ("accounting periods)" by reference to which payments of the levy are to be made;

(d) make provision about the times at which payments of the levy are to be made and the methods of payment;

(e) require the amounts payable by reference to accounting periods to be calculated by under the regulations;

(f) make provision for the correction of errors made in accounting for the levy

…

(4) Schedule 8 contains provision about recovery and overpayments.

14. Section 55 – Appeals etc:

"Schedule 10 makes provision about appeals and reviews."

15. Schedule 8: SDIL: recovery and overpayments

"*Recovery as a debt due*

1 Soft drinks industry levy is recoverable as a debt due to the Crown.

Assessments

2(1) Sub-paragraph (2) applies where it appears to the Commissioners

(a) that any period is an accounting period by reference to which a person is liable to account for soft drinks industry levy;

(b) that an amount of soft drinks industry levy for which that person is liable to account by reference to that period has become due (but the amount due cannot be ascertained), and

(c) that there has been a relevant default by the person …

(2) The Commissioners may:

(a) assess the amount of soft drinks industry levy due from the person to the best of their judgment, and

(b) notify the amount to the person.

(3) The following are "relevant defaults":

…

(c) a failure to keep documents, or provide facilities, necessary to verify returns required by [regulations under section 52]

(d) the making, in purported compliance with a requirement of the regulations, of an incomplete or incorrect return;

…

4(1) Sub-paragraph (2) applies where it appears to the Commissioners that:

(a) any period is an accounting period by reference to which a person is liable to account for soft drinks industry levy,

(b) an amount of soft drinks industry levy for which that person is liable to account by reference to that period has become due, and

(c) the amount due can be ascertained by the Commissioners.

(2) The Commissioners may:

(a) assess the amount of soft drinks industry levy due from the person, and

(b) notify the amount to the person.

…

Further provision about assessments under paragraph 2, 4 …

6(1) where an amount has been assessed and notified to a person under paragraph 2, 4 … it is recoverable on the basis that it is an amount of soft drinks industry levy due from that person.

…

Time limit for assessments

7(1) An assessment under paragraph 2 [or] 4 … may not be made after the end of the relevant period.

(2) Except in a case within subsection (3) [not relevant], the relevant period is the period of four years from the end of the accounting period to which the assessment relates.

…

Repayments of overpaid levy

8(1) This paragraph applies where a person (P) has paid an amount to the Commissioners by way of soft drinks industry levy which was not levy due.

(2) The Commissioners are liable, on the making of a claim by P, to repay the amount.

…

(4) Except as provided for by this paragraph, the Commissioners are not liable to repay any amounts due by way of soft drinks industry levy by reason of the fact that it was not levy due.

16. Schedule 10 – SDIL: Appeals and Reviews:

"Part 1 Appealable decisions:

Appealable decisions:

1 A person may appeal against a decision of the Commissioners or of an officer of Revenue and Customs in respect of any of the following matters:

(a) whether or not a person is liable to pay an amount of soft drinks industry levy;

…

(f) the amount of soft drinks industry levy payable by a person;

…

(n) a person's entitlement to a tax credit, the withdrawal of a tax credit, the amount of a tax credit or the period for which a tax credit is to be brought into account under regulations under section 39; …

…

Determinations on appeal

12 On an appeal against a decision mentioned in paragraph 1(a) … the tribunal may affirm or cancel the decision.

13 On an appeal against a decision mentioned in paragraph 1(f) … the appeal tribunal may:

(a) affirm the decision, or

(b) substitute for that decision another decision that the Commissioners had power to make.

…

15(1) On an appeal against a decision mentioned in paragraph 1 … (n) …, the appeal tribunal may allow the appeal only if it considers that:

(a) the Commissioners could not reasonably have been satisfied that there were grounds for the decision, or

(b) if information bought to the intention of the appeal tribunal had been available to the Commissioners at the time the decision was made, the Commissioners could not reasonably have been satisfied that there were grounds for the decision."

Soft Drinks Industry Levy Regulations 2018 (Regs***)***

17. Regulation 2 – Interpretation:

"(1) In these Regulations:

"account" means an account described in regulation 23;

"accounting period" has the meaning given by regulation 19;

…

"liable person" means a person described in section 35 who is liable to pay soft drinks industry levy;

…

"return" means a return described in regulation 21;

"sufficient evidence" has the meaning given by regulation 17 …"

18. Regulation 15 – Tax credits

"(1) A liable person is entitled to a tax credit if, after a charge to soft drinks industry levy has arisen in relation to chargeable soft drinks, any of cases 1 to 3 applies to those drinks.

(2) Case 1 applies where the person or another person exports chargeable soft drinks from the United Kingdom.

…

(5) A liable person must make a claim for the tax credit.

(6) The tax credit is the amount ("the credit amount") equal to the amount of the soft drinks industry levy charge which applies to the chargeable soft drinks at the time of the chargeable event which occurs in relation to them.

(7) In respect of Case 1, a claim for tax credit may be made in the return for an accounting period in which the person liable has sufficient evidence that the chargeable soft drinks have been exported.

…

(10) A claim for tax credit must:

(a) show separately the total of the credit amounts for:

(i) cases 1 and 2; and

(ii) case 3; and

(b) identify how much of each total is in respect of soft drinks industry levy charged at the [higher band rate] and how much at the [lower band rate].

(11) No claim may be made for a tax credit in respect of chargeable soft drinks more than two years after the date on which the chargeable event arose in respect of those soft drinks. …"

19. Regulation 17 – Sufficient evidence

"(1) In regulations 15 … "Sufficient evidence" means the prescribed evidence showing that the case applicable to the chargeable soft drinks has been met.

(2) The Commissioners must prescribe what amounts to sufficient evidence in each case."

20. Regulation 19 – Accounting periods

"(1) A liable person must make payments of soft drinks industry levy in respect of each accounting period.

(2) The accounting periods are the three month period ending 31st March, 30th June, 30th September and 31st December."

21. Regulation 20 – Payment

"(1) A liable person must pay the total amount of soft drinks industry levy payable in respect of an accounting period within the period of 30 days beginning with the last day of the accounting period.

(2) The total amount is the amount required to be stated in the return in respect of the period.

(3) Payment must be made by the method prescribed."

22. Regulation 20(2) is subject to a footnote that references Part 1 of Schedule 8 concerning HMRC's power to raise an assessment where a return is not filed (see paragraph 15 above).

23. Regulation 21 – returns

"(1) For each accounting period, a liable person must make a return to the Commissioners and do so within the period of 30 days beginning with the last day of the accounting period.

(2) A return must be dated and made in the form and manner prescribed by the Commissioners …

(3) A return must include the matters prescribed by the Commissioners."

24. Regulation 22 – content of returns

"(1) The Commissioners must prescribe the matters to be included in a return, in addition to the information required under regulation 15(10).

(2) The matters:

(a) must include:

(i) the total amount of soft drinks industry levy payable in respect of the accounting period in respect of which the return is made; and

(ii) the method for payment …

(b) may include:

(i) any or all of the other information required to be included in an account;

(ii) the information required in relation to corrections required to a previous return; and

(iii) a declaration by the liable person that the matters stated in the return of true and accurate.

…"

25. Regulation 23 – requirement to keep accounts

"(1) For each accounting period, a liable person must keep accounts for the purposes of the soft drinks industry levy.

(2) The accounts must include details of the following quantities:

… (b) where the person liable falls within section 35(2), the quantity of chargeable soft drinks imported to which a chargeable event in section 33(2) … applies …

(3) Those quantities must be shown in litres.

…

(5) The accounts must show separately in respect of each of the quantities described in paragraph (2):

(a) the rate of the soft drinks industry levy which is applicable; and

(b) the amount of the soft drink industry levy payable.

(6) The accounts must include details of:

(a) how any tax credit is calculated;

(b) the case which applies to any tax credit; and

(c) any adjustments or corrections made in respect of any previous accounting period, including identification of the period.

(7) The accounts must show the total of soft drinks industry levy payable in respect of the accounting period.

…"

Notice 2 – SDIL returns and records (part of which has force of law)

26. Relevant extracts of the Notice provide:

"If you're a producer or packager of drinks that are liable for the Soft Drinks Industry Levy or you need to report drinks that have been brought into the UK you'll need to send a return to HMRC every quarter.

…

What you need to include on your return

This section has force of law under regulation 22 of the Soft Drinks Industry Levy Regulations 2018.

On your return, you must include how many litres of liable drinks you need to report. You need to report drinks that are liable for each levy band separately on your return.

…

You must also include how many litres of liable drinks you've paid the levy on, or that you're reporting in the current return, and are claiming a credit for because they were: exported…

Correct an error in a previous return

If you submit a return that includes incorrect information, you should correct it using the online service.

Once in the service, select 'Make a change' in the 'Manage your account' section and follow the instructions. …

Supporting information

You do not need to send any additional documents when telling HMRC about an error you have made. HMRC will ask for it if supporting evidence is needed.

The records you need to keep for any reporting period are the same.

However, when you want to correct an error in a previous return, you will also need to keep a separate record of:

- the date you found the error
- the quarter when the error happened
- the reason for the error
- whether the error was in relation to an export credit,…

If you owe more

If your correction shows that you have not paid enough, you will need to pay the difference between what you originally declared and the correct figure. You should do this when you receive a notice of payment.

You will be charged interest on what you owe and this will continue to be calculated until you pay the amount in full.

…

If you paid too much

If after making your correction you find that you paid too much levy, you can either:

- take the difference as credit towards your liability for the next quarter
- apply for a repayment, as long as your correction was not a credit for drinks exported…

You cannot apply for repayment of any more than the net amount of levy you paid in the quarter you made the error.

If the correction was to a credit for drinks that were exported … no repayment will be made. This will be held on your account and any future liability will be offset against this amount.

27. The Explanatory Memorandum to the Regs states:

"…

2. Purpose of the instrument

2.1 The legislation sets out the detailed legislative framework for the Soft Drinks Industry Levy (levy) which commences on 6 April 2018.

2.2 In particular, the legislation provides the detailed scope of the levy, including exemptions and administrative obligations such as the requirements relating to registration, returns and record-keeping.

…

4. Legislative context

…

4.2 The legislation enables HMRC to register taxpayers and collect the Soft Drinks Industry Levy. In addition, this SI sets out the detailed scope of the levy and a range of obligations for businesses that are registered for the Soft Drinks Industry Levy. Without this legislation, HMRC would not be able to register any taxpayers or collect the levy.

7. Policy Background

…

7.3 Consistent with other taxes, the primary legislation includes a number of powers allowing secondary legislation to provide further legislative detail on the scope and operation of the levy. All of the provisions in this legislation are necessary for an effective and efficient tax regime. The legislation details all of the exemptions from the levy. It also details a range of taxpayer obligations concerning registration, returns, payment, evidence requirements and record-keeping.

HMRC's powers

*Commissioners for Revenue and Customs Act 2005 (*CRCA**)**

28. Section 5:

> "(1) The Commissioners shall be responsible for: … the collection and management of revenue for which the Commissioners of Customs and Excise were responsible before the commencement of this section …"

29. Section 9:

> "(1) The Commissioners may do anything which they think:
>
> (a) necessary or expedient in connection with the exercise of their functions, or
>
> (b) incidental or conducive to the exercise of their functions."

*Interpretation Act 1978 (*IA*)*

30. Section 11:

> "Where an Act confers power to make subordinate legislation, expressions used in that legislation have, unless the contrary intention appears, the meaning which they bear in the Act."

31. Section 12:

> "(1) Where an Act confers a power or imposes a duty it is implied, unless the contrary intention appears, that the power may be exercised, or the duty is to be performed, from time to time as occasion requires. …"

32. Section 23:

> "(1) The provisions of this Act, … apply, so far as applicable and unless the contrary intention appears, to subordinate legislation made after the commencement of this Act …"

AGREED FACTS

33. The parties agreed an extensive statement of agreed facts. We do not need to fully set out all agreed facts which we accept. We summarise below those relevant to the decision we have to reach.

(1) The Appellant is a wholesaler of alcoholic and non-alcoholic drinks. It was incorporated on 8 December 1999 and is registered under the company number 03890320 at Companies House. So far as relevant in the present appeal its business comprises the importation of soft drinks on which it is liable to account for SDIL for sale in the UK. It also exports soft drinks produced by others in the UK.

(2) It applied to be registered for SDIL by application dated 8 November 2018. The registration under number XWSDIL000487 was confirmed on 6 February 2019 and effective from 1 October 2018.

(3) The Appellant's first SDIL return for the period of October to December 2018 was submitted on 11 February 2019, with the self-reported figures for SDIL charged on imported drinks (£25,679.52) and tax credit on exported drinks (£30,110.28) which resulted in the credit of £4,430.76 on its account. The return was immediately subject to a request for correction increasing the levy credit claimed on high band exports and resulting in an overall credit of £16,944.84.

(4) Upon receipt of the return and the application for correction HMRC notified the Appellant that in order to be able to claim a levy credit on a SDIL return the Appellant must first have declared a charge to levy in respect of the goods on which the SDIL credit was claimed. HMRC advised that a correction or amendment to SDIL credit required the completion of a manual return.

(5) The Appellant provided a manual return for the period ended 31 December 2018 on 9 April 2019. This manual return further amended the amount of self-reported SDIL credit from £30,110.28 to £35,405.28 resulting in a net claimed credit of £9,726.30. In the letter accompanying the manual return the Appellant challenged HMRC's assertion that it was only entitled to levy credit for exported goods which they had themselves imported.

(6) Further SDIL returns were rendered by the Appellant for each quarter 03/19 to 03/22. Across all periods, the total export credit claimed (as adjusted on the manual return) was £237,952.56 as compared to total levy due to HMRC of £127,857.60.

(7) On 7 August 2020 the Appellant sought repayment of the credit then standing on its SDIL account. This request led to an enquiry into the Appellants compliance under the SDIL regime. By letter dated 6 April 2021 HMRC set out its position on the relevant legislation and the Appellant's compliance under the regime. HMRC affirmed the view that under section 39 FA17 and regulations 15 to 18 of the Regs the Appellant was only entitled to levy credits where it exported product that it had previously imported. HMRC invited the Appellant to amend its SDIL returns to remove all claims to SDIL credit to which it was not, on HMRC's view, entitled.

(8) Corrections to the SDIL returns for periods 12/19 to 12/20 were submitted by the Appellant on 2 November 2021 removing the export credit claims totalling £84,271.60 for those periods. Those corrections were not acknowledged by HMRC who, on 4 February 2022, warned the Appellant that failure to submit amendments may lead to an officer's assessment. Immediately upon receipt of that letter the Appellant provided evidence of the amendments filed on the 2 November 2021. The Appellant confirmed that it did not propose to make amendments for earlier returns on the basis that, despite

the amendments submitted on 2 November 2021, the Appellant did not accept that export credits were restricted to those who had accounted for the levy on production or importation. The Appellant also contended that there was no statutory mechanism which could compel the Appellant to amend its returns in respect of over claimed export credit and no power of HMRC to remove or reject such claims.

(9) On 23 December 2022 HMRC notified the Entitlement Decision by which they confirmed their view that the Appellant was not entitled to the SDIL credit claimed for each quarter period 12/18 to 12/20 (**Relevant Period**). On the same date HMRC notified the Assessments to the SDIL for periods 12/18, 03/19, 09/19, 12/19, 03/20, 12/20, 03/21, and 12/21.

(10) The Decisions were reviewed and confirmed on 27 June 2023.

OVERVIEW OF RELEVANT DOCUMENTS

34. The Appellant completed online SDIL returns. We were provided with the confirmation of return submission for 12/18 which showed as follows:

"

Return sent

You do not owe anything

What you need to do next

You do not need to do anything else.

We will take the payment from your Soft Drinks Industry Levy account shortly.

Your next return will be for January to March 2019. You must send this return and make any payments by 30 April 2019.

…

Details of your return

Activity	**Band**	**Litres**	**Levy**
Own brands packaged at your own site	Low	0	£0.00
	High	0	£0.00
Contract packed at your own site	Low	0	£0.00
	High	0	£0.00
Contract packed for registered Small producers	Low	0	£0.00
	High	0	£0.00
Brought into the UK	Low	0	£0.00
	High	106,998	£25,679.52
Brought into the UK from small producers	Low	0	£0.00
	High	0	£0.00
Exported	Low	84,518	-£15,213.24
	High	62,071	-£14,897.04
Lost or Destroyed	Low	0	£0.00
	High	0	£0.00
Subtotal			**-£4,430.76**
Balance Brought forward			**+£0.00**
Total			**-£4,430.76**

35. The relevant parts of the Entitlement Decision are:

> "… I note that you have amended your SDIL returns for the periods ending December 2019, March 2020, June 2020, September 2020 and December 2022 to remove wrongly claimed tax credits. However, your SDIL returns for the periods ending December 2018, March 2019, June 2019 and September 2019 remain incorrect as you have claimed tax credits to which you were not entitled.
>
> This letter is to notify you of HMRC's decision that you are not entitled to claim tax credits for periods ending December 2018, March 2019, June 2019 and September 2019.
>
> HMRC has assessed the amounts due from you for periods December 2018, March 2019 and September 2019 under paragraph 4, Schedule 8, Part 1 FA 2017.
>
> HMRC has also assessed the amounts due from you for periods December 2019, March 2020, December 2020, March 2021 and December 2021 because the levy due on the soft drinks imported in those periods was not paid due to the claims for tax credits to which you were not entitled being on your account."

36. The letter then offered a statutory review.

37. The Assessments provided:

> "**Notice of assessments – Soft Drinks Industry Levy (SDIL)**
>
> These are assessments to Soft Drinks Industry Levy (SDIL) under Schedule 8 of the Finance Act 2017. Payment of these assessments is due under Part 2 of the Finance Act 2017.
>
> I have enclosed a letter explaining the reason for the assessments.
>
> …
>
> The amount(s) we have assessed are shown in the table below."

38. The table provided:

Return period From	**Return period** To	**Assessment** Due to HMRC	**Assessment** Due from HMRC
24/10/2018	31/12/2018	£25,679.52	£0.00
01/01/2019	31/03/2019	£17,563.20	£0.00
01/07/2019	30/09/2019	£18,061.20	£0.00
01/10/2019	31/12/2019	£5,097.60	£0.00
01/01/2020	31/03/2020	£9,979.20	£0.00
01/10/2020	31/12/2020	£19,766.64	£0.00
01/01/2021	31/03/2021	£29,640.48	£0.00
01/10/2021	31/12/2021	£2,069.76	£0.00
Total		**£127,857.60**	**£0.00**

39. The Assessments also offered a statutory review.

PARTIES' SUBMISSIONS

40. As indicated, this is the first case concerning the SDIL regime. We are indebted to the parties and their representatives for their clear and careful submissions and their willingness to take the us through the terms of the legislation. We set out below a summary of the arguments and analysis presented to us; however, we confirm that we carefully considered the skeleton arguments and reviewed our notes of oral submissions made in reaching our decision and preparing this judgment.

Appellant's submissions

41. For the purposes of appeal before this Tribunal, but otherwise reserving its position, the Appellant accepts that entitlement to claim tax/levy credit in the context of exported soft drinks accrues only to a liable person (as defined in regulation 2 of the Regs) who declared the liability for payment of levy on the soft drinks in respect of which the circumstances for credit arise. As such, the Appellant accepts for the purposes of argument that it had no statutory entitlement to the credits it claimed on its SDIL returns in the Relevant Period.

42. At the heart of the Appellant's case is a contention that despite the acknowledged lack of entitlement to the credits claimed HMRC have no statutory power to raise the Assessments they have purported to raise.

43. The Appellant invites us to consider this appeal has been made against three separate decisions of HMRC:

(1) a decision that the Appellant was not entitled to tax credits claimed in periods 12/18 to 12/20 inclusive;

(2) HMRC's decision to withdraw the tax credits for the above periods by amending the Appellant's return or account; and

(3) the Assessments.

44. Whilst the three decisions represent a continuum of analysis resulting in the asserted liability to collect £127,857.60, we are invited to carefully consider each of the three decisions in the context of the relevant underlying statutory provisions. It is submitted that the consequence of taking this approach reveals that HMRC have no power to issue the Assessments as HMRC have no statutory power to withdraw the tax credits even where there is no entitlement to those credits. The Appellant contends that the Regs are seriously defective and fail to introduce a self-enclosed regime for the collection and payment of SDIL. In the absence of an effective regime it is not for the Tribunal to "fill the gaps". Rather, HMRC should prepare and lay a further statutory instrument through which the relevant and necessary powers are granted to HMRC by Parliament as envisaged under FA 17.

45. The Appellant notes that the Entitlement Decision has no independent effect. Whether or not the Appellant was legally entitled to the tax credits represents only a precondition for subsequent action associated with the withdrawal of the benefit of those credits. As set out further below, the Appellant contends there is no statutory basis for withdrawal of the credits even to the extent that there was no entitlement to them. Once the credits were applied to the account, and absent any statutory mechanism for withdrawal, the Appellant remains entitled to the benefit of the credits. The Appellant considers that the apparent right to appeal against a decision concerning entitlement and/or withdrawal as set out in paragraph 1(n) Schedule 10 FA 17, does not assume or confer a statutory power to HMRC to affect the withdrawal, particularly as the FA 17 predates the Regs and explicitly provided for a power to enact regulations "making provision for the withdrawal of a tax credit where any requirement of the regulations is not complied with" (section 39(3)(f) FA17).

46. By reference to the provisions of paragraphs 14 and 15 Schedule 10 FA 17 the Appellant submits that HMRC's decision that there was no entitlement to tax credit on export will necessarily have been unreasonable in circumstances where there is no statutory power to affect a withdrawal of the credits, and any power to assess cannot be invoked independently of having withdrawn, at law, the credits.

47. Further, regarding the Assessments, the Appellant contends that HMRC have effectively sought to reassess for sums of levy which have already been declared by the Appellant on its SDIL returns. As the levy chargeable on importation has been duly declared as payable the terms of paragraph 4 Schedule 8 FA 17 are not met, as there is no amount due which has not been declared. The proper and only basis for an assessment would be to assess for the credits for which there was no entitlement. However, the Assessments have not been made for all periods in which credits were claimed on returns; they have been made only for the periods in which levy was declared as due. In substance therefore, the credits have not been withdrawn even by the Assessments, there has been a second charge to levy. It is asserted that what HMRC seek to achieve is to establish a liability for payment of sums previously declared as levy by reassessing that levy rather than withdrawing the credit which would then leave the levy previously declared as payable. This, the Appellant observes, arises as a direct consequence of HMRC's inability, under the terms of the statute, to withdraw credits previously given.

48. The Appellant notes that there is no statutory right of appeal against any assessment issued by HMRC in accordance with its powers as set out in paragraphs 32 to 35 of the Regs (paragraphs 2 – 5 Schedule 8 FA 17).

49. Analysing section 39 FA 17 and regulations 15 - 18 of the Regs the Appellant contends in drafting and laying the Regs HMRC simply failed to provide for themselves a mechanism by which credits claimed on an SDIL return may be withdrawn. The Appellant notes that section 39(3) FA 17 provides for the tax credit to be brought into account when the person is accounting for SDIL in the prescribed accounting periods with regulation 15 prescribing the form and manner in which a claimed credit is required to be made.

50. A similar position is contended regarding amendment of a SDIL return. Whilst the Appellant, on HMRC's invitation, submitted amendments to its returns, the amendments were not processed to withdraw the claims to credit, rather HMRC raised the Assessments to SDIL. The Appellant submits this is because there is no statutory mechanism for the correction/amendment of an SDIL account where tax credits have been overclaimed, thus rendering the amendments made of no effect.

51. A distinction is drawn between SDIL and VAT. In the latter context returns are rendered subject to verification by HMRC (certainly where output tax exceeds input tax, and the return seeks repayment of the VAT credit shown on such returns as defined in section 25 Value Added Tax Act 1994 (**VATA**)). Where SDIL credits are claimed on a return for an accounting period they are immediately and automatically set against the declared liability to SDIL with no entitlement to be repaid any balancing credit. That feature of the SDIL regime being confirmed by reference to the enabling power in section 39(3)(f) and (g) FA 17. The Appellant maintains that in order to be withdrawn the credit must have been definitely rather than provisionally obtained.

52. The Appellant sought to demonstrate that there was no statutory mechanism for HMRC to withdraw the credits claimed and given affect to. The Appellant notes that HMRC's letter of 23 December 2022 simply states that the Appellant was not entitled to the credits applied to its account. Neither the Entitlement Decision nor the Assessments include the word "withdrawn" implicitly at least tending to a view that HMRC accepted that there was no power

to withdraw and thereby no statutory justification for the Assessments, under paragraph 4 Schedule 8 FA17 or otherwise.

53. It is said, contrary to the invitation from HMRC, that this is not a situation in which it is open to the tribunal to infer a power for HMRC to withdraw credits on the basis that Parliament provided for the power to be enacted through regulations.

54. A distinction was drawn between the circumstances in which it is appropriate to imply powers and those in which it is right to conclude that regulations are simply defective. The Appellant referred to *Oliver Fisher (a firm) v Legal Services Commission* [2002] All ER (D) 140 concerning the Civil Legal Aid (General) Regulations 1989 in which the High Court determined that it was not possible to construe the regulations to imply a power to recover sums of legal aid paid in circumstances in which the Legal Services Commission had already paid the amounts claimed even where the sums were not due. Further, in the matter of *R (oao Machi) v Legal Services Commission* [2002] 1 WLR 983, the Court determined that where Parliament has prescribed a statutory basis for comprehensive regulations there is no room for the operation of general residual powers. It was contended that the provisions of section 39 FA17 intended to provide the basis on which tax credits were withdrawn and the failure to enact regulations in this regard did not permit the gap to be filled by a general power.

55. We were invited to conclude that a clear distinction could be drawn between the approach taken by the Supreme Court in its judgement in *DCM (Optical Holdings) Ltd v HMRC* [2022] UKSC 26 (***DCM***), in respect of VAT credit and the tax credits in this case, despite the superficially similar obligation resting on HMRC under whose care and management both VAT and SDIL rest.

56. Resisting HMRC's position that the Appellant's approach results in an absurd situation whereby credits are given but cannot be withdrawn, the Appellant submits that there is no legislative absurdity, merely a failure to legislate for the powers under regulations that were envisaged by Parliament when enacting FA17.

57. This is not, the Appellant contends, a situation meeting the terms of section 9 Commissioners for Revenue and Customs Act 2005 as section 39 FA 17 did not envisage the need for ancillary non-legislative powers.

58. As a defensive position, if the Tribunal finds that there is an implied power to withdraw which then justifies the Assessments, the Appellant contends that there should be no assessment for any period exceeding 2 years on the basis of parity between the time limit for claiming credit as prescribed in regulation 15(11) of the Regs and for the assessments issued to recover excessive repayment under paragraph 12 Schedule 8 FA 17.

59. A further jurisdictional point was advanced by the Appellant. So far as we understood the point, the Appellant contended that as there was no decision meeting the terms of paragraph 1(n) Schedule 10 FA17, there could be no appeal under that provision with the consequence that the provisions of paragraphs 14 and 15 Schedule 10 FA 17 limiting the powers of the Tribunal were not invoked such that we had a full appellate jurisdiction to cancel the Assessments and determine the appeal in the Appellant's favour.

HMRC's submissions

60. HMRC start by framing the statutory framework of SDIL within HMRC's duty to collect tax and the general powers that support them in that duty as provided for in section 25 FA 17, sections 5 and 9 of CRCA and section 12 IA and explained in *R (oao JJ Management Consulting LLP and others) v HMRC* [2020] EWCA Civ 784 (***JJ Management Consulting***):

> "46. First, as s 5 CRCA 2005 and s 1 TMA 1970 make clear, HMRC's primary function is the collection of tax. That involves both a power and a duty to

> collect tax. The well-established principle of tax law to the effect that there is a public interest in taxpayers paying the correct amount of tax means that the duty to collect tax is to collect, as far as reasonably possible, the correct amount of tax rather than simply the tax that a taxpayer accepts is due (see if necessary, *Tower M Cashback LLP 1 v Revenue and Customs Cmrs* [2011] UKSC 19, [2011] STC 1143, [2011] 2 AC 457 (Lord Walker at [15]).
>
> …
>
> 55. … It is for HMRC to determine the best way facilitating collection of tax they are under a statutory duty to collect …"

61. Against that context HMRC contend that they have a power to amend, reject, determine, or withdraw claims for tax credits because:

(1) Such powers are implied within the terms of the primary legislation, in particular as a consequence of section 25(2) FA 17 which places responsibility for collection and management of SDIL with HMRC. In this regard, reliance is placed on the Supreme Court judgement in *DCM*. HMRC contend that the imposition of a duty to collect tax necessarily implies a power to do whatever is required in order to comply with the duty. It was stated that it followed that to determine if the right amount of SDIL had been collected HMRC's powers must necessarily include the power to determine tax credits; otherwise it would render impossible the ability to arrive at the right amount of SDIL in circumstances in which tax credits were involved. The absence of an express power to determine tax credits is the necessary precondition to finding that such powers may be implied.

(2) Further, such implied powers were derived under the Regs; in particular regulations 19 to 21 and 23 interpreted in the context of paragraphs 1 to 7 of Schedule 8 FA17 and interpreting these provisions to give effect to Parliament's purpose in the context of the statute as a whole, its historical context and the provisions of the IA. The Regs are said to provide the mechanism for the collection of SDIL thereby implying that HMRC have all the powers necessary for the proper administration of that regime with the requirements on a liable person to account for SDIL being mirrored in the collection regime provided for in Schedule 8 FA 17. Specifically, HMRC contend that the provisions of Schedule 8 impute a power for HMRC to verify SDIL returns which necessarily requires a power to determine entitlement to tax credits and to then assess if there is SDIL due from the taxpayer.

(3) A conclusion that HMRC have no power to determine tax credits is contrary to commonsense and the purpose of the legislation because it would open the statutory scheme for SDIL to fraud by allowing taxpayers to benefit from tax credits to which they are not entitled. It would give rise to an absurd outcome that HMRC could not collect SDIL properly due to them where liable persons claimed tax credits to which they were not entitled. Where competing interpretations of the provisions exist, an interpretation that does not lead to an absurdity should be preferred.

62. On the basis that the necessary power to determine tax credits is inferred HMRC contend they are entitled to raise the Assessments all of which fall within the statutory time limit of four years as provided for in paragraph 6 Schedule 8 FA 17. The two-year time limit to which the Appellant refers is one imposed by Parliament on late claims to tax credit and/or overpayments. There is no requirement for parity between time limits, and Parliament chose what time limits, if any, were to apply in the different scenarios arising.

63. HMRC contend that the Assessments are valid for the following reasons:

(1) There was no entitlement to the SDIL credits claimed (as accepted for the purposes of this appeal).

(2) The Appellant wrongly self-assessed itself to SDIL credits to which it was not entitled.

(3) The allocation of SDIL credit as claimed on a return involves no recognition of the validity of the claim. Drawing a parallel to a claim to be paid a VAT credit and relying on the judgment of the Court of Appeal in *R (on the application of UK Tradecorp Ltd) v HMRC* [2004] EWHC 2515 (Admin) (***Tradecorp***) it is not until a claim is "admitted or upheld" that it gives rise to an entitlement to repayment.

(4) In consequence of the claim to credit and the mechanism of calculating the SDIL payable, and therefore that due for payment, the Appellant's incorrect claim to credit leaves an amount of SDIL due which HMRC are entitled to assess.

(5) The Assessments do not duplicate other sums declared in the Appellant's returns.

(6) The formal requirements for an assessment have been met.

64. HMRC counter the jurisdictional challenge by contending that the Assessments represent the basis on which the Appellant's entitlement to a SDIL credit has been determined; such decision meeting the description in paragraph 1(n) Schedule 10 FA 17 and thereby subject to the limited jurisdiction provided for under paragraph 15. Alternatively, there is a decision under paragraph 1(a) or (f).

DISCUSSION

65. We start with an observation that neither party's case was particularly attractive. The Appellant acknowledges (at least for the purposes of this appeal) that it claimed credits to which it was not entitled and which were netted off against their acknowledged and reported liability to SDIL thereby reducing the amount actually paid to HMRC to a sum less than it should have been. Nevertheless, the Appellant contends that HMRC cannot collect the levy which has thereby gone unpaid. Equally offensively HMRC acknowledge that the statutory instruments they prepared and laid before Parliament do not include any express mechanism to withdraw claims to SDIL credit in respect of which there is no entitlement. Whilst HMRC's case is that taken as a whole and by reference to the scheme of the statutory provisions there is nothing strictly missing from the regime, if we find otherwise, they simply invite us to imply the missing mechanisms and make the regime work according to Parliament's "obvious" intention.

Our view on statutory infrastructure

66. We start by considering the statutory infrastructure for SDIL.

67. SDIL is charged in accordance with Part 2 FA 17 and HMRC are responsible for its collection and management (section 25). It is charged on chargeable soft or prepared drinks (as defined in sections 26 – 30). The charge arises on a chargeable event. For the Appellant, the relevant chargeable event was that specified in section 33(2) (the importation of chargeable soft drinks into the UK). The Appellant's importation of the chargeable soft drinks generated a liability to pay the levy (section 35) at the rates prescribed in section 36.

68. Section 39 FA 17 recognises the Parliamentary intent (discerned from the Explanatory Memorandum) and accepted by the Appellant that SDIL be a levy on high sugar drinks consumed in the UK. Section 39 FA 17 authorises regulations making provision for a SDIL credit in respect of, inter alia, chargeable drinks which are exported from the UK and for that credit to be "brought into account when the person is accounting for [SDIL] due from [them]".

69. Part 6 of the Regs was enacted under the authorisation provided by section 39. Regulation 15(1) – (4) deals with entitlement to a credit. As set out above it is conceded, for

present purposes, that the Appellant is entitled to the SDIL credit on export only where SDIL was paid on import by it (i.e. if the SDIL was paid by a third party on production or import and the Appellant subsequently acquired the goods and exported them it is not entitled to SDIL credit). However, at the time that SDIL returns were made in the Relevant Period, the Appellant understood that it was entitled to credit on goods purchased from brand owner/producers. There is no dispute that the Appellant's calculation of the credit (had it been entitled to it) was as set out in regulation 15(6) and (7) representing a claim in the form specified in regulation 15(10) as required by regulation 15(5). We understand that there is also no dispute that the Appellant held evidence of export which would have satisfied the requirements of regulation 17 (and the terms of the notice in which HMRC prescribe what amounts to sufficient evidence) and retained the records as specified in regulation 18, again had it met the statutory test for entitlement to the credit.

70. Section 52 provides the authorising legislation pursuant to which HMRC were empowered to enact regulations making provision for the payment, collection, and recovery of SDIL. Pursuant to this section Part 7 of the Regs were enacted. This part, construed by reference to the interpretation provisions within FA17 and the Regs, required the Appellant, as a liable person to make payments of SDIL in respect of each three-month period ended 31 March, 30 June, 30 September, and 31 December (accounting periods) (regulation 19). Payment so required was of "the total amount of [SDIL] payable" defined as "the amount stated on the return in respect of the period" (regulation 20).

71. The contents of the return are addressed in regulations 22 and 15(10). As set out above regulation 15(10) specifies what must be included on the return where a claim to credit is made. Regulation 22 specifies that HMRC must prescribe (i.e. specify in a notice which has force of law) the matters to be included in the return. Such matters must include the "total amount of [SDIL] payable" and may include information required in relation to corrections to a previous return. The requirements of Notice 2 drive the form of the return (as set out in paragraph 34 above which is required to be submitted online). By the return the liable person reports to HMRC the volume of soft drinks chargeable at each of the lower and higher band rates in respect of each category of chargeable event. Each of these entries gives rise to either a nil or positive value entry. The liable person also enters, as a nil or negative value entry any credits claimed (for product exported and separately for product lost or destroyed). There is also an entry field for corrections to previous returns (we anticipate such entry may be either positive, nil, or negative value entries depending on the nature of the correction; i.e. an adjustment to over claimed credit or under declared SDIL would be a positive value entry, under claimed credit or over declared SDIL would be a negative value entry).

72. The return sent screen which, we were told, replicates the information provided on the return, shows the net result of the positive and negative value entries as "total". Where the total is a positive value, we would assume that underneath "Return sent" the screen would inform the liable person of the amount due for payment within 30 days of the end of the accounting period. Where the net result is nil or a negative value the screen shows "You do not owe anything".

73. The accounts required to be kept by the liable person under regulation 23 of the Regs reflect the information entered into the return from which SDIL is calculated. In this context the positive value entries in the return determined by reference to each category of chargeable event and band rate are described in regulation 23 of the Regs as "the amount of [SDIL] payable". The accounts must also include details of how any tax credits are calculated and any adjustments or corrections made in respect of any previous accounting period. Regulation 23(7) then specifies that the accounts "must show the total of [SDIL] payable in respect of the accounting period".

74. The approach to the construction of the relevant statutory provisions was not contested by the parties. We are to construe the terms used or adopted by Parliament in their context (*R (oao Quintavalle) v Secretary of State for Health* [2003] UKHL 13). Whilst we consider that the Regs in particular are not particularly well drafted we have decided "the amount of [SDIL] payable" (in regulation 23 of the Regs) refers to the positive entries of liability arising on the occurrence of a chargeable event in an accounting period. However, the liable person is required to report and pay "the total amount of [SDIL]" shown on the return after the "Return sent" rubric. It will always be a positive value or nil and is calculated by netting off the value of credits claimed from primary liability to SDIL which would otherwise be "due" (as provided for in section 39(2)(b) FA 17) also taking account of any corrections made to previous returns and the amount of credit carried forward from previous return.

75. Having so concluded we do not consider that a liable person is ever liable to pay the individual or total value of positive entries shown on the return against each of the categories of chargeable event/rate and such amounts are only due to be paid where there is nothing to net off. Accordingly, we do not interpret the legislation as treating credits as payment of an amount of SDIL. The liability to pay arising under regulation 20 is of the net sum of SDIL due and credits as shown on the top of the submitted return.

Appellant's entitlement to SDIL credits

76. In accordance with the limited concession made by the Appellant we set as our foundation that the Appellant was not entitled to the SDIL credit it claimed in the Relevant Period. For what it is worth we consider the concession to reflect the statutory provisions in section 39 FA17 and regulation 15 of the Regs.

77. As HMRC stated in the Entitlement Decision "you are not entitled to claim tax credits" we consider that HMRC formed and communicated their view to that effect.

78. With less vigour than its other submissions, the Appellant contends that HMRC has no statutory power to decide that the Appellant was not entitled to the credits it claimed because HMRC have no power to withdraw them where, on the facts and applying the provisions of regulations 15 – 18 of the Regs, entitlement is not established.

79. We reject the Appellant's submissions in this regard. Whether entitlement arises in any particular set of circumstances is simply a question of applying the facts to the legal requirements of entitlement as set out in the Regs. Before us it was conceded that the Appellant was not entitled to the credits, and we can see no basis for concluding that HMRC are excluded from forming that conclusion and communicating it to the Appellant.

80. We are reinforced in this view by the terms of paragraph 1(n) Schedule 10 FA 17 which expressly grants the recipient of a decision on entitlement to credits to bring an appeal against such a decision. The Appellant exercised its right to bring such an appeal.

81. Paragraph 15 Schedule 10 FA 17 applies to such appeals, and we may allow the appeal against the Entitlement Decision if we consider that HMRC could not reasonably have been satisfied there were grounds for the decision. In light of the Appellant's concession, HMRC's decision in this regard was entirely reasonable and we refuse the appeal to the extent that it relates to HMRC's decision on entitlement as expressed in the Entitlement Decision.

Withdrawal of credits

82. The Appellant's case is heavily predicated on the absence of any statutory mechanism for the verification, withdrawal, or refusal of credits.

83. We start with the question of verification. HMRC accept there is no explicit statutory mechanism by which they are entitled to verify returns and/or claims to credits. They contend

that their power to verify the contents of a return is implied under their care and management provisions.

84. We agree that must be the case. That there is some general power to verify the accuracy of a return is implicit in the terms of paragraph 2(3)(c) and (d) Schedule 8 FA 17. Paragraph 2(3)(c) specifies as a relevant default failure to keep documents "necessary to verify returns required [by regulations 21 and 22 of the Regs]". Paragraph 2(3)(d) specifies a default where returns required [by regulations 21 and 22 of the Regs] are incomplete or incorrect. Without an implied power to verify the return HMRC would have no practical means of determining the completeness or accuracy of the return. In light of these assessment powers (which only depend on regulations which HMRC have enacted) we consider section 9 CRCA and section 12(1) IA on their terms would "fill" any statutory gap that may be said to exist.

85. We also consider that conclusion to be entirely consistent with the position taken by the High Court in *Tradecorp* at paragraph [18]:

> "[HMRC] are under a duty to conduct a reasonable and proportionate investigation into the validity of claims for a refund and repayment … The duty to investigate is applicable both to the claim to the refund and repayment and to the question of whether there is a right of set-off (or indeed a claim for further payment from the taxable person). … The availability and proper exercise of [HMRC's] powers of investigation are essential to maintain the fiscal neutrality of that and prevent refunds being made to parties not entitled to them."

86. Whilst the point was not in issue between the parties in DCM by the time it reached the Supreme Court, it is at least implicit that the position in Tradecorp was accepted by the Supreme Court in DCM (see paragraph [30]).

87. *DCM* is also relevant to our consideration of what powers HMRC have where the verification exercise identifies that the correct amount of tax has not been declared. The case concerned HMRC's powers under the VAT regime and in particular whether there was a power to verify a return on which the relevant taxpayer had claimed input tax exceeding output tax such that the return indicated that the taxpayer was due to be repaid a VAT credit as defined in section 25(3) VATA.

88. As with the SDIL regime, VAT is a self-assessed tax under which taxpayers render returns on a prescribed accounting period by prescribed accounting period basis on which they declare output tax due on taxable supplies made, claim by way of deduction against such output tax input tax on purchases or other inputs and pay or reclaim the net difference as shown on the return. DCM challenged HMRC's right to verify the return and reduce the input tax claimed before making a VAT credit repayment. DCM contended that HMRC could only reduce the input tax claim by raising an assessment for the prescribed accounting period in question. In the context of that case, by the time the return had been verified and the decision reached to refuse the claim to input tax, any such assessment would have been out of time.

89. The Supreme Court confirmed that after carrying out the verification process HMRC had the power to give effect to its result by intimating their decision to the taxable person to refuse to pay the claim in full or in part (see paragraph [31]), such power being implicit from the provisions of section 25(3) (definition of VAT credit), 73(1) (best judgment assessment provision where returns are incomplete or incorrect) and paragraph 1 of Schedule 11 (care and management provisions) VATA (see paragraphs [29], [32], [33] and [42]). With nothing within VATA otherwise inconsistent with an implied power to both verify and to deny entitlement to a repayment without the need for an assessment, the Court determined that HMRC were entitled to simply deny the repayment claimed.

90. The Appellant contended that the more apposite Supreme Court authority was *OWD Ltd v HMRC* [2019] UKSC 30. That case concerned the introduction of a regulatory scheme requiring wholesalers supplying duty paid alcohol to be approved by HMRC. Approval was only given where HMRC were satisfied the person seeking to carry on the activity is a fit and proper person. OWD had been refused approval but sought to contend that temporary approval could be granted pursuant to HMRC's general powers under section 9 CRCA despite the absence of an express power to grant temporary approval. The Court declined to infer a power to grant temporary approval. The court accepted that there are situations which would cause a court to accept that HMRC have ancillary powers under section 9 CRCA but whether there are such powers depends on the general attributes, and detailed provisions, of the particular statutory scheme in which the question of ancillary powers arises. The court determined that section 9 CRCA "concerns ancillary powers which are necessary or expedient in connection with [HMRC's] exercise of their functions, or incidental or conducive to that exercise, not ancillary powers which undermined or contradict those functions."

91. The Appellant contends that in a situation in which Parliament had given express power to enact regulations providing a mechanism for withdrawal of credits (either by HMRC or by way of the liable person amending/correcting the return) where the conditions of entitlement are not met, it would be contrary to the intention of Parliament and the infrastructure of the regime to allow HMRC to rely on inferred or ancillary powers when it was anticipated that express powers would be given.

92. We do not consider that *OWD* assists the Appellant in the context of a general power to verify whether claims to credit meet the requirements of regulations 15 to 18 of the Regs for the reasons stated above.

93. Neither do we think it assists in connection with HMRC affecting a correction to a return in connection with both the charge to SDIL and a claimed credit. In this regard we note:

(1) section 52(2)(f) FA 17 provides for regulations making provision for the correction of errors made in accounting for the levy;

(2) regulation 22(1) of the Regs provides for HMRC to prescribe the matters to be included in a return (which may include "any or all of the other information required to be included in an account" (regulation 22(2)(b)(i)));

(3) regulation 23(6)(c) requires that the accounts must include details of "any adjustments or corrections made in respect of any previous accounting period including identification of the period";

(4) Notice 2 sets out the mechanism by reference to which a correction should be made (albeit not referring to either regulation 22 or 23 explicitly).

94. We consider that these provisions expressly contemplate that where a correction/amendment is made by a liable person HMRC will give effect to that correction without the need to assess in much the same way as the Supreme Court determined that HMRC did not need to assess to recover sums incorrectly claimed by way of VAT credit. Inferring a power to do so is therefore consistent with the legislative scheme. The effect of this conclusion is that for the accounting periods ended 31/12/2019 to 31/12/2020 we consider that HMRC are entitled to give effect to the corrections made by the Appellant on 2 November 2022.

95. We are not prepared to similarly infer for accounting periods in which the Appellant did not submit a correction. When enacting FA 17 Parliament consciously placed the care and management of SDIL with HMRC; in doing so Parliament can be assumed to have taken account of the provisions of sections 5 and 9 CRCA and sections 11 and 12 IA. We are also entitled to presume that Parliament understood that the care and management provision

imposes a duty on HMRC to collect the right amount of tax. Presumably for this reason, Parliament did not authorise the enactment of regulations concerning such matters as verification of returns, rather, it assumed such a general power to do so and provided for HMRC to assess where the outcome of verification revealed that the correct amount of tax had not been collected. In contrast Parliament legislated expressly for regulations to provide for the withdrawal of credits and for the correction of errors. Whilst not a complete framework we consider the provisions referred to above facilitate a conclusion that section 9 CRCA provides for an ancillary power to process a correction including a request from a liable person to reduce the value of credits previously claimed.

96. However, for reasons unknown and unexplained HMRC did not similarly seek a regulation wich provided them any express powers to deny/reject/withdraw credits to which it is possible to apply section 9 CRCA and provide ancillary powers. In our view the only statutory power (express or implied) capable, if at all, of compelling the withdrawal of an incorrectly claimed credit is the power to assess.

97. We consider this conclusion to be consistent with that reached in a very different context by the High Court in *Oliver Fisher (a firm) v Legal Services Commission* [2002] EWH 1017 (Admin) although we did not derive any particular direct assistance from that judgment itself in reaching our conclusion.

Efficacy of the Assessments

98. The parties agree that the Assessments have been issued in purported exercise of the powers provided in paragraph 4 Schedule 8 FA 17. That paragraph provides for HMRC to assess where, for any accounting period for which a person is liable to account for SDIL, an ascertained amount of SDIL has become due from that person.

99. We are invited by HMRC to construe this provision as enabling them to assess for the SDIL which was reported on the relevant returns, but which was not paid by the Appellant as the total amount payable on the return was incorrectly calculated with the acknowledged liability to SDIL having been impermissibly reduced by credits to which the Appellant was not entitled.

100. Having concluded that the liability to pay SDIL following the submission of a return is limited to the "total amount" shown under "Return sent" as calculated after the netting off of credits claimed, we are satisfied that HMRC's interpretation of their assessment power is correct and that it enables them to deny the effect of an incorrectly claimed credit by way of assessment. In accordance with the statutory infrastructure of the regime, the Appellant was liable to account for SDIL period by period by reference to the chargeable soft drinks imported and was not entitled to the credits claimed; as such, the SDIL recorded in the accounts and on the return was due, but because the returns had incorrectly included claims to credit, the SDIL due had not become payable and was not paid. Paragraph 4 Schedule 8 FA 17 requires only that ascertained amounts are established as having become due in order to access the assessment provision. In each period in which the Appellant claimed credit to which it was not entitled and/or reduced the SDIL due (and thereby payable) in an accounting period as a result of carried forward credit we are satisfied that HMRC had the power to assess.

101. HMRC raised the Assessments for account periods ended: 31/12/2018, 31/03/2019, 30/09/2019, 31/12/2019, 31/03/2020, 31/12/2020, 31/03/2021 and 31/12/2021. We are satisfied that for those periods HMRC have reduced the claim to credit to nil and thereby withdrawn the credit.

102. The credits for periods in which no SDIL was declared have not been similarly withdrawn by way of the Assessments and we have concluded that through a failure to draft and have

enacted a specific power to withdraw/assess for periods where there was no amount of SDIL due in the period HMRC have no means of removing the credit balance because for those returns there is no SDIL which becomes due when the credit is withdrawn. However, without a free standing power to withdraw it is our view that the credits claimed in periods in which there was no SDIL due remain on the Appellant's account capable of being set against amounts of SDIL falling due in later periods. The effect of our conclusion is set out in the table below:

Period ended	SDIL	Credit	Total amount payable for the accounting period	Available credit not assessed
31/12/18	£25,679.52	£0.00	£25,679.52	£0.00
31/03/19	£17,563.20	£0.00	£17,563.20	£0.00
30/06/19	£0.00	£50,862.48	£0.00	(£50,862.48)
30/09/19	£18,061.20	£0.00	£0.00	(£32,801.28)
31/12/19	£5,097.60	£0.00*	£0.00	(£27,703.68)
31/03/20	£9,979.20	£0.00*	£0.00	(£17,724.48)
30/06/20	£0.00	£0.00*	£0.00	(£17,724.48)
30/09/20	£0.00	£0.00*	£0.00	(£17,724.48)
31/12/20	£19,766.64	£0.00*	£2,042.16	£0.00
31/03/21	£29,640.48	£0.00	£29,640.48	£0.00
30/06/21	£0.00	£0.00	£0.00	£0.00
30/09/21	£0.00	£0.00	£0.00	£0.00
31/12/21	£2,069.76	£0.00	£2,069.76	£0.00
31/03/22	£0.00	£0.00	£0.00	£0.00
Total			**£76,995.12**	

* amendments to returns were submitted by the Appellant showing no claim to credits.

103. Having so concluded, we have considered our jurisdiction. Paragraph 1 to Schedule 10 FA 17 does not provide for an appeal against an assessment; however, subparagraph (a) provides for an appeal as to "whether or not a person is liable to pay an amount of [SDIL]" and (f) provides for an appeal in respect of "the amount of [SDIL] payable by a person". HMRC appeared to accept that the Appellant's appeal, fell within either (a) or (f). In our view (a) covers decisions, including assessments, determining what SDIL is due consequent upon the occurrence of chargeable event and before consideration of credits. We thereby consistently interpret liable to pay as due and vice versa (a position we understood to be agreed between the parties). As there is no dispute as to the SDIL which became chargeable in each accounting period and thereby no dispute as to the Appellant's liability to pay an amount of SDIL we do not consider our jurisdiction to arise under paragraph 1(a).

104. By similar logic, i.e. that the Assessments determine the amount of SDIL which is payable by the Appellant (i.e. the total amount shown on the returns as corrected by the Appellant or by way of the Assessments) the decision under appeal falls within the terms of paragraph 1(f). By virtue of paragraph 13 our jurisdiction is to either affirm the decision or substitute another decision that HMRC had the power to make.

105. We therefore affirm the Assessments for accounting periods ended 31/12/2018, 31/03/2019, 31/03/2021 and 31/12/2021. We substitute the amount identified in the table above in the column the "total amount payable for the accounting period" for periods 30/09/2019, 31/12/2019, 31/03/2020 and 31/12/20. Because there is no freestanding power to withdraw credit we consider that the amount in the table is the only figure that the terms of the legislation provide as a substitute.

106. For completeness, we reject the Appellant's alternative argument that the time limit for the Assessments should restrict HMRC to assessing only for periods within a 2-year period prior to the making of the assessment in question. The provisions of paragraph 7 Schedule 8 FA 17 are clear. Alternative time limits apply for recovery assessments under paragraph 12 Schedule 8 FA 17 where a person has made a claim for repayment of SDIL which was not due, and it is subsequently established that the claimant was not entitled to the repayment. There is no statutory basis for an argument that a time limit applying to one type of assessment should apply to another. Any argument that Parliament should have aligned the time limits is not a matter within the Tribunal's jurisdiction.

107. We therefore uphold the Assessments to the extent set out above.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

108. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

Release date: 17th JULY 2025