[2016] UKUT 0434 (TCC)

Appeal numbers: UT/2014/0027; UT/2014/0063, UT/2014/0029, and UT/2015/0038

VAT – grouping – claim for overpaid tax where company leaves VAT group – correct entity to make claim – last representative member – first appeal (BMW/MGR) allowed; second and third appeals (Lloyds/Standard Chartered) dismissed

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

(1) HER MAJESTY'S REVENUE AND CUSTOMS	**Appellants**
(2) BMW(UK) HOLDINGS LIMITED	
and	**Respondents**
MG ROVER GROUP LIMITED	
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(1) LLOYDS BANKING GROUP PLC	**Appellants**
(2) BLACKHORSE LIMITED	
and	
HER MAJESTY'S REVENUE AND CUSTOMS	**Respondents**
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(1) STANDARD CHARTERED PLC	**Appellants**
(2) STANDARD CHARTERED BANK	
-and-	
HER MAJESTY'S REVENUE AND CUSTOMS	**Respondents**

TRIBUNAL: MR JUSTICE WARREN
JUDGE CHARLES HELLIER

Sitting in public in the Rolls Building, London on 5-8, 11, 12 and 14 July 2016

Andrew Hitchmough QC and Jonathan Bremner instructed by Eversheds for MG Rover Group Limited
David Scorey QC instructed by Deloitte for the Lloyds Appellants
Ian Glick QC, Derek Spitz, Victoria Wakefield, and Adam Rushworth instructed by Norton Rose Fulbright for BMW (UK) Holdings Limited
Tim Eicke QC and Edmund King instructed by PwC for the Standard Chartered Appellants
Andrew Macnab and Peter Mantle, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for Her Majesty's Revenue and Customs

DECISION

1. The decisions of the First-tier Tribunal (the "FTT") in Standard Chartered plc v HMRC; Lloyd's Banking Group plc v HMRC [2014] UKFTT 316 (TC) ("***Lloyds/SC***"), and MG Rover Group Limited v HMRC, BMW (UK) Holdings Limited, and Rover Company Limited [2014] UKFTT (TC) 327 (TC) ("***BMW/MGR***"), relate to how the grouping provisions in section 43 Value Added Tax Act 1994 ("VATA") operate when a company moves into or out of a VAT group, and which company has the right to make a claim under section 80 VATA for the repayment of VAT on a supply on which VAT should not have been paid or accounted for. Relevant to both decisions is the extent and effect of the authority conferred by what was Article 4(4) of the Sixth Directive to treat a number of closely linked companies as a single taxable person.

2. The *Lloyds/SC* and the *BMW/MGR* decisions gave answers to the questions which arose in the appeals whose reasoning conflicted. In the *Lloyds/SC* appeal the tribunal regarded the section 43 grouping provisions as being in compliance with the authority of Article 4(4) and interpreted the grouping rules with reference to EU principles. It found that the EU law was clear and that there was no need for a reference to the Court of Justice. We will refer to the Court as "the CJEU" or "the Court". In *BMW/MGR* the tribunal considered that Article 4(4) did not authorise the form of the grouping rules enacted by the UK, interpreted the UK rules on domestic principles only, and indicated that if it had to apply EU law there was sufficient uncertainty to justify a reference to the CJEU.

3. In each of *Lloyds/SC* and *BMW/MGR* the FTT gave permission for the losing parties to appeal to this tribunal. It was directed that the appeals be heard together. We use 'Lloyds', 'SC', 'BMW', 'MGR' and 'HMRC' in this decision to refer to the relevant appellants in these appeals. We use "Lloyds" to embrace the company now known as Blackhorse Limited which was at times relevant to these appeals called Chartered Trust plc and is now a subsidiary of Lloyds.

4. We shall return to the provisions of section 43 VATA later but for the following summary it is sufficient to note that when a VAT group is formed it requires that one member of the group be designated as the "representative member" and that what would otherwise have been supplies to and by third parties by and to the individual members for the purposes of VATA are treated as supplies by and to the representative member. In what follows we follow the parties' terminology and call the company which made the provision of goods or services which is treated as a supply for VAT purposes by the representative member, the Real World Supplier or RWS.

5. In the *BMW/MGR* appeal the FTT decided the question of who was entitled to make a claim for overpaid VAT as a preliminary issue. The hearing proceeded on the following basis: VAT had been overdeclared at various times in relation to the provision of motor vehicles by Rover Company Ltd, Rover Wholesale Ltd and MGR when they had been members of a VAT group; those companies left the VAT group; at that time and subsequently BMW was the representative member of that VAT group; Rover Company Limited executed an assignment to MGR of any claim they might have to the repayment of the overdeclared VAT. (MGR also claimed that Rover

Wholesale Ltd had assigned its repayment right to it but the FTT did not consider the terms of that assignment.) Later BMW claimed repayment of the overdeclared VAT under section 80 VATA as representative member of the VAT group, and MGR claimed repayment for itself and as assignee of Rover Company Ltd and Rover Wholesale Ltd (although the claim in relation to Rover Wholesale was not considered by the FTT).

6. The FTT held that when a company which, apart from the effects of the VAT grouping provisions would be treated as having made the supply to which the claim relates left the VAT group, it became thereafter the person entitled to make the claim. It therefore decided the preliminary issue in favour of MGR. BMW and HMRC appeal against that decision.

7. In the *Lloyds/SC* appeals, Chartered Trust had supplied goods and services (we use "supply" to denote the provision of goods or services despite its use as a term of art in VATA) in relation to which VAT had been overdeclared. It had done so consecutively in two periods:

> (1) Period 1: in this period it was the representative member of a VAT group which was dissolved at the end of the period;
>
> (2) Period 2: in this period it was a member of the Standard Chartered VAT group.

At the end of Period 2 Chartered Trust left the Standard Chartered VAT group and joined the Lloyds VAT group.

8. Chartered Trust claimed repayment of VAT under section 80 in respect of both periods; Standard Chartered also claimed in respect of both periods. Its claim in relation to Period 1 arose because in that period it was the holding company of Chartered Trust and was on the basis that it had borne the burden of the overpaid VAT.

9. The FTT held that: in Period 1 only Chartered Trust was entitled to claim (Standard Chartered appeals against that decision); and in Period 2 only Standard Chartered was entitled to claim (Lloyds/Chartered Trust appeals against that decision).

10. The *Lloyds/SC* appeal to the FTT also concerned ACL Ltd, which was separately registered from 1973 to 1996, when it joined the Standard Chartered VAT group. Later it was sold to Lloyds. Both ACL and Standard Chartered made claims for the repayment of VAT in respect of the period in which ACL had been separately registered. The FTT held that only ACL was entitled to claim in respect of that period. Before us Standard Chartered did not pursue its appeal against that decision.

11. Before us the parties' positions were as follows.

12. HMRC and BMW argue that where a supply is made to or by a member of a VAT group the right to make a claim for overdeclared VAT in relation to that supply rests in the representative member of the group for the time being. On that basis BMW is entitled to claim in respect of the supplies made by MGR, Rover Company Ltd and Rover Wholesale Ltd; Chartered Trust is entitled to claim in respect of Period 1 (as representative member at the time the VAT group was dissolved) and Standard

Chartered (as representative member of the relevant VAT group) in respect of Period 2.

13. Lloyds and MGR argue that the right to make a claim in respect of a supply made by a RWS rests in the representative member of the VAT group while the RWS is a member of that group but once it leaves the group the right becomes that of the RWS and not any member of the remaining VAT group. On that basis Chartered Trust is entitled to claim and receive payment in respect of Periods 1 and 2, and MGR is entitled to repayment in respect of the supplies made by itself and Rover Company Ltd.

14. Standard Chartered argues that the right to make a claim in respect of a supply made by a company while it was a member of a VAT group rests in the representative member while the group is extant, but on the coming to an end of the group devolves on the company which suffered the economic burden of the overpayment. On this basis Standard Chartered, and not Chartered Trust, would be entitled to claim in respect of Period 2.

15. Broadly therefore three possibilities were canvassed before us. Namely that the right to claim: (i) lay with the representative member for the time being of the VAT group of which the RWS had been a member at the time of the supply; (ii) lay with the representative member of that group until the RWS left it, when it reverted to the RWS, and (iii) lay with the representative member while the VAT group was extant but on the coming to an end of the VAT group devolved on the company which had borne the economic burden of the wrongly charged VAT.

16. Lloyds and MGR also say that these are issues on which it would not be possible to reach a conclusion with confidence and that we should refer a question to the CJEU.

17. The hearing of the appeals before this tribunal was so arranged that each party could comment on the arguments advanced by all the others. The parties relied on a number of decisions of the CJEU in relation to the interpretation of Article 4(4), and also upon the principles of the *San Giorgio* line of cases. After describing the relevant legislation we shall turn to those cases before discussing the different arguments in more detail.

The Applicable Legislative Provisions

18. The Sixth VAT Directive (77/388/EEC) applied at the times relevant to these appeals although corresponding provisions are found in the Principal VAT Directive (2006/112/EC). We shall refer only to the provisions of the Sixth Directive, but our findings are equally applicable to the position under the Principal VAT Directive.

19. Article 4(1) of the Sixth Directive defines "taxable person" as any person who independently carries out any economic activity. The term "economic activity" is explained in paragraph (2), and paragraph (3) extends the meaning of taxable person. Article 4(4) describes circumstances relevant to groups, where individual persons may be treated as a single taxable person:

> "... each Member State may treat as a single taxable person [any] persons established in the territory of the country who, whilst legally independent, are

closely bound to one another by financial, economic and organisational links." ("any" is added in the Principal Directive).

"A Member State exercising the option provided for in the first paragraph, may adopt any measures needed to prevent tax evasion or avoidance through the use of this provision." [This second paragraph was added in 2006.]

20. The UK's legislation takes advantage of the permission granted by Article 4(4) in two separate sets of provisions. The first is in sections 43-44 VATA which permit a set of companies under common control to apply to HMRC to be treated as a VAT group and give HMRC power to accede to that request. The second is in paras 1A and 2 Sch 1 which take advantage of the second paragraph of Article 4(4) and provide that HMRC may, for the purposes of combating avoidance, compel a set of persons to be treated as a single taxable person.

21. Section 43 provides:

"(1) Where under sections 43A to 43D any bodies corporate are treated as members of a group, any business carried on by a member of the group shall be treated as carried on by the representative member, and—

(*a*) any supply of goods or services by a member of the group to another member of the group shall be disregarded; and

(*b*) any supply which is a supply to which paragraph (*a*) above does not apply and is a supply of goods or services by or to a member of the group shall be treated as a supply by or to the representative member; and

(*c*) [makes provision in relation to supplies from abroad]

and all members of the group shall be liable jointly and severally for any VAT due from the representative member.

(1AA) [Provides that where it is material, for the purposes of any provision whether the person by or to whom a supply is made is a person of a particular description, the relevant provision shall have effect in relation to that supply as if the only description applicable to the representative member were the description in fact applicable to the RWS]."

22. Section 43A provides that companies are eligible to be treated as members of a group if, broadly, they are under common control. Section 43B provides for making of applications for companies to be treated as grouped, for companies to be added to the group, for the group to be dissolved, for companies to leave the group and for changes in the representative member. It provides that the application must be made by one of the companies or the company controlling them and that an application for grouping must appoint one of the companies as the representative member. Where the application is accepted it takes effect from a date specified by HMRC.

23. It will be seen that this is a voluntary regime entered into by companies under common control which will be able to settle between them the effects of entering into it.

24. Section 43 does not itself make the representative member a "taxable person" (the status that gives rise to obligations and rights under VATA). This is left to other provisions of the Act. The supplies made by the members to third parties are attributed to the representative member. Section 3 makes a person taxable if it is registrable, and Sch 1 makes it registrable if its supplies exceed a threshold. If that threshold is achieved in respect of all the supplies attributed to it by section 43 the representative member becomes a taxable person for the purposes of the Act and then becomes obliged to deliver returns, keep records, and pay VAT. If the threshold is not achieved the representative member will not automatically be a taxable person for the purposes of the Act.

25. Schedule 1 VATA deals with registration for VAT in respect of taxable supplies. Paragraphs 1A and 2 enable HMRC to direct that persons named in a direction "shall be treated as a single taxable person". Where such a direction is made:

> (1) the single taxable person is registered in a name chosen by the named persons;
>
> (2) provisions in the form of s 43(1)(b) and (c) and the joint and several tailpiece to that subsection apply;
>
> (3) any failure by the taxable person to comply with any requirement imposed by or under this Act shall be treated as a failure by each of the constituent members severally; and
>
> (4) the constituent members are to be treated as a partnership carrying on the business of the taxable person.

26. That provision, which is an anti-avoidance provision, is not directly relevant to these appeals but follows more closely the language of Article 4(4). However it provides no greater clarity than section 43 in relation to any question as to which member should be entitled to receive the proceeds of any claim for, although the claim might be made by any partner as a partner in the partnership and paid by HMRC to any partner as a member of the partnership, it provides no indication as to how the benefit of the receipt is to be divided between the partners.

27. The claims at issue in the appeals were stated to be made under s 80 VATA. That section provides:

> (1) Where a person—
>
> > (*a*) has accounted to the Commissioners for VAT for a prescribed accounting period (whenever ended), and
> >
> > (*b*) in doing so, has brought into account as output tax an amount that was not output tax due,
>
> the Commissioners shall be liable to credit the person with that amount.

[(1A) makes equivalent provision where HMRC have wrongly assessed tax and (1B) makes HMRC liable to repay certain wrongly paid VAT.]

(2) The Commissioners shall only be liable to credit or repay an amount under this section on a claim being made for the purpose.

(2A) Where—

(*a*) as a result of a claim under this section by virtue of subsection (1) or (1A) above an amount falls to be credited to a person, and

(*b*) after setting any sums against it under or by virtue of this Act, some or all of that amount remains to his credit,

the Commissioners shall be liable to pay (or repay) to him so much of that amount as so remains.

We observe that section 80 refers to the making of claims by "persons" rather than "taxable persons" but HMRC are made liable only to the person who accounted for or paid the VAT.

The Decisions of the CJEU in relation to Article 4(4).

28. Guidance from the CJEU on Article 4(4) is limited. None of it directly addresses the issues raised in these appeals. That lack of direct guidance is one of the reasons that MGR and Lloyds say that we should refer a question to the CJEU.

29. In *Ampliscientifica Srl* Case C-162/07, [2011] STC 566 ("*Ampliscientifica*") the first question referred to the Court was whether an Italian system for the making of VAT returns by a group of companies was an implementation of Article 4(4) or merely a simplification measure. The Court answered the question by setting out criteria which national legislation would have to satisfy in order to constitute an Article 4(4) implementation:

"[19] …national legislation adopted on the basis of [Article 4(4)] allows persons, in particular companies, which are bound to one another by financial, economic and organisation links no longer to be treated as separate taxable persons for the purposes of VAT but to be treated as a single taxable person. Thus, where that provision is implemented by a member state the closely linked person…cannot be treated as a taxable person within the meaning of Article 4(1)…It follows that treatment as a single taxable person precludes persons who are thus closely linked from continuing to submit VAT declarations separately and from continuing to be identified, within and outside their group, as individual taxable persons, since the single taxable person alone is authorised to submit such declarations...."

"[20] [Article 4(4) required that the national legislation provide] that the taxable person is a single taxable person".

30. It is clear from this that during the currency of grouping an implementation of Article 4(4) must not recognise an individual member as a taxable person in its own right.

31. In *Commission v Ireland* Case C-86/11, [2013] STC 2336, ("*Ireland*") the Court was asked whether a person who was not a taxable person could become a member of a VAT group.

32. The Advocate General considered that the words of the Directive plainly allowed such inclusion but went on to consider the objectives and context of the grouping rules. He said that VAT grouping "supports fiscal neutrality by allowing member states to diminish the influence of VAT on the way economic operators organise themselves"; thus, a bank not entitled to deduct VAT might produce IT services in house rather than acquire them from a subsidiary if grouping were not available ([48]). VAT grouping enabled appropriate business structures without negative VAT consequences ([49]). From the perspective of neutrality including non taxable persons in a group made no difference to the pursuit of the goals of grouping ([53]).

33. In its judgment the Court said:

> (i) the words of the Directive did not preclude non-taxable persons being included in the group;
>
> (ii) the context of the provision, being set among others which affected who could be a taxable person, did not indicate to the contrary, and
>
> (iii) the objects of the provision, which appeared from the Explanatory Memorandum preceding the Sixth Directive, were administrative simplification and combating abuse. Those objects did not indicate that non-taxable persons could not be included in a group.

The Court made no express reference to fiscal neutrality.

34. One of the Commission's arguments in *Ireland* was that the inclusion of a non-taxable person in a VAT group could have an impermissible substantive effect on the rights and obligations of the members of a VAT group; (because for example a person whose supplies were confined to those members of a group and which would otherwise be making taxable supplies would cease to be liable to VAT on its supplies). It is clear however that the Court rejected this argument regarding the effect as being a consequence of simplification.

35. Mr Hitchmough notes that the Advocate General spoke (at [40]) of a VAT group resulting in the "creation of a single taxable person which is in all respects comparable to a taxable person"; "comparable to" he says was not "identical with". It seems to us that the Advocate General's language admits of the idea that a new legal person need not be created but that the effect of grouping must be as if the group members formed such a person.

36. In *Commission v Sweden* [2013] STC 2076 ("*Sweden*"), the Court held that Article 11 was not a derogating provision and thus there was no requirement that it was to be construed strictly.

37. In *Skandia America Corp (USA) v Skatteverket*, Case C-7/13, [2015] STC 1163 ("*Skandia*") Skandia was established in the US. It had a Swedish branch which was part of a Swedish VAT group. The question for the Court was whether supplies from Skandia in the US to the branch were taxable supplies. As a matter of ordinary law a person could not supply something to himself. The Advocate General opined that the inclusion of the branch in the Swedish VAT group was unlawful, but the Court said that it was common ground that the branch was a member of the VAT group, and therefore it formed "with the other members a single taxable person". After reciting the reasoning in *Ampliscientifica* it said*:*

> "[29]… It follows that, in such a situation, the supplies of services made by a third party to a member of the VAT group must be considered, for VAT purposes to have been made not to that member but to the actual VAT group to which that member belongs".

The Court held that as the supplies must be deemed to be supplied to the VAT group and, as the supplier and its branch could not be considered to be a single taxable person, the supply was a taxable transaction.

38. Mr Glick submits that the Court equated the VAT group with the single taxable person as the only taxable person and confirmed that its members have no independent existence for VAT purposes. Mr Hitchmough says that the Court simply repeated the ambiguous language of *Ampliscientifica* and its decision is of no help in determining rights and obligations. It seems to us that this judgment means that, during the currency of the VAT group, rights and obligations under VATA which accrue to taxable persons cannot be taken to accrue to an individual member: although the language of *Ampliscientifica* was directed to the question of VAT returns, the logic of that judgment and of the judgment in *Skandia* must mean that the incidents of being a taxable person cannot be taken to accrue to an individual member whilst grouped.

39. In *Beteiligungsgesellschaft Larentia + Minerva mbH & Co KG v Finanzamt Nordenham* Case C-108/14, [2015] STC 2101 ("*Larentia*"), the Court held that Article 4(4) precluded national legislation limiting the right to form a VAT group to entities with legal personalities except where justifiable in preventing abusive practices. The Advocate General's opinion recognises that a margin of discretion is conferred on member states by Article 4(4) but that discretion was constrained by principles of EU law, in particular that of fiscal neutrality ([71]); he said that the VAT grouping mechanism must promote fiscal neutrality and not give rise to artificial distinctions based on legal form.

40. We draw the following principles from these cases:

> (1) during the currency of grouping, domestic legislation is required to have the effect that the only taxable person is the single taxable person so that the individual members of the group are not treated as taxable persons. This affects in particular whether or not a supply is made and the quantification of VAT liability;
>
> (2) the purposes of Article 4(4) are administrative simplification and the avoidance of abuse;
>
> (3) member states have a margin of discretion in the implementation of Article 4(4), but must exercise that discretion having regard to the purpose

> of the Article and in accordance with EU law principles including that of fiscal neutrality (whereas fiscal neutrality is not an object of grouping (if it were one would expect grouping to be mandatory), member states must exercise their discretion with due regard to that principle).

41. Although the subject matter of the decisions did not concern persons leaving a group or a group being dissolved there is no hint in the judgments that such events should unwind previous treatment so that supplies originally treated as made by the single taxable person would be treated as no longer having been so made and instead treated as having been made only by one of the persons who had been treated as a single person. Indeed it seems to us that the obligation to exercise the discretion within EU principles includes having due regard to the principle of legal certainty, which, in the context of taxation, requires that a person should be able to know the tax effects of his action at the time he takes it, militates against the implementation of a regime in which a later event, leaving a group, can affect the rights and obligations which accrue from earlier ones.

42. None of these cases deals directly with the way in which the rights and obligations of the several persons who are treated as the single taxable person are permitted or required to be allocated among them. The concept of the single taxable person is helpful when considering whether a supply is made and in the quantification of any VAT liability, but the Court's judgments are of less help in assessing how the rights and liabilities of that single taxable person give rise to rights or liabilities of the persons who are members of the VAT group (a question which may not be one of EU law at all, but only one of domestic law). It seems to us however that it is at the least consistent with these judgments for the rights and obligations which have arisen during the grouping to continue to be treated as rights and obligations of the members, treated as a single person, after grouping ceases.

Domestic authorities.

43. The leading domestic authority is *C&E Commissioners v Thorn Materials Supply Limited* [1998] STC 725 ("*Thorn Materials*"). The leading speech was given by Lord Nolan with whose conclusions all but Lord Hoffmann agreed. Lord Nolan said that Article 4(4) and section 29 (the precursor of section 43):

> "are designed to simplify and facilitate the collection of tax by treating the representative member as if it were carrying on all the businesses of the other members as well as its own, and dealing on behalf of them with non-members ... the purpose of section 29(1) was to enable the group to be treated as if it were a single taxable entity even though it is not expressed in those terms."

44. That makes clear that section 43 is to be construed to give effect to Article 4(4). We do not understand Lord Nolan's description of the representative member as dealing on behalf of the members to mean that it is an agent for each of them individually: some real person is required to deal with HMRC, but that person deals for all the members as they are to be treated as a single person.

45. In *Thorn Materials*, a group member had agreed to make a supply to another group member and while still a member of the group had been paid 90% of the price. It then left the group whereupon the physical supply was made and the remaining 10% of the price was received. The supplier argued that the consideration for the supply

was only the 10% because as regards the 90% the time of supply rules meant that the supply took place when payment was received and so should be disregarded under section 43 as a supply between two members of the group.

46. Lord Nolan accepted that the disregard of the supply under section 43 did not mean that the separate existence of the companies or the fact that there had been an agreement or payment should be disregarded. But the 90% supply should be ignored for VAT purposes. When the supplier emerged into the VAT world as a separate taxable person the transfer of the goods was a supply and was taxable on the amount paid or payable, that was the 100%:

> "The appellants' objection that this approach disregards the fact that, to the extent of the 90%, the supply was treated as having taken place when the advance payment was made must fail because this disregard is precisely what section [43] requires." (733e).

47. Thus after the supplier had emerged from the VAT group the effect of section 43 on the transactions it had undertaken when a member of the group remained effective and was not unwound. Lord Nolan's statement related to intra group supplies disregarded by virtue of section 43(1)(a) but his reasoning seems to us to be equally applicable in relation to the other requirements of section 43.

48. In *C&E Commissioners v Barclays Bank* [2001] STC 1558 ("*Barclays*"), the Court of Appeal considered whether the provisions of section 43, which could mandate the continuance of a company's membership of the group after its links with other members of the group had been severed, were permitted by Article 4(4). The Court of Appeal held that they were. Buxton LJ said that Article 4(4) was intended "to simplify and facilitate the collection of tax ... In that context therefore, it is understandable, and indeed to be expected, that member states will be afforded latitude in the detailed collection arrangements they make. Those arrangements must, however, conform with both the letter and spirit of the ... Sixth Directive ...". Arden LJ said that "article 4(4) does not deal with cesser of group status at all" but regarded the extension of grouping for a short period after the link had been severed as compatible with the object of ensuring efficient administration of the tax.

49. It can be seen that in *Barclays* there is recognition by the English court of the simplifying purpose of the grouping provisions and, consistently for example with the Advocate General in *Larentia* [70], of the latitude afforded to a member state in an implementation of Article 4(4) so long as it is pursued in accordance with the objects of the provision and principles such as fiscal neutrality.

50. In *Intelligent Managed Services Ltd v HMRC* [2015] UKUT 344 TCC ("*Intelligent Managed Services*"), the Upper Tribunal said that the fiction that the representative member was to be treated as carrying on all the businesses of the group companies did not change the nature of those businesses: the fiction did not extend to creating a different amalgamated business; similar findings were made in *Thorn EMI PLC v C&E Commissioners* [1993] VATTR 94 ("*Thorn EMI*") and *Canary Wharf v CCE* (VATD 14513) ("*Canary Wharf*"). This principle is also reflected in section 43(1AA). Treating all the members of a group as a single person does not require the nature of the businesses each of them conducts to be ignored.

51. We consider below the recent decision of the Inner House of the Court of Session in *Taylor Clark Leisure plc v HMRC* [2016] CSIH 32; 2016 S.L.T. 873 ("*Taylor Clark Leisure*").

The *San Giorgio* Line of Cases

52. This line of cases developed the principle that a taxpayer has an EU right to repayment of wrongly levied tax. The early cases address whether a member state may resist a taxpayer's claim on the grounds that repayment to it would unjustly enrich him. Later cases address the extent to which the passing on of the cost of a wrongfully levied tax means that a taxpayer would be unjustly enriched, and the final cases in the sequence address whether an end customer to whom the tax has been passed on may recover unduly borne tax from the member state if it cannot be recovered from the taxpayer.

53. These cases played a part in the arguments of each party and the decisions of the two tribunals. Two issues arose in those arguments: can a right against the state accrue other than to a taxpayer or a person to whom the tax has been passed on in accordance with the operation of the tax; and does the principle require that an individual member of a group holds a right in respect of tax borne by it.

54. In *Amministrazione della Finanze dello Stato v SpA San Giorgio* Case C-199/82, [1983] ECR 3595 ("*San Giorgio*"), the CJEU held that entitlement to the repayment of charges levied by a member state contrary to Community law was a consequence of and an adjunct to the rights conferred on individuals by community provisions prohibiting certain charges. But it said that national law may disallow the repayment of such charges where to repay them would cause unjust enrichment of the recipient. That could be the case where it was established that such charges had been passed on to purchasers although the difficulty a taxpayer might have in showing to what extent the charge had been passed on "to other persons" must not render the exercise of the right to repayment virtually impossible.

55. In *Société Comateb v Directeur Général des Douanes et Droits Indirects* (and related cases) Cases C-192 to 219/95, [1997] STC 1006 ("*Comateb*"), the CJEU held that a member state could resist repayment of a charge levied in breach of EU law only where it was established that the charge had been borne by another, but a claimant could resist a state's defence of unjust enrichment where it could show the levying of the charge had caused damage, for example a reduction in sales.

56. In *Weber's Wine World Handels-GmbH* Case C-147/01, [2005] All ER (EC) 224 ("*Weber's Wine World*"), the CJEU reiterated that there was only one exception to the obligation to repay a wrongly levied charge: a member state could resist repayment only where it was established that the charge had been borne other than by the taxable person (but even passing on the charge to any customer did not necessarily neutralise the economic effect of the illegal tax because of the possibility that the taxpayer suffered other consequent damage).

57. *Reemtsma Cigarettenfabriken GmbH v Ministero delle Finanze* Case C-35/05, [2008] STC 3448 ("*Reemtsma*") was the first of this line of cases to relate to VAT. VAT which was not chargeable had been invoiced as part of the purchase price to a

customer. One of the questions for the Court was whether it was permissible for national law not to allow the customer to claim against the tax authorities.

58. The Court held that it is permissible for member states to say that the first port of call for the customer must be a civil action against the supplier, but where that would be virtually impossible or excessively difficult the recipient must be able to apply directly to the tax authorities.

59. *Lady & Kid A/S v Skatteministeriet* Case C-398/09, [2012] STC 1651 ("*Lady & Kid*") concerned a business tax. In its judgment the Court said that "the direct passing on to the purchaser of the tax wrongly levied constitutes the sole exception to the right to reimbursement of the tax levied in breach of European Union law".

60. In *Danfoss A/S v Skatteministeriet* Case C-94/10, [2013] STC 1651 ("*Danfoss*"), Denmark levied a duty on oil which the Court had found was unlawful. The duty was abolished retrospectively. Danfoss had purchased oil from suppliers who had paid the duty. Those suppliers did not claim repayment from the state in relation to the oil sold to Danfoss, but Danfoss did. The question for the Court was whether a person such as Danfoss to whom the duty had been passed on had an EU right against the state for reimbursement.

61. The Advocate General said at [34] that in *Comateb* the Court had pointed out that repaying a taxable person where the charge had been passed on was tantamount to paying him twice over "whilst in no way remedying the consequence for the purchaser of the illegality of the charge", and that the Court had thus considered that the charge levied contrary to EU law "may affect economically a party other than the taxable person and that the amount of the charge needs to be returned to the assets of that other party".

62. But the Advocate General went on to say: "That need [for reimbursement] also ensues from the general nature of indirect taxes. They are levied on expenditure or consumption, and the financial burden associated with them can typically be passed on and borne by the final customer".

63. The Court said ([23]) that reimbursement of sums unduly paid helps to offset the financial consequences of the wrongly levied tax "by reducing the economic burden on the operator who in the final analysis has actually borne it". If the consumer "who in the final analysis has actually borne the duty" was not able to obtain reimbursement of the tax passed on to him the member state must provide a procedure for reimbursement.

64. *Alakor Gabonatermelo es Forgalmazo Kft* Case C-91/12 ("*Alakor*") related to VAT. In this case the taxpayer was wrongly denied input tax credits but recovered part of the overall cost of the supply made to it from state and EU grants. It made a claim for the whole of the input tax wrongly denied.

65. The Court said that Alakor was not entitled to claim that part of the input tax which could be regarded as financed by the grants. The proportion which could be recovered would have to be determined by the national court on the basis of an economic analysis.

66. We set out our conclusion on the effects of these decisions when we consider in more detail the arguments of the parties.

The Decision of the FTT in *BMW/MGR*

67. The FTT in *BMW/MGR* considered first the application of section 43 without regard to the application of EU law. In paragraphs [34] to [43] it considered, on the assumption that the RWS put the representative member in funds to pay the VAT which would be attributable to its supplies, whether the representative member merely accounted on behalf of the VAT group members as a trustee. It concluded that this was not the effect of the section: saying that so far as VATA was concerned the representative member:

> "is deemed to have the primary liability to pay VAT and is deemed therefore, when it pays VAT to pay it on its own account. So, for as long as the deeming effect of section 43 applies, for the purposes of section 80, the representative member is the "person" who "accounted for" the VAT because for VAT purposes it is deemed to have paid it on its own account to settle its own liability [43]." (original underlining)

68. At [44] to [46] the FTT held that the representative member did not act as an agent because that "would involve ignoring the provisions of section 43 which states that the representative member is deemed to be the supplier".

69. The FTT, having thus characterised section 43 as a deeming provision, then applied the guidance on the application of such provisions given by the Supreme Court in *DCC Holdings (UK) Ltd* [2010] UKSC 58, [2011] 1 W.L.R. 44. It went on at [91] to [99] to consider the purpose of VAT grouping and the anomalies and absurdities which might be said to arise if the effect of the grouping continued after the link between the RWS and the representative member had been severed (or the RWS had left the VAT group). Then it concluded:

> "200. The purpose of s 43 was to enable companies in common control to be treated for VAT purposes as a single entity. This goes beyond administrative convenience to the point that it can affect the nature of what is supplied (*Kingfisher)* subject to the normal rules of single and multiple supplies.
>
> 201. Its purpose is therefore limited in time to when the companies are in common control: its purpose is not fulfilled if companies no longer in common control are yet treated to some extent as still grouped. Moreover, if the deeming effect of s 43(1)(b) does not end when the RWS leaves the VAT group absurd, unjust and anomalous consequences follow in cases involving VAT overpayments, BDR claims, VAT underpayments and assignments of rights to VAT overpayments. Allowing the deeming effect to continue after the RWS has left the group uncouples the burden of paying the VAT from the liability to pay it. It leads to a situation where Company X overpays the VAT but Company Y recovers it from HMRC, or Company X underpays VAT but Company Y is primarily liable for the assessment, even though Company X and Y are no longer connected, and (in some cases) may never have been connected.

202. So I conclude that as a matter of UK law, and applying the principles outlined in *DCC*, the deeming effect of s 43(1)(b) ceases when RWS leaves the group. At that point the RWS (or its new representative member if it joins another VAT group) is able to make (and assign) s 80 and BDR claims for VAT accounted for by the RWS' erstwhile representative member, and the RWS is primarily liable for VAT underpaid while it was a VAT group member (albeit the companies in the group at the time, including the erstwhile representative member, will retain joint and several liability)."

70. The FTT then turned to the position as affected by EU law. It recognised the width of the discretion given by Article 4(4) but concluded that section 43 did not implement that Article:

"231 ... While Article 4(4) does give member states a great deal of latitude, one of the few things on which it is prescriptive is that member states only have a discretion to treat certain persons as a single taxable person. But S 43 VATA does not do this. On the contrary, s 43 treats only the representative member of a VAT group as the taxable person because it provides:

> (1) Where …. any bodies corporate are treated as members of a group any business carried on by a member of the group shall be treated as carried on by the representative member, and …any supply which …. is a supply of goods or services by or to a member of the group shall be treated as a supply by or to the representative member; ..."

71. The FTT then considered the nature of the right to recover wrongly collected VAT arising from the *San Giorgio* line of cases, and having considered *Ampliscientifica* at [19] (see quotation at [29] above) it said:

"237. This precludes the representative member being seen, for the purposes of EU law, as the taxable person. It really precludes representative members at all: the taxable person is the VAT group. BMW cannot claim any *San Giorgio* rights as the person liable to pay the tax. The VAT group was the person liable to pay the tax in EU law.

238. Mr Glick's point was that the UK's representative member rules are simply one way of implementing the Article 4(4) discretion. The UK VAT group is a single taxable entity. After all, only one person can make the VAT returns. I do not agree. The directive provides for all the members of the group to be treated as a single taxable person. It implies that they are all responsible for the submission of a single VAT return, even though, no doubt, that task would be administratively delegated to a single individual. It implies *all* group members are deemed to make the supplies to persons outside the group. The provision of joint and several liability goes someway perhaps to narrowing the gap with the EU rules, but joint and several *liability* is not the same as joint and several *rights*. And it seems to me that Article 4(4) gives all members of the VAT group equal rights as well as equal liabilities, and in so far as s 43 fails to do this, it has failed to properly implement Article 4(4)."

72. As a result it came to a conclusion on the preliminary issue that any *San Giorgio* claim rested with the group members as a whole both before and after the RWS left the VAT group [248] and [252]; but it said that these were questions it would refer to the CJEU if necessary.

73. The FTT's conclusion was thus that only MGR had a right to make a section 80 claim as a result of the operation of section 43 read without the benefit of Article 4(4). HMRC and BMW appeal against that conclusion. MGR supports the conclusion but its reasoning differs from that of the FTT. It argues that EU law vests the right to recover the VAT in the RWS once it has left the VAT group.

74. We do not agree with the FTT's reasoning. We set out our reasons towards the end of this decision. In summary we regard the representative member as a taxable person, not by virtue of its own activities but by virtue of those of all the members, and thus as giving effect to the concept in the Directive of VAT being administered as if all the members were a single person. The Directive does not require the creation of a new legal person in national law as part of an implementation but requires that any implementation treat the members as if they were that person. The purpose of Article 4(4), and so section 43, would not be fulfilled if that treatment were retroactively unwound when a member ceases for whatever reason to be a member of a group.

The FTT's Decision in *Lloyds/SC*

75. The FTT in *Lloyds/SC* started at the other end of the racetrack by considering: the scope of Article 4(4), the concept of the single taxable person, and the EU law from which rights to repayment emanate ([69] to [75]). It set out the results of its analysis of the law in the context of a continuing group. In outline it concluded:

> (1) that the single taxable person was a fiction with real consequences in terms of the effect on intra group supplies, and the treatment of the single taxable person as a taxable person for all relevant purposes. The object might be administrative but the concept should not be construed restrictively;
>
> (2) nevertheless regard must be had to the real transactions carried out by the individual legal entities in the group as the fiction did not alter the characteristics of actual transactions ([70]);
>
> (3) the construct operated only as regards matters which took place while the individual persons were members of the group ([71]);
>
> (4) rights and obligations in relation to those matters are not those of the individual members but those of the single taxable person ([72]);
>
> (5) section 43 properly implemented the concept of the single taxable person through the mechanism of the representative member. It described the representative member as the "embodiment" of the single taxable person ([73]);
>
> (6) it followed that the representative member had all VAT rights and obligations in relation to supplies made by members of the group while members ([74]); and

(7) those rights and obligations remained those of the representative member from time to time and were those of the representative member as such - so that when there was a change of representative member they would devolve upon the successor ([75]).

The tribunal then considered the nature of the *San Giorgio* right in relation to VAT levied in breach of Community law. It regarded the case law of the CJEU as being that it was in principle the supplier who was entitled to reimbursement, but that that was coupled with a right of the final consumer if that consumer could not effectively claim any VAT overpaid from the supplier, and that a supplier's claim could be opposed by a member state if the supplier had passed on the duty. It did not regard the jurisprudence as establishing a general right to claim in favour of a person who had been economically burdened by the incorrect levying of the tax. No other economic enquiry was mandated or necessary as a matter of EU law. At [94] it said:

> "94. We consider that the scope of the *San Giorgio* right, as identified by the ECJ, has been defined by the essential characteristic of the common system of VAT in ensuring complete neutrality of taxation of all economic activities, whatever their purpose or results, provided that they are themselves subject in principle to VAT …Accordingly …VAT must burden the final consumer and not the various traders and service providers who have contributed to the final product or through whose hands it has passed. The extension to a final consumer of a right to claim repayment from the tax authority, in cases where it would otherwise be impossible or excessively difficult for the final consumer to recover, is a natural concomitant to the essential characteristic of the VAT system in ensuring neutrality through a supply chain of taxable transactions, with the burden falling on the final consumer.
>
> 95. The relationship between the VAT system itself and the right to make such a claim is, we consider, key to understanding the boundaries of the right to make a claim. There can, in our view, be no principled basis for an extension of the right to claim to a person other than one, such as the final consumer, on whom the burden of the tax has fallen as a consequence of the VAT system itself. It is not a consequence of the VAT system that taxable persons, whether individually or as a group, may choose to fund the payment of VAT in a particular way, or may elect that the burden should be borne or shared in a manner specified by private agreement. That is not what the ECJ is referring to when it describes the burden of the tax."

76. The FTT then turned to consider the issue of a company ceasing to be a member of a group. It said ([109]) that it did not regard the representative member as representing individual members of the group but as representing or embodying the single taxable person. As a result a change in the components of the group (as might occur when an RWS left the group) had no effect on the entitlement of the representative member as regards the past ([110]): the entitlement remained in the single taxable person and so vested in the representative member.

77. The position was the same if the group ceased to exist. The single taxable person fiction ceased to apply, but for the future only. There was no unravelling of the prior

effect of the fiction ([112]). The historical effect of the statutory fiction endured as it would if a taxable person ceased to be taxable for some reason:

> In ordinary circumstances, therefore, the s 80 right is that of the representative member of the group immediately before the group registration came to an end. That right under national law cannot, as a matter of principle, be regarded as in breach of the principle of effectiveness.

78. But if it became impossible or excessively difficult for the representative member to obtain reimbursement the *San Giorgio* right could arise in relation to another person. However the necessary enquiry into where the burden of the tax had fallen did "not encompass ascertaining where the burden of the tax has fallen otherwise than through the operation of the VAT system itself. Questions of internal funding ... are not relevant ..." [113].

79. As a result the FTT found that:

> (1) the rights to make the claim remained with ACL;
>
> (2) in relation to Period 1 the right to make a claim remained with Chartered Trust as the last representative member; and
>
> (3) in relation to Period 2 the right to make the claim remained with the Standard Chartered Group.

80. Standard Chartered appeals against the conclusion in relation to Period 1, maintaining that as the group had been dissolved the rights to claim devolved on the person who bore the burden of the tax wrongly paid and that, in fact, it had borne the burden; and Chartered Trust (Lloyds) appeals against the conclusion in relation to Period 2, maintaining that as the RWS which had left the group it was entitled to claim.

81. Jumping ahead, we state that we have come to the same conclusions as regards the outcome of these appeals and for much the same reasons as those of the FTT in *Lloyds/SC*.

The Argument of Standard Chartered

82. Mr Eicke for Standard Chartered said that:

> (1) the single taxable person is a creation of EU law and has features similar to those of the legal fiction of a company;
>
> (2) unlike a company incorporated under the Companies Acts there are no rules for what happens when the single taxable person ceases to exist;
>
> (3) the default position cannot be that the money in relation to any over paid VAT goes to the last representative member. (After all not all member states need use the same mode of implementation through a representative member; and the representative member of paragraph 2 Schedule1 is a different beast);
>
> (4) the overarching principle must be that once the single taxable person has gone, the monies must go to the person who bore the cost: the person with the *San Giorgio* right.

83. Mr Eicke argues that while a VAT group is extant there is someone, the representative member, who represents the single taxable person and HMRC's dealing must be with that person, but when it is disbanded there is no longer a person who represents the single taxable person who may make the claim, but under the *San Giorgio* line of cases the person who suffered the economic burden of wrongly paid VAT is entitled to claim.

84. In our view this argument fails at its first hurdle, for, as we shall explain later, as regards transactions which happened during the currency of group treatment, we see no reason in the words or policy of the provisions for not treating the notional single taxable person as continuing to exist after grouping has ceased (or the representative member as continuing to be treated as such) in order to deal with the rights and obligations which arise in relation to the reporting and accounting for those transactions, or put another way, for treating the members as respects those transactions as if they remained a single person. Indeed that seems the only administratively expedient and legally certain way of dealing with the termination of a group.

85. We turn to the Mr Eicke's arguments in relation to the *San Giorgio* line of cases.

86. As we have noted the FTT in *Lloyds/SC* rejected these arguments, holding that the VAT system provided a boundary to the right to make a claim so that the right could not be extended (from the taxpayer) to a person other than one, such as the final consumer, on whom the burden had fallen as a consequence of the VAT system.

87. Mr Eicke says that in the *San Giorgio* cases the CJEU starts with the taxpayer, the taxable person, as the obvious claimant where tax has been overpaid, but when a taxable person would be unduly enriched by repayment it goes on to the next step to identify who else has borne the burden to see whether the member state should reimburse that person. Thus if there is no longer a taxable person the person entitled to payment is the person who bore the economic burden of the wrongly collected tax.

88. Thus Mr Eicke says:

(i) that in *San Giorgio* at [13] the Court, having recognised the validity of the unjust enrichment defence and the permissibility of a national court taking into account the passing on of charges to purchasers, sets out its conclusion that a member state may resist repayment claims in wider terms:

> "where it is established that the person required to pay such charges had actually passed on to <u>other persons"</u>

(a formulation repeated at [18] after the Court had added the caveat that such a restriction should not make the exercise of the right virtually impossible). That he says indicates a wider group of potential holders of the right than that suggested by the FTT in *Lloyds/SC*.

(ii) that in its disposition in *Comateb* the Court speaks of whether the burden of the charge has been passed on to "other persons". We note, however, that in the course of its judgment the Court spoke only of rights accruing to the final consumer:

> "[24]. In this respect it should be made clear, first, that if the final consumer is able to obtain reimbursement through the trader of the amount of the charge passed on to him, that trader must in turn be able to obtain reimbursement from the national authorities. On the other hand, if the final consumer can obtain repayment directly from the national authorities of the amount of the charge which he has paid but which was not due, the question of reimbursing the trader does not, as such, arise."

(iii) that at [94] of its judgment in *Weber's Wine World*, the Court casts the unjust enrichment defence in terms of the charge being borne by "someone other than the taxable person", and at [97] it refers to the burden of the charge being passed on to third parties. Mr Eicke submits that the Court identifies the factual enquiry that may be necessary to work out whether the burden has been passed on and refers to it being passed on to third parties in a general sense.

(iv) that in *Reemtsma* the Court acknowledged the potential right of the supplier against the state because it bore the burden of the tax.

Mr Eicke treats the Court's judgment as saying that it happens to be the customer who bore the burden and was thus entitled to payment of the tax unlawfully levied; but this is only an example of the wider principle that other persons might have a claim. However the Court does not, we note, indicate a wider economic enquiry. It says the "recipient - who bore the tax invoiced" may obtain reimbursement, and conducts no wider enquiry into how it was borne other than pursuant to the operation of the tax system. The Advocate General says that the right to reimbursement flows from the principle of neutrality and unjust enrichment of the state. Neither of those indicates an enquiry beyond the operation of the tax system. The Court phrases its conclusions in terms of neutrality, effectiveness and non discrimination. None of these indicates a right by virtue of suffering an economic burden otherwise than by operation of the tax system.

(v) that *Lady & Kid* does not undermine the principle to be derived from the earlier cases that the person who bore the economic burden is entitled to repayment because the question in that case was specific and the later decision in *Danfoss* shows that the Court did not regard *Lady & Kid* as precluding an investigation of who actually bore the burden of the wrongly collected tax.

(vi) that in *Danfoss* the Advocate General's use of "typically" indicates that there are other lines of enquiry and that a more detailed enquiry may be needed to neutralise the economic effects.

That he says is reflected in the judgment of the Court where, having cited *Lady & Kid*, it says at [23] that the right to recover sums unduly paid helps to offset the consequences: "by neutralising the economic burden which the duty has unduly imposed on the operator who in the final analysis has actually borne it." The Court, says Mr Eicke, had replaced "the final consumer" in *Lady & Kid* by the "person who bore the economic burden".

We note however that *Danfoss* concerned the right of the purchaser to bring a claim, and, after the passage Mr Eicke cites, the Court returns the focus of its arguments to the final consumer at [27] where it says that in principle a member state could oppose a claim by the final consumer "on the grounds that it is not

that consumer who has paid the duty to the tax authorities, provided that the consumer – who, in the final analysis, bears the burden of duty - is able [to bring a civil action for its recovery against the taxable person]."

(vii) that the analysis of the Court in *Alakor* (and the recognition by the Advocate General in *San Giorgio* that an economic burden could have been incurred by a taxpayer even if the tax had been passed on e.g. because of lower sales) shows that there is no requirement to restrict the economic burden which is relevant to the test to that which arises as an operation of the tax system: passing on does not necessarily occur through the tax system.

However, we note that the analysis of the Court in *Alakor* related to the question of whether the taxpayer would be unjustly enriched; that was affected by the economic burden borne by the taxpayer. Likewise the burden of lower sales could be a counteraction to the passing on of VAT. Each were part of the determination of whether there had been unjust enrichment of the taxpayer, and neither related to whether another person might have a claim in relation to wrongly charged tax. Neither indicates that merely having suffered an economic burden is sufficient grounds for such a claim.

89. For the following reasons we are unable to draw a conclusion that the EU law right to repayment of taxes wrongly collected by a member state extends, beyond the supplier who accounted for those taxes and the customer, to other persons who bore the economic burden. These are much the same reasons as those for which the FTT came to the same conclusion in *Lloyds/SC*.

90. First, the reasoning of the Court in each of *San Giorgio*, *Comateb, Weber's Wine World, Lady & Kid* and *Alakor* concerns the unjust enrichment limitation of the right of the taxpayer to repayment. The Court is not concerned with whether another person may have an EU right but with what are permissible limitations on the taxpayer's claim. The passing on of the tax to another may affect the level of enrichment which would accrue to the taxpayer: it matters not for that purpose who the other person was. The language of Court cannot be regarded as indicating that a general right was available to any person who suffered an economic burden.

91. There is a difference between asking whether a person within the VAT system such as the taxpayer would be unduly enriched because he does not bear any costs since he has passed it on, and asking who bore the economic cost of an event. The Court asks the former question not the latter.

92. Second, in the cases of *Danfoss* and *Reemtsma*, the Court accepts that the final customer may have a right to a claim against the state when recovery against the taxpayer is virtually impossible, but there is no considered suggestion that a person whose interest was other than that of a final consumer was entitled to claim.

93. Third, the Court describes the rights to repayment as a consequence of, and an adjunct to, rights conferred on individuals by Community provisions prohibiting the wrongly levied tax. In the context of VAT, Community law applies the principle of neutrality to its operation. It is, as the FTT says in *Lloyds/SC*, a natural concomitant of the essential characteristic of neutrality that only the proper burden falls on the final consumer. The extension of the right to claim to a final consumer derives from that

source. (As the Court noted at [95] in *Weber's Wine World*: "indirect taxes are designed in national law to be passed on to the final consumer.")

94. The duty of the member state to reimburse is explained by the Advocate General in *Reemtsma* ([82] to [84]) as flowing from the principle of neutrality and from the principle of unjust enrichment on the part of the tax authority[1]. The latter requires the member state to disgorge the tax wrongly extracted, the former requires that the tax borne by the final consumer is at the prescribed rate. The final consumer's right is to the proper operation of the system which is infringed by the wrongly levied tax. No such right vests in the person who may be economically affected otherwise than by the operation of the VAT system.

95. Fourth, a condition for the exercise of a right that the holder bore the economic burden of the wrongful act would be impractical or impossible to apply without further qualification. Any cost borne by a company is also borne by those who finance it and by its and their shareholders; costs borne by a company may be reflected in what bonuses its staff earn - its staff may bear some of the burden of those costs as may their families. The test Mr Eicke proposes is not one of immediate or proximate cause but of wider economic effect.

96. We conclude, contrary to Mr Eicke's submissions, that the *San Giorgio* right in the context of VAT extends only to persons such as the taxpayer and the final consumer who have borne the burden of the wrongly collected tax as a result of the operation of the VAT system.

The Argument of MGR

97. Mr Hitchmough supports the view expressed by the Commission in paragraph 3.4.4 of its Communication to the Council and the European Parliament on VAT grouping of 2009:

> "Since the VAT group is regarded as a single taxable person which has assumed the members' rights and obligations regarding VAT it follows that when a VAT group ceases to exist the rights and obligations assumed by the group revert to the individual members from the moment the VAT group ceases to exist. Simultaneously, the former members of the group return to the status of individual taxable persons. The same applies where a member leaves the group.

98. Mr Hitchmough regards this passage as indicating, not simply that as regards future transactions the individual member stands again on its own two (VAT) feet, but that it also does so as respects unresolved past transactions. He says that this is the only approach which is consistent with fiscal neutrality and the *San Giorgio* principle.

99. In summary Mr Hitchmough says:

> (1) Article 4(4) creates the fiction of the single taxable person. The scope of the deeming and the limitations on that fiction are matters of EU law. What is required is that several persons are treated as one taxable person –

[1] The Court referred to neutrality at [39] in which it says that the system it regarded as acceptable "observes the principles of neutrality and effectiveness".

a composite made of its members. If the membership of the group changes the single taxable person changes;

(2) the fiction must be applied sensitively having regard to fiscal neutrality and so as to reflect economic reality (citing the Advocate General in *Larentia*, *Canary Wharf* and *Intelligent Managed Services*) and legal certainty;

(3) the fiction must be applied to allow effective application of the *San Giorgio* right and the exercise of the right to bad debt relief;

(4) those goals can be achieved only if the RWS takes its claim with it when it leaves a VAT group: unless the RWS can recover wrongly paid VAT an effective means of neutralising the economic burden is not provided. He accepts that the question of who bore the tax must be answered by reference to the operation of the VAT system, but says that after the departure of a RWS from a group it must be regarded as the person who bore the tax in accordance with the VAT system;

(5) there is nothing in the principle that the single taxable person is distinct from the members which is inconsistent with this conclusion;

(6) although there is nothing in the CJEU jurisprudence which is inconsistent with this answer, the CJEU has never had to consider this issue. A reference should be made.

100. Mr Hitchmough cautions against reading the Court's words in [19] of *Ampliscientifica* as legislative prose. He says that the later question before the Court in *Ireland* highlighted the ambiguity or lack of precision of the Court's words in *Ampliscientifica:* for on one reading of [19] (quoted at [29] above), it meant that each potential member of a group would have had to be a taxable person before it could actually become a member of the group; the Court in *Ireland* dismissed the argument based on that reading because the issue had not been before the Court in *Ampliscientifica*, but Mr Hitchmough says that, given that lack of precision, the Court's stated reasoning cannot be taken as meaning that a RWS has no basis to claim after it has left the group.

101. It is clear to us that the Court's words mean that while the RWS is a member of the group it can have no claim; that may leave open the possibility of a change on its leaving the group, because that issue was not addressed by the Court, but there is no hint of that result in the Court's language.

102. As regards the application of fiscal neutrality Mr Hitchmough says that the Court in *Sweden* and *Ireland* accepted that grouping promotes fiscal neutrality; and the Advocate General in *Larentia* at [83] recognised that a member state's implementation of VAT grouping must promote fiscal neutrality. The *San Giorgio* principle requires, he says, that a right accrues to a person who has suffered the economic burden as a result of the operation of the VAT system. Applying those principles, he says that if VAT has been wrongly collected on supplies made by an RWS when it was a member of the group, then an implementation which limited the right to claim to the single taxable person would not effectively neutralise the burden of the tax and would distort the neutrality of the tax.

103. He says that in the ordinary course the RWS will have borne the burden of the tax by accounting for it to the representative member and will have charged the tax in making its sales, suffering possibly the kind of diminution in profit recognised as blocking a member state's unjust enrichment defence. The *San Giorgio* right he says is part of the VAT system and the RWS has a right in relation to the wrongly charged tax. *Danfoss* and *Reemtsma* acknowledged that the customer's first port of call in relation to wrongly collected tax will be the supplier - the RWS for the VAT charged: the burden in the ordinary course thus falls on the RWS

104. We accept that the principle of fiscal neutrality may play an important role in construing both Art 4(4) and section 43. As the Court explained in *Zimmerman* ([47] and [48]), the concept of fiscal neutrality is used in two different senses: one is the release of the trader from the burden of the tax (by crediting input tax), and the other the treating of competing supplies equally. The Advocate General's comment in *Ireland* noted at [32] above reflected the second of these.

105. We do not regard fiscal neutrality as requiring that section 43 must be interpreted as meaning that the departing RWS must be entitled to claim. As regards that aspect of the doctrine which reflects the mechanisms for releasing the trader from the burden of VAT paid or payable, it is satisfied by reference to the computation of the tax liability or right to repayment of the notional single taxable person who obtains the credits for the inputs and who is entitled to reclaim VAT unduly paid.

106. As regards that aspect of the doctrine which requires that similar supplies should be treated equally, where the supply is treated as having been made by a single taxable person it is the treatment of that supply which attracts the benefit of the doctrine, and the accrual of a right to repayment of wrongly charged VAT to the notional single person who for VAT purposes made the supply achieves the object of the doctrine where that right will give rise to a real payment to one or more of the real persons who are treated as that single person.

107. The division of the rights and liabilities between the members who are treated as the single person does not affect the neutrality of the tax in either of these senses.

108. Further we do not regard the doctrine as requiring that there must be equality between the financial position of a person who has become a member of the VAT group and an equivalent person who has not. They are in different positions.

109. Mr Hitchmough says that the fiction must be deployed to reflect economic reality, and that the economic reality is that the RWS will have paid the tax. To our minds the economic reality which the words of Article 4(4) require to be observed is that of the close connection between the members during the currency of the grouping. That connection enables them to make such arrangements as they wish to share the benefits and burdens attributed to the single person they are treated as being; a compliant implementation of Article 4(4) does not need to be concerned with those arrangements.

110. Mr Hitchmough suggests that treating the representative member as entitled does not promote legal certainty because it does not give the RWS a certain remedy. A contractual or common law claim by the RWS against the representative member will

be complex and uncertain. Legal certainty requires the RWS to be able to claim directly.

111. It seems to us that this argument founders on the assumption that the RWS has a right in the first place. If the effect of a domestic implementation of Article 4(4) is that the only person entitled to claim is the representative member and it is entitled to claim then there is certainty.

112. We do not follow Mr Hitchmough's logic in relation to the *San Giorgio* principle. He accepts that the right is limited by the effect of the scheme of the tax, but there is nothing in Article 4(4) or section 43 which requires the VAT burden to be passed on to the RWS; if that happens in the ordinary course that is part of ordinary commercial relations between the members of the group, not part of the tax system. Whilst the *San Giorgio* right is a complement of imposition of the tax, it is not part of the intended system of operation but a remedy for when it is wrongly applied; and it seems circular to say that because a *San Giorgio* right is part of the tax system, it is part of the operation of the tax and therefore a *San Giorgio* right.

113. The conferring of that right upon the notional single person and giving it effect by paying the representative member for the members to deal with between themselves is an effective implementation of the right they together hold. Conferring the right on the RWS alone would ignore the fact that the burden fell on the members treated as a single person, not just the RWS. Treating the right as reverting to or remaining with a RWS is, contrary to Mr Hitchmough's submission, inconsistent with the principle that all the members should be treated as the single taxable person.

114. Mr Hitchmough relied upon the comment of the Advocate General in *Ireland* at [40] (repeated in *Skandia)* that "[r]egardless of its nature as a special scheme, VAT grouping neither introduces limitations nor broadens the rights of taxable persons as defined in…the Directive." There he says that by "taxable persons" the Advocate General means the members of the group. Thus grouping is not meant to alter the rights which the members would have enjoyed had they not been grouped. That he says promotes fiscal neutrality – which would be undermined if grouping changes the rights or liabilities of members in a substantive way.

115. We do not draw the same conclusions from the Advocate General's language. He speaks of the "taxable person as defined in…the Directive" and that person is the single taxable person not the members individually; the members together are treated as that person, and none of them is a taxable person. Further the Advocate General's acceptance at [42] that VAT grouping "terminates the VAT liability of those members who were taxable persons" indicates that he was not advocating a principle that the individual members' situations should be regarded as unchanged. Finally, if grouping promotes fiscal neutrality then it must have some effect on the incidence of VAT.

116. Turning to domestic law, Mr Hitchmough argues that a nuanced approach is required to section 43. He relies on *Intelligent Managed Services, Thorn EMI* and *Canary Wharf*. He says that the constituent elements of the single taxable person must be recognised in appropriate cases. This is his nuanced approach. He also derives some support from the bad debt cases which we consider later.

117. We accept that regard must be had to the real transactions carried out by members of the group, and that the treatment of the members as a single person does not affect the character of the transactions they undertake with third parties. This however relates to the computation of the tax liability and is a consequence of treating the members as a single person who will have in relation to any supply the characteristics and conduct of the member making the supply. The tax liability or right to repayment is the effect of such treatment, but this does not indicate that any form of disaggregation is required by section 43 or Article 4(4) in determining the liability or rights of the individual members.

118. During the currency of group treatment the rights and obligations which arise must be vested in the members treated as a single person. The effect of such treatment is clearly intended to continue after grouping ceases as respects things which happened while group treatment applied. The member state is allowed to treat something as being the case; having done so neither Article 4(4) nor section 43 provides any authority for a retrospective change. What has been treated as being the case has enduring consequences: VAT due or repayable in respect of a transaction in a period falls due under the rules which applied during that period.

119. Mr Hitchmough relies on Lord Nolan's recognition in *Thorn Materials* that the representative member is treated as carrying on the businesses of the members as well as its own and dealing on behalf of them with non-members. Thus he says that Lord Nolan recognised that each member retained its separate existence and that the representative member dealt on behalf of the members. Once the RWS left the group there was no reason to regard it as being represented by the representative member.

120. Lord Nolan did not say that the representative member deals on behalf of each member separately but that it dealt on behalf of the members. Mr Hitchmough endeavours to extract a principle that because the representative member deals on behalf of the members the rights it exercises are those of particular individual members; but the rights are those given to the members as a group – as if they were a single person. When the RWS leaves the group it takes with it the rights which it had before – rights which remain entangled with those of the other members with which it is to be treated as a single taxable person as regards the period of grouping.

121. We accept that domestic case law shows that section 43 is to be interpreted carefully and sensitively. But we see no principle which requires the unravelling of its deeming when a company leaves a section 43 group. Neither *San Giorgio*, fiscal neutrality nor a purposive approach to section 43 requires that result.

The Argument of Lloyds

122. Mr Scorey adopts MGR's arguments and makes some additional points.

123. In the first group of these he says that neither Article 4(4) nor section 43 creates a new separate taxable person. Article 4(4) permits the member state to treat the members *as if* they were a separate person. There is no entity for the purposes of the Directive which is "the VAT Group". It is unhelpful to talk of "the VAT Group" as having a life or as ceasing because that concept has no function in the legislation.

124. He says that the *San Giorgio* rights have to reside somewhere. They cannot reside in a non-entity: it is therefore no answer to say that they reside in the single taxable person. They cannot reside in the representative member for that is not the single taxable person. *Skandia* and *Ampliscientifica* do not help answer that question. They were about quite different matters. One cannot ignore the members because what they do makes up what the notional single person does.

125. Next, he says that section 43 does not *treat* the members as a single person. The representative member does not embody the single person. It is the members who embody the single taxable person, not the representative member. The only way to read section 43 is that VAT rights and obligations lie with the members but are corralled or administered by the representative member. Those rights arose in the members and were administered by the representative member; when group treatment finishes they must revert back to the members.

126. It seems to us that VAT rights and obligations which arise in relation to transactions undertaken during the currency of group treatment do not start with the members individually but rest with all the members: for they are together to be treated as being the single person. This does not ignore the members. But rights and obligations from their activities must be treated for VAT purposes as arising not to them as separate entities but as if they were a single person. In such an implementation there can be no "reversion" to one particular member since the rights and obligations were never those of a particular member but are those of all the members treated as a single person.

127. The UK provides a regime under which the rights and obligations arising from transactions during the currency of a group are vested in the representative member, the obligation to report and administer lies with that member and the obligation to pay is joint and several. The members can choose how the representative member holds the rights which arise and how the members bear the cost of payment between them. That satisfies the requirement of Article 4(4) that they should be treated as holding the rights as if they were the notional single person. If together the members decide how a right should be exercised by the representative member and how its proceeds shall be divided between them then they are being treated as the holder of the right. That is the case whether the right is to credit or repayment of input tax or a *San Giorgio* right to recover wrongly collected tax.

128. Mr Scorey criticises the description of the single taxable person as being "embodied" in the representative member. If that phrase suggests identification of one with the other, we agree. The representative member is not the notional single taxable person but mechanically fulfils the need created by any implementation of Article 4(4) for a person recognised by the legal order of the member state for the administration of the tax; in that sense it embodies, reflects, manifests or represents the single person or gives effect to the scheme of Article 4(4).

129. As Mr Scorey says, section 43 does not expressly treat the members as a single person but it gives effect to such treatment. Even if one regards the rights which the members are to be treated as having as being corralled or administered by the representative member, the object of the provision is to make a permanent change to how VAT is charged on a person's transactions while it is a member of a group. The rights are no longer individual rights of separate members but rights of them all as if

they were a single person. Treating rights and obligations arising from such transactions as continuing to be so corralled or administered after a RWS has left the group is consistent with that aim.

130. Third he says that in practice unwinding at the end of group treatment does not present a problem. Each member will keep records; in fact most members will prepare notional VAT returns and send them to the representative member for consolidation and the making of the return. In some cases there may be complications but the occasional tail should not wag the dog.

131. If that is in fact the case it seems to us that in practice group treatment could be unwound; but that does not mean that it should be. Not only would unwinding every time a member left a group, even if practical, not promote simplicity, but Lord Nolan's analysis in *Thorn Materials* indicates that it would not be the simple process envisaged by Mr Scorey of adopting the notional VAT returns of the members since intra group supplies would remain disregarded and would have to be extracted from those notional returns, leaving difficult questions as to the recovery of input tax on the inputs used to make those disregarded supplies.

132. Fourth he says that the concept of the representative member in section 43 does not address how rights can pass from one representative member to another when there is a change of representative member, or how a representative member at a particular time may assign or give good title to the rights arising from the transactions of the members since on a change of representative member they devolve on the new one. His answer is that the right is that of the RWS but while it is a member of the group it is administered by the representative member.

133. It does not seem to us that this is a stumbling block. This relates to what happens not just when a RWS leaves the group but at any time during the currency of a group when there is a change of representative member. If the only person with which HMRC deals is the representative member for the time being we accept that it may not be able to give title to any particular right it holds against HMRC, but we do not regard that as indicating that each right held by the representative member (or each right held by the single person which the members are to be treated as being) must be treated as the property of a particular member which reverts to it on leaving the group. That is because: (i) there is nothing in the Directive or the UK tax system which requires rights to be conferred in such a way that they can be assigned, and (ii) even if there were a principle which required a particular right to be capable of being transferred, it is not beyond the wit of lawyers to tie the group members into arrangements which have substantially that effect.

134. Mr Scorey asks how, if a representative member changes, do rights pass from the old to the new. He says that "by operation of law" is not enough. It seems to us that it is not intrinsic in a right that there must be a mechanism by which it is transferred. Other rights recognised by the law of England and Wales, for example rights under trusts, may move without any mechanism but the provisions of the trust deed.

135. Fifth, Mr Scorey notes that the provisions of paragraph 1A and 2 of Schedule 1 are quite different. They create a single taxable person, make all the members liable for compliance and treat the members as a partnership. How can both that and section 43 be consistent with Article 4(4)?

136. It seems to us that there may be more than one way of treating several persons as if they were one, and that different methods might be adopted depending on whether the treatment was voluntary or compulsory.

137. Finally Mr Scorey says that there is real uncertainty as to what Article 4(4) requires of national legislation. It requires a fictional overlay on real entities. The CJEU has never addressed the question of on whom rights and obligations of the single person rest, whether they are held collectively or are individual rights of the members which may be administered by one of them. The questions should be referred to the CJEU.

138. We address the question of a reference to the CJEU later.

Bad Debt Relief

139. The FTT in both *Lloyds/SC* and *BMW/MGR* considered two tribunal cases dealing with bad debt relief. The parties also referred to them in their submissions to us. The issue arises when a RWS, having made a third party supply in return for a debt obligation while it was a member of a group, leaves the VAT group and after it has left the debt becomes uncollectable in whole or part. The Directive requires the taxable amount to be adjusted in such cases. The current domestic legislation giving effect to that adjustment is that in section 36 VATA. It provides that "where a person has supplied goods or services …and has accounted for and paid VAT" and the whole or part of the consideration is written off in his accounts, then, after 6 months have passed on the making of a claim, he is entitled to repayment of the VAT on the unpaid amount.

140. The perceived problems with a construction of section 43 which leaves the right to make a claim (and to receive payment) under section 43 in the hands of the representative member are: (i) that it is the RWS which suffers the loss but the representative member that reaps the repayment and (ii) that the representative member could not write off the debt in its own accounts since it was the RWS who was owed the debt. In *Triad Timber Components Ltd v C&E Comms* [1993] VATTR 384 the VAT Tribunal found that once it had left the VAT group the RWS could be regarded as the person who made the supplies and so could claim the relief. A similar conclusion was reached in *Proto Glazing Ltd* (1995) VAT Decisions 13410 where the representative member had gone into receivership. Those conclusions fit ill with the provisions of section 43 which treat the representative member as the only person making supplies and where the tax was paid by the representative member.

141. Mr Scorey treats these decisions as support for the proposition that the right of a member is represented by the representative member while it is a member of a group but reverts to it when it ceases to be.

142. In *Lloyds/SC* the FTT considered that the conclusions in these cases could be supported by the argument that it was virtually impossible for the representative member to make a claim with the result that some way to neutralise the burden of the tax had to be provided.

143. It seems to us that if several persons are treated as one it accords with such treatment to treat the adjustment of the consideration for a supply made by one of them

as a reduction in the consideration for the supply made by the notional single person, and, as the taxable amount relates to a supply made by the notional single person, to treat the benefit of that adjustment as accruing to that person even after the grouping has ceased – because the supply was treated as made by that person. Consistently with that it is in our view proper for the UK regime to regard the representative member for the time being as the only person who can claim. Thus even after a group has been dissolved it is in accordance with Article 4(4) to treat the last representative member as the only person who can claim. That gives effect to the members being treated as one person and allows them to make such arrangement as they may agree between them in relation to the benefit of the claim. We accept that in exceptional circumstances such as where the last representative member has been irrevocably dissolved, some other remedy might be required to provide the benefit of the relief to the members of the group.

144. We would not therefore have come to the same conclusion as the tribunal in *Triad,* and do not therefore regard that case as support for the principle that rights revert to the RWS on its ceasing to be part of the group.

145. Difficulties may arise in relation to the requirement of section 36 that the consideration must have been written off in the accounts of the claimant. Those difficulties however relate to the UK's formulation of bad debt relief, not to the principle of to whom the benefit of the relief should accrue.

The Decision of the Inner House of the Court of Session in *Taylor Clark Leisure plc v HMRC* [2016] CSIH 54, 2016 S.L.T 873

146. Shortly after the hearing before us the Inner House of the Court of Session gave its judgment in *Taylor Clark*. The parties have provided written submissions on that judgment.

147. The question of whether this tribunal is bound by a decision of the Inner House of the Court of Session was considered by the Upper Tribunal in *National Exhibition Centre* [2015] UKUT 0023, [2015] STC 1185 ("*NEC*"). After considering *Income Tax Special Purposes Commissioners v Pemsel* [1891] AC 531, and the decisions of the Court of Appeal and House of Lords in *Abbott v Philbin (Inspector of Taxes)* [1960] Ch 27 and [1961] AC 352 it concluded that, whilst not formally bound by the decision of the Inner House of the Court of Session in *Scottish Exhibition Centre Ltd v Revenue and Customs Commissioners* [2008] STC 967, in the absence of conflicting authority the Upper Tribunal should follow it.

148. We shall take the same course. To the extent that the decision of the Inner House required the resolution of the issues before us we shall follow its decision unless there is conflicting authority to the contrary. We should not, however, be taken as agreeing with the conclusion of the Upper Tribunal in *NEC* that the Upper Tribunal sitting in England on an English VAT appeal is not bound by a decision of the Inner House on an appeal from the Upper Tribunal, a conclusion about which we have misgivings.

149. Taylor Clark Leisure was the representative member of a VAT group. Carlton had been a member of that group. While it was a member Carlton made supplies on which VAT was accounted for by Taylor Clark. Carlton then left the VAT group. It

was then established that the supplies Carlton made were not VATable. Taylor Clark made no timeous claim for the repayment of that VAT, but Carlton did make claims which, if they were valid, would have been in time. The Inner House set out the issue before it:

> "[7] …The issue that remains relevant is as follows. The only timeous claim for repayment of VAT paid by the appellant's VAT group was made by Carlton. No timeous claim was made by the appellant itself, whether in its capacity as the representative member which embodies the VAT group or as an entity in its own right. The critical question is accordingly what the effect is of the claims by Carlton: can the VAT group embodied in the appellant as representative member rely on those claims for repayment of VAT overpaid by the group, when the claims were made timeously but by another member of the VAT group rather than the representative member?"

150. The Inner House answered that question in the affirmative, but before it addressed the question it embarked on a consideration of the concept of a VAT group and its legal effect, the position of a representative member, and the position of other members of the group. It regarded the context of the legal framework governing VAT groups and their tax liability to be "of vital importance" [8]. It considered the Directive and section 43 and referred to the striking example of *Skandia* in which "the individual identity of the members under national law [was] disregarded for the purposes of VAT". It referred to decisions of the FTT including that in *Lloyds/SC* and said that the concept of the single taxable person

> "is not used directly in the United Kingdom VAT legislation but is rather mediated through the structures found in sections 43 *et seq* of the Value Added Tax Act 1994. In considering the construction of the legislation, in particular sections 43 *et seq* and section 80, which deals with the right to recover overpaid VAT, we have had regard to the wording of the legislation and to its fundamental purposes and the commercial context in which it operates"

151. It analysed the scheme of section 43 in the light of the Directive thus:

> *"VAT groups and representative members*
>
> [14] In the light of those considerations, we are of opinion that the underlying scheme of section 43 of the Value Added Tax Act 1994, read in the light of the Sixth Directive, is as follows. The underlying concept is that of the single taxable person, as found in article 11 of the Principal VAT Directive. The single taxable person is, however, a fiction; it exists only for the purposes of VAT, and has no existence in the general law. In order to translate the notion of the single taxable person into the domestic legal system of the United Kingdom, section 43 of the 1994 Act uses three basic concepts: the VAT group, the ordinary group member, and the representative member of the group. The single taxable person, as contemplated in the Directive, is the VAT group as embodied in the representative member. For the purposes of the VAT, but only for those purposes, the VAT group comprising all the members is treated as if it were embodied in the representative member, and the VAT group as so embodied is

treated as if it were a legal person in its own right. The group as so embodied might be described as a quasi-persona, since it lacks legal personality for any other purposes, and in relation to the general law the constituent members of the group continue to enjoy their own personality. In relation to liability for VAT, therefore, all supplies made by and to members of the VAT group are treated as made to the group embodied in the representative member as a quasi-persona. Equally, we consider that any liability of HMRC to repay VAT must be owed to the VAT group so embodied as a quasi-persona; that is plain from the general scheme of the legislation.

[15] The concept of the representative member is central to the structure of section 43. It is a device used in the United Kingdom legislation to permit the VAT group to be treated as a single taxable person – a quasi-persona - for VAT purposes while still respecting the independent legal personality of the constituent members of the group for all other purposes. The precise relationship of the representative member to the VAT group has been the subject of differing opinions in the First-tier Tribunal. In our opinion the best formulation is that the representative member embodies the group as a single taxable person. The VAT group as so embodied is a quasi-persona for VAT purposes, but otherwise it has no personality, and consequently the rights, obligations, powers and liabilities of the individual members are ascribed to the representative member so far as they relate to VAT. Equally, the acts of the individual members in relation to VAT are ascribed to the representative member as embodying the VAT group. Furthermore, it is the representative member which has the group's VAT registration number, and the individual members of the group will use that number in all their dealings with other persons to the extent that a transaction is subject to VAT.

[16] It follows that, so far as VAT is concerned, the individual members of the group have no independent existence; they function merely as part of the quasi-persona embodied in the representative member. Nevertheless they continue to function for all other legal purposes, including the methods used to regulate the incidence of VAT among the various entities forming part of the VAT group. Thus VAT will normally be paid by the representative member as embodying the group (or conceivably by another entity operating as an agent for the representative member, for example where the debts of a group of companies, in the domestic law sense, are in practice paid by one of their number; any such payment, however, is made on behalf of the representative member). The representative member will be entitled to recover the tax so paid from the individual member of the VAT group whose activities generated the tax, either contractually or using restitutionary remedies, or simply by exercising the power of the holding company in the group to direct subsidiaries to make payments. None of that, however, has any bearing on the payment of VAT to HMRC by the representative member as embodying the VAT group. This is subject, however, to one express statutory exception: under the final part of section 43(1) the individual members of the VAT group are liable to HMRC jointly and severally for any VAT due from the representative member.

[17] When an individual member leaves a VAT group, it may acquire its own VAT registration number for the future; if it intends to trade in goods or services that are subject to VAT it will require to do so. Nevertheless, leaving the group and acquiring its own registration have no effect on the transactions

that took place when the individual member was a member of the VAT group. As a matter of tax law, those transactions were the transactions of the representative member as embodying the VAT group, and to the extent that they still have tax consequences they remain the transactions of the representative member embodying the VAT group. Even if the VAT group ceases to exist, the tax consequences of transactions that took place while the group existed remain those of the group, embodied in the representative member. If the representative member has itself ceased to exist exceptional treatment would obviously be required, but for present purposes it is unnecessary to consider that possibility. As long as the representative member remains in existence, it can continue to embody and represent the affairs of the group. In the present case Carlton left the appellant's VAT group on 23 January 1998, and the appellant ceased trading and applied for deregistration from VAT in February and March 2009. Neither of these events is relevant to the status of the appellant as representative member in respect of transactions that took place during the period when the VAT group existed; all liability for VAT on trading activities during that period remains that of the appellant as representative member. Correspondingly, any entitlement to a VAT repayment in respect of trading activities during that period must remain that of the appellant as representative member. That appears to us to be inherent in the very notion of the representative member as embodying the VAT group: all rights, obligations, powers and liabilities in relation to VAT are, so far as HMRC are concerned, those of the representative member and no one else, subject only to the joint and several liability imposed by the final part of section 43(1)."

152. Lloyds says that the issues before us were not addressed and did not need to be addressed by the Court of Session in *Taylor Clark*. The question before the court was whether a claim had been made on behalf of the representative member, not whether the RWS was entitled; there was not the same detailed argument on that point as there was before us.

153. Standard Chartered says that before the Court of Session it was clearly in the interests of both HMRC and Taylor Clark to treat the single taxable person as embodied in the representative member. Mr Eicke says that the decision proceeded on the basis of concessions not made before this tribunal: Taylor Clark Leisure was unlikely to assert that Carlton had borne the economic burden of the tax and that it rather than Taylor Clark Leisure could claim; it suited both parties to accept that the representative member embodied the group rather than that it represented it.

154. The principle of fiscal neutrality and the extent of *San Giorgio* rights were not, as Mr Hitchmough pointed out, expressly considered in the court's judgment in *Taylor Clark* but it was clear that the court had considered the analysis in *Lloyds/SC* in which those matters were addressed.

155. We accept that the question to be decided by the court was narrower than the argument addressed to us but (i) in the permission to appeal given by Lady Clark she said that the concept and legal implications of VAT grouping raised issues to be resolved not only for entitlement but for time bar also, and that their resolution depended on the correct understanding of the nature and concept of a VAT group, (ii) the judgment of the court indicates that it regarded the conceptual structure as fundamental to its analysis ([13]) and it conducted a considered analysis of that

framework, and (iii) the court's conclusion that the claim succeeded was the result of: (a) its finding that all rights in relation to VAT were and remained those of the representative member, together with (b) that Carlton was the agent of Taylor Clark Leisure.

156. Mr Eicke also criticises the approach of the Court of Session in [13] where it speaks of the single taxable person concept as being "mediated through" the structures found in section 43 *et seq*. We reject that criticism: the process of putting EU law concepts into domestic law can properly be described as mediation, and it is clear that the court uses "mediating" in the sense of bringing about or communicating through an intermediary (namely the VAT Act and UK's legal systems).

157. MGR and Standard Chartered say that the Court of Session was wrong to adopt the terminology of the FTT in *Lloyds/SC* of treating the representative member as "embodying" the VAT group.

158. MGR says that it is wrong to regard the representative member as embodying the VAT group because:

> (i) *Skandia* and *Ireland* show that the single taxable person is the VAT group; and no single member can be the VAT group;
>
> (ii) Lord Nolan's description of the representative member as being treated as carrying on the members' businesses and dealing with them "on behalf of them" with third parties is inconsistent with treating the representative member as embodying the group. The representative member represents those members and does not embody the group.

159. Standard Chartered says that to identify one member of the group as retaining its own identity as a taxpayer is contrary to the decisions in *Ampliscientifica* and Skandia which require that none of the members be recognised as a taxpayer.

160. In our view it all depends on what is intended by "embodies". It seems to us that if used in the sense of making tangible or providing a home in the domestic legal order rather than being equivalent to "is", its use does not fall foul of the crimes laid at its door by Mr Hitchmough or Mr Eicke. Seen that way "embodies" does not suppose that the representative member is the VAT group or is the notional taxable person, but indicates that the representative member provides a domestic enactment of the effect of the required fiction. In particular the representative member does not "retain" its identity as a taxable person because, in the clothes it is given, it carries on other businesses.

161. Even if the analysis by the Inner House of the nature of the grouping provisions could be seen as *obiter*, we agree with its conclusions and see no reason to depart from them in the absence of any conflicting authority. We set out our reasoning below.

Discussion

162. What constraints do EU law and Article 4(4) put on an implementation by a member state so far as concerns the rights and liabilities of a member of the group?

163. The words of Article 4(4) are sparse and merely require an implementation to treat several persons as a single taxable person. The context of those words is a set of provisions dealing with the nature of taxable persons. That context is relevant to determining whether a supply is taxable and on whom the obligations and rights which arise under the directive fall (for they fall only on taxable persons). The purpose of the provisions is administrative simplification and the avoidance of abuse.

164. Any implementation must also pay due regard to EU law principles of legal certainty, fiscal neutrality and effectiveness.

165. Those factors guided the CJEU's decision in *Ampliscientifica* that implementing legislation must have the effect that members were not individually to be recognised as taxable persons, and in *Skandia* that the individual identity of the members was to be disregarded for VAT purposes. It is also an inevitable consequence of these factors that supplies between members of the group must be disregarded.

166. Those factors lead us to conclude that any implementation must: provide simplified administration, provide that members of the group be treated as if they were a single taxable person and not taxable persons in their own right, and have regard to other principles and EU law in particular that of fiscal neutrality.

167. But neither the words, context nor purpose of Article 4 (4) specify how the rights and obligations of the notional single person accrued to the actual persons who are members of the group. Those rights and obligations have to take effect under the scheme of each member state's national law. The way in which they are recognised falls within the margin of discretion afforded to the member state as long as it recognises the relevant requirements.

168. In our view, the scheme created by section 43 may easily be read as giving effect to these requirements. The transactions undertaken by each member are treated as if undertaken by one person, each individual member is no longer a taxable person and intra group transactions are disregarded. This reflects and satisfies the requirement that members are treated as if they were a single person.

169. The scheme reflects and satisfies the requirements for simplicity of administration: it provides one principal point of contact for HMRC.

170. In making the members of a group jointly and severally liable for VAT due the scheme strays from simplicity but translates the requirements that members must be treated as a single person and thus have the liability of a single person. The choice of joint and several liability as the domestic implementation falls, in our view, within the margin afforded to a member state as necessary for the proper collection of the tax and the avoidance of abuse. No provision needs to be made for reimbursement of tax or allocation of liabilities between members in order to satisfy either simplicity, the object of treating all the members as if they were a single entity, or the avoidance of abuse: that may be left to the members of the group to agree among themselves or, in the absence of agreement, by application of ordinary legal principles of UK law.

171. To give effect to the requirements of Article 4 (4) that all members are treated as one, and that none is in its own right treated as a taxable person, the representative member of section 43 must, in our view, be understood as a continuing entity (perhaps

akin to a corporation sole whose role is fulfilled by whoever holds the relevant office at any time). Thus actions, liabilities and rights of an old representative member must be ascribed to the new representative member on a change of representative member. That construction is also supported by administrative simplicity and the avoidance of abuse.

172. As the members are to be treated as a single person they must be treated as having the rights of the single person. The Directive does not prescribe how that should be done. The member state has a discretion to be exercised within the parameters of the principles of Articles 4(4) and EU principles such as neutrality. Whereas in relation to liabilities the avoidance of abuse and the need to be able to secure collection of the tax means that joint and several liability provided a proper implementation, in the case of rights such as those to repayment, simplicity permits construing section 43 in accordance with its terms as providing that only the representative member has the rights of a taxable person for the purposes of the Act. That construction does not offend fiscal neutrality or legal certainty for reasons already discussed.

173. Section 80 does not expressly restrict the persons who may make a claim to taxable persons but provides that any repayment falls to be made to the person who has accounted for (subsection (1)) or been assessed to (subsection (1A)) or has, in other circumstances paid the tax (subsection 1(1B)). The Act however imposes the obligation to account on a taxable person, and assessment under section 73 may be made on a person with an obligation to make a return (a taxable person). Thus the Act provides only the representative member with the associated rights to make a claim under those provisions.

174. That implementation is in our view such as to give effect to the requirements (1) that all members be treated as having the right of a single person, (2) that only one person be recognised as a taxable person and (3) of simplicity. It does not affect the neutrality of the tax.

175. We conclude therefore that a construction of section 43 and section 80 under which the only person entitled to receive payment in the section 80 claim is the representative member for the time being is not only a permissible construction but is one which is required by the words and purpose of section 43.

176. In our view any right arising under the *San Giorgio* line of cases is to be treated in the same way as a right such as that to the credit of input tax arising under express provisions of the VAT legislation. Those rights are to be recognised as the rights of a single person. Vesting them in the representative member achieves the effect of treating all the members as one taxable person because they are free to deal between themselves with the benefits arising from such rights.

177. In effect, Article 4(4) invites, and section 43 provides, a two stage process. At the first stage the VAT rights and obligations of a notional single person are determined. In the second stage those rights and obligations are attributed to the members who have been treated as that single person. That is different from treating the members as holding the rights and obligations which they would have held absent grouping; and it is not treating them as several taxable persons, but attributing to them the rights and obligations which would arise to the single person they are treated as being.

178. In the first part of this process a *San Giorgio* right may be recognised in favour of the notional single person just as a right to the credit of input tax is recognised in favour of that person. It is a right of that notional person which the actual members are treated as being and thus is a right of those members to be exercised through the representative member, and not a right of any particular one of them. By adjusting the rights and obligations of that notional taxpayer the neutrality of the tax is preserved and the member state disgorges the tax wrongly collected. The right may be defeated if the actions of the members who are treated as the single person have been such as to pass on the tax to another. A person to whom the tax has been passed on under the VAT system such as a final consumer might also acquire such a right, but the right does not accrue to other persons such as financiers or individually to the group member who may have borne or financed the cost otherwise than in accordance with the scheme of the tax. It does not therefore accrue to a member who has financed the payment of the tax by virtue of arrangements made among the group.

179. The second stage is the allocation of that right of the notional person to the real members. They are to be treated as having that right. If the member state provides a mechanism to enable them to receive the benefit of the repayment, it acts within the authority given to it by Article 4(4). The UK's attribution of the rights to the representative member achieves that purpose in a system in which companies may voluntarily become members of a group. The member state is not required to unravel the grouping to investigate whether any one particular member has a particular interest in any right but to treat the members as one; section 43 has that effect – the only relevant person is the representative member. Affording the right to the representative member satisfies the obligation to provide it to the members. No right arises to any of them unless it is virtually impossible for the representative member to exercise it.

180. Despite Mr Scorey's protestations to the contrary it does not seem to us to be a simple process to disentangle the rights and obligations of a member on its leaving a group. Not only does *Thorn Materials* require the intra group transactions to continue to be disregarded, but complexities arise in relation to the netting off of input and output tax and partial exemption calculations which although they may be solvable involve considerable complexity.

181. We see nothing in Article 4, its context or purpose, or in the principles to be taken from the CJEU judgments concerning Article 4(4), which requires that the rights held by a member in respect of things which took place while it was one of those treated as a single person to change by virtue of its ceasing to be a person so treated, whether that arises from its leaving the group or from the group being dissolved. To our minds the object of simplification, and the words and the context of Article 4(4), require that transactions which took place during the currency of group treatment do not cease to be subject to that regime when a member leaves a group or a group is disbanded. The effect as regards those transactions is intended to be permanent. The member remains, as regards those transactions, one of the members treated as being the single taxable person and the implementation of rights and obligations remains subject to the effects of treating those members as a single taxable person. In the UK's implementation of Article 4(4) those effects include treating the representative member as the only person eligible to claim under section 80.

182. That is consistent with the approach taken by Lord Nolan in *Thorn Materials* in which he did not regard the fact that the supplier had left the group as affecting the

operation of section 43 as regards intra group transactions which had taken place while it had been a member of the group. It is inconsistent with Mr Hitchmough's reading of paragraph3.4.4 of the Commission Communication. However, not only do we not read it as unambiguously indicating a different view but also we note that it has no binding effect.

183. We conclude that section 43 requires and Article 4(4) permits rights in relation to wrongly paid tax arising under section 80 to be held only by the representative member both before and after the relevant RWS has left the group, or the group has been dissolved.

Special cases

184. There may be cases, for example where a group is dissolved and the representative member has been irrevocably dissolved, in which it is virtually impossible for wrongly paid tax to be recovered through the representative member. That is not the situation in any of the appeals. If it arose it might, depending on the facts, be necessary to provide some other method by which the members could be treated as having the rights that would be ascribed to the representative member.

Our conclusions (i) The Decision in *Lloyds/SC*.

185. For the reasons set out above we conclude that the FTT in *Lloyds/SC* came to the correct conclusions for the correct reasons. We therefore dismiss the appeals against that decision.

Our conclusions (ii) The Decision of the FTT in *BMW/MGR*

186. For the reasons set out above we have come to a different conclusion on the operation of Article 4(4) and section 43 from that of the FTT in *BMW/MGR*. We should explain how we differ from the reasoning of the FTT.

187. Whilst the FTT described its reasoning as first considering section 43 without regard to Article 4, it stated the purpose of section 43 in the precise terms of Article 4(4) (see [200] of its decision quoted at [69] above). It erred however in not attempting to construe section 43 by reference to Article 4(4).

188. The FTT treated section 43 as a deeming section and, on the basis of its view of the purpose of the provision and the anomalies it considered would otherwise arise, concluded that the deeming should cease with retrospective effect after a RWS left the VAT group.

189. The FTT considered that the purposes of section 43 were not fulfilled if companies "no longer in common control are yet treated to some extent as grouped" (which had the effect that rights arising by reference to transactions which took place prior to leaving the group remained governed by the provision). We disagree. The purpose of section 43, whether seen on its own as a piece of domestic legislation untrammelled by EU law, or as an implementation of Article 4(4), is simplification; that clearly means that when group treatment is applied it must have a permanent effect on all the transactions which occurred during its application and should not be unwound. The permanence of that effect does not mean that after the cessation of

membership a company is "treated to some extent" as if it continued to be a member of the group; it is treated as having the rights and obligations which arose to it as a member, that is to say as one of the members who were treated as a single person, while it was grouped.

190. The FTT also regarded the preservation of rights and obligations arising prior to leaving a group as having anomalous results in the following situations. For the reasons given we do not regard those consequences as absurd or anomalous:

(1) The first situation was that in which a RWS, having made a supply, left the group and was no longer able to recover overpaid VAT on the supply – perhaps because the representative member would no longer be concerned with the interest of that RWS ([109]).

This does not seem absurd to us. The RWS would have been able to come to some agreement with the other members during its membership of the VAT group or on its leaving the group: it might be expressly agreed that the benefit of any claim remain with the other members of the group. That would not be absurd. If no provision was made but the same result obtained that would be no different.

(2) The second example was that in which the RWS made a supply on which VAT was underdeclared when it was part of a group of which A was the representative member, and then later, after the RWS had left the group and B joined the group and become the representative member, B was assessed for the VAT on that supply ([112] to [118]).

It seems to us that there is nothing absurd in this. If B joined the group or became representative member it did so because it or its controller applied. There is nothing absurd in expecting B to step into the shoes of A even as regards an obligation attributable to the actions of a long gone RWS.

(3) The third example related to bad debt relief. The FTT considered that it would be absurd if only the representative member could make a bad debt claim ([137] to [159]).

As we have explained earlier we disagree: it would be quite possible for the RWS to make arrangements giving it the benefit of any claim when it left the group.

191. Even if these examples showed the existence of anomalies, when construing a domestic provision in the light of a Directive such matters weigh in the balance only to the extent that they are matters of the construction of a discretion given to the member state where there is no relevant governing principle of EU law, or they are anomalous in the context of the purpose of the Directive or principles of EU law. None of these examples fall into the second category, and in our view the simplification purpose of the Directive means that they do not fall into the first.

192. The FTT also considered that section 43 failed to implement Article 4(4) for three reasons.

193. First it said that the representative member was made a taxable person whereas Article 4(4) required the taxable person to be the VAT group. We do not agree with this critique. The Inner House of the Court of Session regarded the concept of the

single taxable person as being mediated through the structure of section 43. That to our minds describes the process of aligning the concept of the single taxable person with the legal persons in the VAT group. In that process the representative member is not treated as a taxable person by virtue only of its own activities, but by virtue of those of the members. Making the representative member the taxable person fulfils the purpose of treating the notional single taxable person as the only taxable person.

194. Second, it said that Article 4(4) implied that all the members would be responsible for compliance, and whereas section 43 made them jointly liable for the VAT, it did not make them liable for reporting and other compliance. We accept that a member state implementing Article 4(4) could make all members of a VAT group liable for compliance (and that is the approach taken in paragraph2 Sch 1). But it lies within the discretion of the member state to provide an administratively simple mechanism for collection and administration of the tax, and the section 43 regime does that.

195. Third, the FTT said that Article 4(4) required that the member state give all members equal rights as well as equal liabilities. To our minds treating the members as a single person does not require equal entitlement. There must be a mechanism under which the notional entitlement of the single person can be claimed and received by one or more legal persons, but allowing the members to deal with the receipt between them fulfils the requirement that they should have the entitlement of the notional single person.

196. For the reasons given we conclude that the FTT erred in law. We therefore set aside its decision. We remake that decision by finding that, on the preliminary issue and the relevant assumptions, BMW was entitled to make the section 80 claims.

Determining the economic burden: the second hearing

197. Ground 8 of Standard Chartered's grounds of appeal is that the FTT failed to find on undisputed facts that it had borne the economic burden of the wrongly collected VAT. The FTT said that it did not need to make such a finding as it had found that it was only if the economic burden had arisen through the operation of the tax system that a *San Giorgio* claim could lie. Before us Standard Chartered asks that we make four factual findings which it says are related to whether it bore that burden namely:

(1) It owned and controlled Chartered Trust,

(2) It had a policy that Chartered Trust's profits should be dividended up,

(3) It made capital injections to Chartered Trust when it was short of money, and

(4) On its selling Chartered Trust no account was taken of the tax claims now at issue.

198. Section 12 Tribunals Courts and Enforcement Act 2007 ("TCEA") provides that if this tribunal decides that a decision of the FTT involved the making of an error of law it may set aside the decision and may either remake it or remit it to the FTT. If it remakes the decision section 12(4) provides that it may make such factual findings as it considers appropriate.

199. In *HMRC v Pendragon plc* [2015] UKSC 37, [2015] 3 All ER 919, Lord Carnwath suggested a flexible approach to the jurisdiction given to this provision where the contested issue was one of mixed fact and law, but accepted that the "tribunal's power to intervene had to begin from a finding of an error of 'law'." ([53]).

200. We have not found an error of law in the *Lloyds/SC* decision (for completeness we do not regard its failure to find the facts Standard Chartered sought to be such). But Mr Eicke says that for us to make the findings he seeks would be in line with the overriding objective because if there is a subsequent appeal, it would provide the appellate court with the view of a specialist tribunal.

201. We decline to make the findings sought for three reasons:

202. First, we do not consider we have jurisdiction so to do. Although section 12 does not proscribe fact finding outside its specific provisions, it is the only provision of TCEA which confers relevant powers on tribunal proceedings, and the limitation of the fact finding powers it confers must exclude an interpretation of the Act under which wider powers are conferred on the tribunal.

203. Second, the overriding objective is a creature of the tribunal's rules which were made under the Act and cannot enlarge the jurisdiction conferred by the Act. Although paragraph16 Sch 5 TCEA permits the rules to confer ancillary powers on the tribunal it does not seem to us that a power to find facts where we have found no error of law is ancillary to the powers conferred under the Act.

204. Third, we have not addressed the computation of the economic burden should we be wrong in our dismissal of Mr Eicke's argument. There may be factors relevant to that computation such perhaps as the extent to which Standard Chartered itself passed on any burden in similar ways which may be relevant. There is no advantage in making specific findings when the basis of the computation may be at large.

A Reference to the CJEU

205. We do not think it necessary to make a reference to the CJEU. We have been able to reach a conclusion on the requirements of Article 4(4) as they affect section 43 in the circumstances of these appeals with confidence. Whilst there is no decision of the CJEU in which the issues before us have been addressed, the applicable principles are, in our view, clear.

Mr Justice Warren

Judge Charles Hellier

JUDGES OF THE UPPER TRIBUNAL

RELEASE DATE: 19 October 2016