Neutral Citation Number: [2019] EWCA 485 Civ

Case No: A3/2017/0761, 0796, 0797, 0802

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL
(TAX AND CHANCERY CHAMBER)
WARREN J and JUDGE CHARLES HELLIER
[2016] UKUT 434 (TCC)
HENRY CARR J and JUDGE CHARLES HELLIER
[2016] UKUT 543 (TCC)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21/03/2019

Before :

LORD JUSTICE PATTEN
LORD JUSTICE HENDERSON
and
LADY JUSTICE ROSE

- -

Between :

(1) LLOYDS BANKING GROUP PLC **(2) BLACKHORSE LIMITED** **(formerly Chartered Trust Ltd)** **(3) MG ROVER GROUP LIMITED** **(4) STANDARD CHARTERED PLC** **(5) STANDARD CHARTERED BANK** **(6) 2016 G1 LIMITED (formerly GALA 1 LIMITED)**	**Appellants**
- and -	
(1) THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS	**First Respondents**
(2) BMW (UK) HOLDINGS LIMITED	**Second Respondent**

- -

David Scorey QC (instructed by **Forbes Hall LLP**) for the **First and Second Appellants**
Andrew Hitchmough QC and Jonathan Bremner QC (instructed by **Eversheds Sutherland (International) LLP**) for the **Third Appellant**
Kieron Beal QC (instructed by **PriceWaterhouseCoopers LLP**) for the **Fourth and Fifth Appellants**

Jonathan Peacock QC and Michael Ripley (instructed by **Ashurst LLP**) for the **Sixth Appellant**
Andrew Macnab and Peter Mantle (instructed by **General Counsel and Solicitor to HM Revenue and Customs**) for the **First Respondents**
Ian Glick QC, Victoria Wakefield, and Adam Rushworth (instructed by **Norton Rose Fulbright**) for the **Second Respondent**

Hearing dates: 21, 22, 23 and 24 January 2019

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Approved Judgment

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Lady Justice Rose:

I. INTRODUCTION

1. From time to time it becomes apparent from a domestic or EU court ruling or after a reconsideration by HMRC that HMRC have been collecting VAT from businesses registered as taxable persons on the basis of an incorrect interpretation of the law and that the VAT collected was not as a matter of law due. The mistakes relevant to the present appeals arose in relation to the VAT treatment of the earnings of bingo halls, the cash discounts paid to purchasers of fleet cars and sums arising from the sale of fleet cars on hire purchase where the purchaser defaults and the car is sold before the hire purchase contract has run its course.

2. The case law of the Court of Justice of the European Union has established that where a member state has levied unlawful duties or taxes, it must reimburse a claimant who has paid those taxes. This right is generally referred to as the *San Giorgio* right after the judgment in *Amministrazione delle Finanze dello Stato v SpA San Giorgio* (Case 199/82) [1983] ECR 1595. Such a claim can be brought against HMRC under section 80 of the Value Added Tax Act 1994 ('VATA'). That provides, broadly, that where a person has accounted to HMRC for VAT and has brought into account as output tax an amount that was not output tax due, HMRC shall be liable to credit the person with that amount.

3. The issues that arise in these appeals concern who has a right to claim back the tax in a situation where the goods or services on which the tax was wrongly levied were supplied by companies which were at the time of the supply members of a VAT group formed pursuant to the UK legislation implementing article 11 of the Council Directive 2006/112/EC on the common system of value added tax ('PVD'). Article 11 provides that member states "may regard as a single taxable person" any persons established in its territory who although legally independent are closely bound to one another by financial, economic and organisational links. Article 11 thus permits but does not require member states to adopt provisions for VAT grouping. The UK has chosen to make such provision and has enacted what are now sections 43 to 44 VATA for that purpose. One of the main issues in this case is whether those provisions, in conjunction with section 80 VATA, correctly implement the EU Directive provision and confer the rights that EU law requires. When companies apply to HMRC to be treated as a VAT group, they must appoint one of them as the "representative member" of the VAT group. Section 43(1) then provides that any business carried on by a member of the VAT group shall be treated as carried on by the representative member. Where HMRC grants an application for the formation of a VAT group, a VAT registration number is provided to the representative member and that representative member accounts to HMRC for all the VAT arising from supplies of goods or services by the members, who are referred to in these proceedings as the "real world suppliers".

4. If it later becomes apparent that some of the output tax accounted for by the representative member was not lawfully due, and at the time that a claim for a refund is made the real world supplier is still a member of the VAT group, all the parties to these appeals accept that it is the representative member which is entitled to bring the claim under section 80 to recover the overpaid VAT. The parties also accept that the domestic law is compliant with article 11 to that extent. The issue that arises is what happens if the real world supplier has left the VAT group at the time the claim is made.

HMRC have responded to the claims for the refund of overpayments made by the parties to these appeals by accepting the claims of the representative member of the VAT group and refusing claims by real world suppliers who have left the VAT group. Further, HMRC have applied this policy even where the VAT group has been dissolved by the time the claim is made, regarding the correct claimant under section 80 as the last representative member of the VAT group before dissolution.

5. The Upper Tribunal decisions challenged in these appeals upheld HMRC's interpretation of UK domestic law. In opposing the appeals to this Court, HMRC contend that their hand has been greatly strengthened by the decision of the Supreme Court delivered in July 2018 in *Taylor Clark Leisure plc v Revenue and Customs Commissioners* [2018] UKSC 35, [2018] STC 1556 ('*Taylor Clark*'). HMRC submit that *Taylor Clark* is binding on this Court and decides not only that as a matter of domestic law the correct claimant is the representative member in all these cases but also that section 43 VATA is a permissible and compliant implementation of article 11.

6. The Appellants accept, as they must, that the Supreme Court's decision is binding as to the proper interpretation of the domestic law provisions. They maintain, however, that those provisions are not compliant with article 11 and that that is an issue which was not before the Supreme Court in *Taylor Clark* and was not determined by it. They therefore submit that this Court should find that sections 43 and 80 VATA read together infringe EU law and that they must be construed, applying the principles established in *Marleasing SA v La Comercial Internacional de Alimentación SA* (Case C-106/89) [1990] ECR I-4135 ('*Marleasing*'), to bring them into compliance in such a way as to allow these Appellants to claim back the overpaid tax from HMRC.

II. THE LAW: VAT GROUPING

(a) The EU provisions

7. Article 11 PVD provides:

> "After consulting the advisory committee on value added tax (hereafter, the 'VAT Committee'), each Member State may regard as a single taxable person any persons established in the territory of that Member State who, while legally independent, are closely bound to one another by financial, economic and organisational links.
>
> 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."

8. The predecessor to article 11 was article 4(4) of the Sixth Council Directive harmonising value added tax (Directive 77/388/EC) ('the Sixth Directive'). Article 4(4) was in similar terms providing that each member state "may treat as a single taxable person persons established in the territory of their country who, while legally independent, are closely bound to one another by financial, economic and organisational links." The appeals before us proceeded on the basis that there was no material difference between article 11 PVD and article 4(4) of the Sixth Directive. I

shall refer to article 11 in this judgment, although article 4(4) applied during some of the periods to which the appeals relate.

9. The term "taxable person" used in article 11 is defined in article 9 PVD. That provides:

> "1. 'Taxable person' shall mean any person who, independently, carries out in any place any economic activity, whatever the purpose or results of that activity.
>
> Any activity of producers, traders or persons supplying services, including mining and agricultural activities and activities of the professions, shall be regarded as 'economic activity'. The exploitation of tangible or intangible property for the purposes of obtaining income therefrom on a continuing basis shall in particular be regarded as an economic activity."

(b) The domestic law provisions

10. The United Kingdom took up the opportunity to establish VAT groups of companies. The current provision is in section 43 VATA, as amended:

> "**43.— Groups of companies**
>
> (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 all members of the group shall be liable jointly and severally for any VAT due from the representative member."

11. Sections 43A and 43AA deal with the controlling links which must be established if two or more bodies are to be eligible to be treated as members of the group. Section 43B deals with applications to HMRC for the formation of the group and for changes to who is treated as being a member of the group:

> "**43B.— Groups: applications.**
>
> (1) This section applies where an application is made to the Commissioners for two or more bodies corporate, which are eligible by virtue of section 43A, to be treated as members of a group.

> (2) This section also applies where two or more bodies corporate are treated as members of a group and an application is made to the Commissioners—
>
> (a) for another body corporate, which is eligible by virtue of section 43A to be treated as a member of the group, to be treated as a member of the group,
>
> (b) for a body corporate to cease to be treated as a member of the group,
>
> (c) for a member to be substituted as the group's representative member, or
>
> (d) for the bodies corporate no longer to be treated as members of a group.
>
> (3) An application with respect to any bodies corporate—
>
> (a) must be made by one of them or by the person controlling them, and
>
> (b) in the case of an application for the bodies to be treated as a group, must appoint one of them as the representative member."

12. Section 43B also provides that the Commissioners may refuse an application if the bodies corporate are not eligible or if the refusal is necessary for the protection of the revenue.

13. Section 43 thus does not itself make the representative member a 'taxable person' subject to obligations and rights under VATA. That is left to other provisions of the Act. The effect of those provisions is that if the aggregated value of the transactions in the businesses deemed by section 43 to be carried on by the representative member exceeds the threshold set in Schedule 1 to VATA, the representative member becomes a taxable person under section 3.

(c) The main European authorities on VAT grouping

14. There have been a number of important decisions by the Court of Justice of the European Union ('CJEU') clarifying the scope and effect of the VAT grouping provision. None of those cases has addressed the relationship between VAT grouping and the *San Giorgio* rights arising from the unlawful levying of tax. Although none of the cases is directly in point, the Appellants rely on them to show first the context and objectives of the VAT grouping rules, those being relevant to their proper interpretation, secondly, the limited extent of the member states' discretion when implementing the provision in domestic law and thirdly the way in which the CJEU refers to the consequences of the introduction of the 'single taxable person'.

15. The first case to which we were taken was *Ampliscientifica Srl and another v Ministero dell'Economia e delle Finanze and another* (Case C-162/07) [2011] STC 566 ('*Ampliscientifica*'). This preliminary reference concerned an Italian Ministerial Decree adopting rules on VAT relating to payments and declarations by subsidiary

companies. The question arose whether the Decree was a transposition by Italy of article 4(4) of the Sixth Directive. The CJEU noted that Italy had not consulted the VAT Committee before adopting the Decree. The Court then identified the elements that domestic legislation would need to contain to be regarded as implementing the VAT grouping provisions. Article 4(4) necessarily requires the national implementing legislation to provide "that the taxable person is a single taxable person and that a single VAT number be allocated to the group": [20]. It was therefore distinguishable from other mechanisms for simplifying VAT declarations and payments which enabled, for example, companies within the same group to remain separate taxable persons but to consolidate VAT in the accounts of the parent company. The Court therefore held that:

> "23 … the second sub-paragraph of art 4(4) of the Sixth Directive is a provision which, in order to be implemented by a member state, requires prior consultation by that state of the Advisory Committee on VAT and the adoption of national legislation authorising persons, in particular companies, established in the territory of that country who, while legally independent, are closely bound to one another by financial, economic and organisational links, no longer to be treated as separate taxable persons for the purposes of VAT in order to be treated as a single taxable person to whom a single VAT identification number is allocated and, accordingly, the sole person entitled to submit VAT declarations. …"

16. In *European Commission v Ireland* (Case C-85/11) [2013] STC 2336 ('*Commission v Ireland*') the European Commission brought infraction proceedings against Ireland because the Irish domestic provisions implementing article 11 permitted entities which did not fall within the definition of taxable persons in article 9 to be included in a VAT group, provided that at least one member of the group was a taxable person and all the members were closely bound by financial, economic and organisational links. The Commission argued that it was implicit in article 11 that the reference to 'any persons' meant any taxable persons. Ireland argued that permitting non-taxable persons, especially holding companies, to be members of the VAT group might promote the prevention of tax avoidance and/or evasion and had the advantage of imposing joint and several liability on the holding company where trading members of the group ran into difficulties in paying VAT that was due.

17. The judgment of the CJEU (Grand Chamber) began its analysis by recalling that in determining the meaning of a provision of EU law, the objectives, context and wording of the law must all be taken into account: [35]. The Court first concluded that the literal wording of article 11 did not rule out the inclusion of non-taxable persons. It then examined whether such an interpretation was consistent with the objectives and context of the article. The Court described the objectives of article 11 as simplifying administration and combating abuses to ensure that member states would not be obliged to treat as taxable persons "those whose 'independence' is purely a legal technicality": [47]. The Court dismissed the infraction proceedings:

> "48. It is not evident that the possibility for member states to regard as a single taxable person a group of persons including one or more persons who may not individually have the status of a taxable person runs counter to those objectives. It is, on the

> contrary, conceivable that, as Ireland and the interveners have submitted, the presence, within a VAT group, of such persons contributes to administrative simplification both for the group and for the tax authorities and makes it possible to avoid certain abuses, and that that presence may even be indispensable to that end if it alone establishes the close financial, economic and organisational links which must exist between the persons constituting that group in order for it to be regarded as a single taxable person."

18. The Court's reasoning in *Commission v Ireland* followed closely that of Advocate General Jääskinen's Opinion in the case. He noted, [36], that the conclusion that a single taxable person might include any legally independent persons provided that they were closely bound to one another was "in conformity with the principle of legal certainty, which is particularly important in taxation matters, where not only taxable persons and tax authorities but also the member states need to rely on the clear and precise wording of the relevant European Union law". The Advocate General described the effect of the formation of a VAT group in the broader context of the VAT regime. He said that "[t]he forming of a VAT group results in the creation of a single taxable person for VAT purposes which is in all aspects comparable to a taxable person consisting of only one entity." [40]. The VAT regime works best, he said, when the imposition of the tax does "not affect either competition or the decisions economic operators make when organising their activities, such as legal form or organisational structure." [41]. He went on: (footnotes omitted)

> "42. The establishment of a VAT group initiates the tax liability of the VAT group, and terminates the separate tax liability of those of its members who were taxable persons for VAT purposes before joining the group. The VAT treatment of the group's transactions, both to and from entities outside the group, is comparable to VAT treatment of the single taxable person operating individually. Transactions between the individual members of the group, and which remain therefore within the group, are considered as having been carried out by the group for itself. Consequently, a VAT group's internal transactions do not exist for VAT purposes."

19. Advocate General Jääskinen noted the beneficial effects of membership of a VAT group for the members but emphasised that VAT grouping allows member states to diminish the influence of VAT on the way economic operators organise themselves.

20. A few days after it handed down the judgment in *Commission v Ireland*, the Court handed down judgment in *European Commission v United Kingdom* (Case C-86/11) [2013] STC 2076 ('*Commission v UK*'). In that judgment it dismissed similar infraction proceedings brought by the Commission against the United Kingdom because the scheme created by section 43 VATA also allowed non-taxable persons to be members of a VAT group. That was the only basis on which the Commission challenged the compliance of the UK regime with article 11. Again, the CJEU held that the proper interpretation of articles 9(1) and 11 PVD did not require that every person referred to in article 11 must individually satisfy the general definition of a taxable person set out in article 9, provided that the persons taken together were closely bound to one another

by financial, economic and organisational links, and collectively satisfied that definition: [41].

21. The ability of the member state to decide who is entitled to benefit from VAT grouping was also considered by the CJEU in *European Commission v Sweden* (Case C-480/10) [2013] ECLI:EU:C:2013:263 1, where the Court dismissed infraction proceedings brought by the Commission because Sweden had limited the application of the VAT grouping provisions to suppliers of financial and insurance services. Later, in *Beteiligungsgesellschaft Larentia + Minerva mbH & Co KG v Finanzamt Nordenham* (Joined Cases C-108/14 and C-109/14) [2015] STC 2101 ('*Larentia + Minerva*') the CJEU returned to the question of eligibility in a preliminary ruling on a reference from the Federal Finance Court in Germany. The German VAT grouping law limited membership of the VAT group to legal persons, thereby denying partnerships the possibility of being "integrated into the undertaking of another taxable person". German domestic law further required that the integration of those legal persons was only possible where they were in a relationship of control and subordination. The German court asked whether, if the domestic law was incompatible, article 4(4) could be relied on directly by taxable persons.

22. The CJEU in *Larentia + Minerva* recognised that there were two questions raised. The first was whether the wording of article 4(4) itself ruled out the inclusion of members which did not have legal personality. The Court held that it did not. The wording of article 4 did not make the availability of VAT grouping subject to any condition other than that the members of the group be closely bound by financial, economic and organisational links. Nor did the article expressly allow member states to impose other conditions on economic operators before they could form a VAT group. The next question was therefore whether the margin of discretion enjoyed by member states allowed them, nevertheless, to exclude entities which do not have legal personality. The Court referred to the earlier case of *Commission v Sweden* (Case C-480/10) (unreported) as establishing that member states in the context of their margin of discretion were entitled to make the application of the VAT group scheme subject to certain restrictions "provided that they fall within the objectives of that directive to prevent abusive practices and behaviour or to combat tax evasion or tax avoidance": see [41]. It was for the national court to determine whether the exclusion of entities lacking legal personality and the requirement of the relationship of control were necessary and appropriate conditions for attaining those objectives. The Court agreed with the opinion of Advocate General Mengozzi that since the conditions for the necessary closeness needed to be specified at national level, article 4(4) did not satisfy the conditions for direct effect.

23. Advocate General Mengozzi in *Larentia + Minerva* noted that the effect of grouping was that "since the VAT group is regarded as a single taxable person, the entities forming it do not continue to submit VAT declarations separately or to be identified, within and outside their group, as taxable persons." [48]. He said that the question whether a member state retains a margin of discretion as regards the 'persons' whom they consider to be eligible for participation in VAT groups within their territory called for 'a nuanced response': [66]. He referred to earlier case law which appeared to confer a margin of discretion on member states when they exercise the option provided for in article 4(4) of the Sixth Directive "although that margin of discretion is subject to the pursuit of the objectives of art 4(4) of that directive in compliance with EU law.": [70].

He concluded therefore that the requirement of a relationship of control and subordination between the members of the group was not in itself incompatible with article 4, in view of the margin of discretion conferred on the member states. But "it must nevertheless be justified by the pursuit of the objectives of preventing abuse and tax evasion or avoidance in compliance with EU law, in particular the principle of fiscal neutrality." [97].

24. Finally, the parties referred us to *Skandia America Corp (USA), filial Sverige v Skatteverket* (Case C-7/13) [2015] STC 1163. Skandia America was an American company responsible for purchasing IT services for the companies in Skandia's corporate group. Skandia carried out its activities in Sweden through a branch. The branch was registered in Sweden as a member of a Swedish VAT group. According to the account of the facts in the Opinion of Advocate General Wathelet, the Swedish tax authority registered the Swedish branch as a taxable person and charged the amount of tax due to the branch. The branch contested this decision on the grounds that there was no legal basis for taxing a transaction between a main establishment and its branch or for registering the branch for VAT alongside its existing registration as a member of the VAT group. The first question referred by the Swedish court was whether the branch constituted a legally distinct entity from the American main establishment because it was a member of a Swedish VAT group. The Advocate General's opinion was that a branch could not of its own right belong to a VAT group in the member state where it was established, unless the company of which it formed a part was also a member of the same VAT group. He concluded that the branch was not a 'person' for the purposes of article 11 PVD. He then considered what the position would be if the Court concluded otherwise and held that the supply by the main establishment to the branch would be a taxable supply.

25. The CJEU arrived at a different conclusion from Advocate General Wathelet on the question whether it was possible for a branch to be a member of a VAT group. The Court recognised that the branch, Skandia Sverige, did not operate independently and did not itself bear any economic risk arising from its activities. It was not itself therefore a taxable person. The Court went on:

> "28. However, it is common ground that Skandia Sverige is a member of a VAT group, created on the basis of art 11 of the VAT Directive and therefore forms with the other members a single taxable person. For VAT purposes, that VAT group was allocated a registration number by the competent national authority.
>
> 29. In this connection, treatment as a single taxable person precludes the members of the VAT group 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 [citing *Ampliscientifica*]. It follows that, in such a situation, the supplies of services made by a third party to a member of a 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.

> 30. Therefore, for VAT purposes, the services supplied by a company such as [Skandia America] to its branch which, such as Skandia Sverige, belongs to a VAT group, are considered not to be supplied to that branch but must be regarded as being supplied to the VAT group.
>
> 31. Inasmuch as the services provided for consideration by a company such as [Skandia America] to its branch must be deemed, solely from the point of view of VAT, to have been provided to the VAT group, and as that company and that branch cannot be considered to be a single taxable person, it must be concluded that the supply of such services constitutes a taxable transaction, under art 2(1)(c) of the VAT Directive."

26. In addition to the case law of the CJEU, the Appellants referred us to the European Commission's view set out in the *Communication from the Commission to the Council and the European Parliament on the VAT group option provided for in Article 11 of Council Directive 2006/112/EC on the common system of value added tax* (COM(2009) 325 final) published on 2 July 2009 ('the 2009 Communication'). The Commission notes that the wording of article 11 is brief and leaves it up to the member states to lay down the detailed rules on the implementation of the VAT grouping option. It had become evident that there were wide divergences between the VAT grouping schemes implemented by member states. This might have an impact on the internal market and on the basic principles of the Community VAT system. The purpose of the 2009 Communication was therefore to explain the Commission's view on how the provisions of article 11 should be translated into practical arrangements. Paragraph 3.2 of the 2009 Communication refers to the essential effect of the VAT grouping option being that taxable persons are no longer to be treated as separate taxable persons "but as one single taxable person". In other words, the Commission states, citing *Ampliscientifica*, "a number of closely bound taxable persons are merged into a new single taxable person for VAT purposes." Whilst each member of the group retains its own legal form, for VAT purposes only, the formation of the VAT group is given precedence over legal forms. By joining the group the member "dissolves itself from any possible simultaneously existing legal form" and instead becomes part of a new separate taxable person, namely the VAT group. It follows that the group can only be identified by a single VAT number. The Commission expresses the view that the reference to 'persons' in article 11 applies only to those who fulfil the criteria for being a taxable person. That view was shown to be wrong in *Commission v Ireland*. The Commission also refers to supplies of goods being carried out "by the group itself" rather than by the individual member.

27. On the point which arises in these appeals the 2009 Communication says the following:

> "*3.4.4. Rights and obligations when a VAT group is formed or dissolved*
>
> At the same time as the VAT group becomes a single taxable person, the VAT rights and obligations of the individual members are automatically transferred to the VAT group. The same applies when a taxable person joins an already existing VAT group.

> …
>
> 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 in a situation where a member leaves the group."

(d) The domestic case law on VAT grouping

28. Apart from *Taylor Clark* which I discuss in detail below, there were two domestic cases on VAT grouping drawn to our attention by the parties. *Customs and Excise Commissioners v Thorn Materials Supply Ltd and Thorn Resources Ltd* [1998] STC 725 ('*Thorn*') concerned the VAT consequences of transactions carried out between vendors and purchasers all of which were members of the same VAT group at the time the sales contracts were made but not when those contracts were completed. In all cases the purchase price was payable as to 90% on the signing of the contract and as to the remaining 10% when the contract was completed by the delivery of the goods. The issue was as to the effect on those transactions of section 29 of the Value Added Tax Act 1983, the predecessor to section 43 VATA, in particular what was meant by the requirement that a supply by one member of the group to another must be disregarded. The appellants contended that VAT was payable only on the 10% because the 90% fell to be disregarded as an intra-group supply. The Commissioners argued that VAT was payable on the whole of the purchase price. Lord Nolan (at 732 of the STC report) accepted that VAT grouping does not mean that the separate existence of the appellants is to be denied or that the sale agreement and the prepayment are to be treated as not having taken place. What it did mean was that the 90% supply must be disregarded or ignored for tax purposes. The next question was: did it then follow that the supply of the goods to the extent of 90% was permanently excluded from the charge to VAT? This prompted Lord Nolan to consider the purpose of the VAT group provisions. He said that they 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 all with non-members." It was consistent with this approach that the 90% supplies should be disregarded because the purchaser and vendor were not to be treated as carrying on their own businesses at that time. But when the members left the VAT group, they emerged into the VAT world as separate taxable persons each carrying on its own business for VAT purposes. A supply then took place between them and the supply was for the total amount of consideration whether already paid or still payable. 100% of the consideration must relate to the post-group supply because the earlier supply which took place when the advance payment was made must be disregarded for VAT purposes.

29. The consequences of a member leaving the VAT group were considered by the Court of Appeal in *Customs and Excise Comrs v Barclays Bank plc* [2001] EWCA Civ 1515, [2001] STC 1558 ('*Barclays*'). In that case a subsidiary of a VAT group headed by Barclays Bank ceased to be controlled by the bank and therefore no longer satisfied the conditions for group membership. The question was whether it automatically ceased to be a member of the group or whether it remained a member until an application was

made to HMRC for cessation of membership under the predecessor provision to section 43B(2)(b). The Court of Appeal held that there was no automatic cessation of membership on change of control. The domestic provisions provided a sensible and workable scheme for entry to and exit from the group. Sir Andrew Morritt V-C said at [15] that although that might confer on the group the benefit of group relief for a limited period between the actual change of control and the date on which the tax authority responded to the application for the removal of the subsidiary, there was nothing in article 4(4) to exclude that limited benefit in the interests of providing for a scheme which was practically operable as a whole. Buxton LJ referred to the purpose of article 4(4) being to simplify and facilitate the collection of tax rather than introducing any fundamental change in liability to the tax itself. Member states are therefore "afforded latitude in the detailed collection arrangements that they make": [23]. Arden LJ noted that article 4(4) did not deal with the cessation of group status at all and there was no reason to conclude that it was inconsistent with the Sixth Directive for a member state to require an application to be made when a member left the group.

III. THE LAW: *SAN GIORGIO* RIGHTS

(a) The European case law

30. San Giorgio brought an action to recover health inspection charges that had been held by the Italian Constitutional Court to be unlawful. Its claim succeeded and the Italian court ordered that the charges be refunded. Italian law provided that a person who had paid duties which were unlawful under EU law was not entitled to a refund if he had passed on the charge in any way to other persons. Further, it provided for a presumption in favour of the charges having been passed on unless the taxpayer could show to the contrary. In its seminal judgment in *Amministrazione delle Finanze dello Stato v SpA San Giorgio* (Case 199/82) [1983] ECR 1595 ('*San Giorgio*'), the CJEU held that entitlement to the repayment of charges levied by member states contrary to EU law is a consequence of, and an adjunct to, the rights conferred on individuals by the EU law provisions prohibiting the charges. Although it is for national law to determine the substantive and procedural conditions applicable to such repayment claims, the conditions must not be framed so as to render virtually impossible the exercise of the rights conferred by EU law. The Court stated that EU law does not prevent a national legal system from disallowing the repayment of charges where to do so would entail the unjust enrichment of the recipients. National courts may therefore take into account under their national law the fact that unduly levied charges have been incorporated in the price of goods and thus passed on to purchasers. However, the national court must be free to decide that question without any presumption or rule of evidence placing on the taxpayer the burden of establishing that the charges have not been passed on, if that renders the exercise of the right virtually impossible.

31. The CJEU considered further the scope of the unjust enrichment defence on which a member state can rely to oppose a claim for the reimbursement of unlawfully levied charges in *Société Comateb v Directeur général des douanes et droits indirects and related references* (Joined Cases C-192/95 to C-218/95) [1997] STC 1006 ('*Comateb*'). This was the judgment of the CJEU on 27 references from the Paris District Court. Comateb had paid dock dues on goods brought into Guadeloupe. The dues imposed had previously been held by the CJEU to be unlawful but the customs authority refused to reimburse them. The customs authority pointed to French legislation which required undertakings to incorporate the charges into the price of the goods sold and it was not

disputed that the dues must therefore have been passed on to Comateb's customers. The question referred by the Paris Court was whether this legal position made it virtually impossible or excessively difficult for the claimants to obtain reimbursement.

32. The Court set out the *San Giorgio* principle and the unjust enrichment exception to that principle in the following terms:

> "21. There is, however, an exception to that principle. As the court stated in … *San Giorgio*, the protection of the rights so guaranteed by the Community legal order does not require repayment of taxes, charges and duties levied in breach of Community law where it is established that the person required to pay such charges has actually passed them on to other persons (…).
>
> 22. In such circumstances, the burden of the charge levied but not due has been borne not by the trader, but by the purchaser to whom the cost has been passed on. Therefore, to repay the trader the amount of the charge already received from the purchaser would be tantamount to paying him twice over, which may be described as unjust enrichment, whilst in no way remedying the consequences for the purchaser of the illegality of the charge.
>
> 23. It is accordingly for the national courts to determine, in the light of the facts in each case, whether the burden of the charge has been transferred in whole or in part by the trader to other persons and, if so, whether reimbursement to the trader would amount to unjust enrichment.
>
> 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."

33. The Court reiterated that the question whether an indirect tax has or has not been passed on in each case is a question of fact to be determined by the national court; national law must not create a presumption that the charges have been passed on.

34. Advocate General Tesauro in his opinion in *Comateb* had come to the opposite conclusion and advised that the fact that the claimants had passed the dock dues on to their customers should not prevent them from reclaiming the dues from the state: "if it is necessary to choose between the authorities of the member state which have for years violated Community law and a taxpayer who has paid to those authorities charges that were not properly due, it is certainly not the taxpayer who should be penalised": [22]. The alternative result would, he considered, undermine the protection to be afforded to the individual by Community law.

35. In *Comateb* the Court went on to describe a situation where even if the tax has been passed on in the price charged by the trader, repayment to the trader does not necessarily entail his unjust enrichment and so defeat a claim. The trader might have suffered damage if an increase in the price of his products led to a decrease in his sales. In such circumstances domestic law may allow the trader to claim that this damage excludes any unjust enrichment. The Court said:

> "35. … Where, although the charge has been passed on to the purchaser, domestic law permits the trader to claim that the illegal levying of the charge has caused him damage which excludes, in whole or in part, any unjust enrichment, it is for the national court to give such effect to the claim as may be appropriate."

36. In *Weber's Wine World Handels-GmbH and others v Abgabenberufungs-kommission Wien* (Case C-147/01) [2005] All ER (EC) 224 ('*Weber's Wine*') the Austrian Administrative Court referred questions concerning legislation introduced in anticipation of a judgment of the CJEU in a different case expected to hold that certain beverage taxes were unlawful. Such a ruling could have resulted in very large sums having to be reimbursed, seriously compromising local and regional finances. Legislation was rapidly enacted to provide that reimbursement was not required where the burden had been passed on to another person. The CJEU stressed that as the defence of unjust enrichment is a restriction on a subjective right derived from the Community legal order, it must be interpreted restrictively, taking account in particular of the fact that passing on a charge to the consumer does not necessarily neutralise the economic effects of the tax on the taxable person: [95]. The Court held that it would be contrary to EU law if the Viennese legislation entitled the state to refuse to repay on the sole ground that the charge was included in the trader's retail selling price and thus passed on to third parties, without requiring the degree of unjust enrichment that repayment of the charge would entail for the trader to be established: [102].

37. Advocate General Jacobs in *Weber's Wine* also stated that although national rules precluding unjust enrichment are compatible with EU law, it is necessary to look at any disputed rule carefully in order to be sure that it is truly limited to preventing unjust enrichment and does not also make it in practice impossible or excessively difficult to obtain reimbursement in other circumstances in which a right to reimbursement is required: [50]. The Viennese tax code precluded repayment where the economic burden of the duty had been borne by someone other than the taxable person. The substance of the rule would not therefore appear to affect any traders other than those who would indeed be unjustly enriched by reimbursement provided that the concept of "bearing the economic burden" of a tax included all suffering of economic loss as a result of being liable to pay it.

38. The circumstances in which a trader would be regarded as unjustly enriched if it was refunded the unlawfully levied tax were further considered in *Lady & Kid A/S and others v Skatteministeriet* (Case C-398/09) [2012] STC 854 ('*Lady & Kid*'). In that case the applicants were retailers who had applied to the Danish tax authorities for reimbursement of business tax they had paid, relying on a ruling by the CJEU that the tax was unlawful. When Denmark introduced the business tax, they had abolished a number of other employer charges which businesses had previously had to pay. The applicants' requests for reimbursement of the business tax were rejected by the tax

authorities on the grounds that the burden of the unlawfully levied tax had been offset by the abolition of the more onerous social security contributions. The questions referred to the CJEU by the Danish court asked whether the defence of unjust enrichment could be relied upon not only where the unlawfully charged tax had been passed on in the sale price of the goods but also where the amounts paid in tax were less than a saving made as a result of a concomitant abolition of other levies charged on a different basis.

39. The CJEU (sitting in Grand Chamber) held that since a refusal of reimbursement is a limitation of a subjective right derived from the legal order of the EU, it must be interpreted narrowly. Accordingly, the direct passing on to the purchaser of the tax wrongly levied constitutes the sole exception to the right to reimbursement of tax levied in breach of EU law. As *Comateb* had shown, the defence of unjust enrichment could not always be relied upon even where the charge is wholly incorporated into the price because the taxable person may suffer from a fall in the volume of his sales. The Court went on:

> "22. Similarly, the member state may not reject an application for reimbursement of an unlawful tax on the ground that the amount of that tax has been set off by the abolition of a lawful levy of an equivalent amount.
>
> …
>
> 24. That abolition falls within the ambit of choices made by the state in the field of taxation which express its general policy in economic and social matters. Such a choice can easily have the most diverse of consequences which, disregarding the potential difficulties in ascertaining whether and, if so, to what extent one tax has, in reality, purely and simply replaced another, preclude the reimbursement of an unlawful tax in such a context [as] being regarded as giving rise to unjust enrichment."

40. The defence of unjust enrichment was therefore limited to cases where the tax levied had been passed on directly to the purchaser. Any possible set off by a saving as a result of the abolition of other levies did not as a matter of European Union law mean that the recovery of the unlawfully paid tax would result in the claimant's unjust enrichment.

41. *Lady & Kid* was cited by the CJEU in *Ministre du Budget, des Comptes publics et de la Fonction publique v Accor* (Case C-310/09) [2012] STC 438 ('*Accor*'). In that case a claim was made by Accor for a refund of corporation tax paid in advance when Accor distributed dividends to its shareholders under a regime which unlawfully discriminated against non-resident subsidiaries. The second question asked by the referring court was whether any claim for reimbursement could, as a matter of principle, be defended by the tax authorities raising a defence of unjust enrichment. If it could, was that defence established in circumstances where Accor had not passed on the tax to a third party but had set off the tax paid against the total dividends it paid to its shareholders? Advocate General Mengozzi described the questions referred by the French Conseil d'État as underlining the fact that it was not the parent company which bore the real burden of making the advance payment of tax, although he said that in seeking to raise the defence

of unjust enrichment in this case the national court "appears to wish to push back the boundaries of the right to reimbursement of taxes paid in breach of EU law": [60].

42. The CJEU in *Accor* held, citing *Lady & Kid*, that the member state could not raise the defence of unjust enrichment in any situation more complicated than where the unduly levied tax was passed on to third parties such as a purchaser in the case of an indirect tax. In an important passage for current purposes, the Court stated at [76]:

> "76. In those circumstances, the answer to the second question is that where a national tax regime such as that at issue in the main proceedings does not of itself lead to the passing on to a third party of the tax unduly paid by the person liable for that tax, EU law precludes a member state refusing to reimburse sums paid by the parent company on the grounds either that such reimbursement would lead to the unjust enrichment of the parent company, or that the sum paid by the parent company does not constitute an accounting or tax charge for it but is set off against the total of the sums which may be redistributed to its shareholders."

43. A different result was reached in *Alakor Gabonatermelö és Forgalmazó Kft v Nemzeti Adó-és Vámhivatal Észak-alföldi Regionális Adó Föigazgatósága* (Case C-191/12) [2013] ECLI:EU:C:2013:315 ('*Alakor*'). This was a reference from the Hungarian Court of Cassation concerning the right to deduct input tax. Hungarian law provided that where a business has received a subsidy from the state in order to fund its payments of input tax, it could not deduct the input tax it had incurred from its output tax to that extent. Hungarian law also provided that where a judicial decision determined that VAT had been paid unlawfully and created a right to repayment, the tax authority could reject a claim if the taxpayer had passed on the tax on to another person. It further provided that tax was treated as having been 'passed on' where the taxpayer had been granted a state subsidy from public funds in order to finance the payment of VAT and to compensate for non-deductible VAT. Alakor had received a subsidy from the Hungarian Ministry of Agriculture and Rural Developments to enable it to finance a project. It was not therefore entitled to deduct the input tax it paid on the costs relating to that subsidised project. The CJEU later decided in Case C-74/08 *PARAT Automotive Cabrio* [2009] ECR I-3459 that national laws that prevent the deduction of input tax on the basis of the receipt of subsidy from public funds were inconsistent with the Sixth Directive. Alakor then claimed from the tax authority repayment of VAT which had previously been treated as non-deductible. The tax authority reduced the amount repayable on the basis that Alakor had already received subsidy for an amount corresponding to about 40% of the non-deductible VAT. That amount was therefore to be regarded as having been 'passed on'. Alakor challenged this on the basis that the refusal to reimburse all the tax that was not initially deductible was itself also contrary to the ruling in *PARAT*.

44. The CJEU confirmed that the member state must in principle repay the entirety of the VAT which the taxable person was unlawfully prevented from deducting. That right "helps to offset the consequences of the duty's incompatibility with EU law by neutralising the economic burden which that duty has unduly imposed on the operator who, in the final analysis, has actually borne it": [24]. This was subject to the unjust

enrichment exception where the person required to pay the charges has actually passed them on to other persons. The Court continued:

> "27. In that regard, given the purpose of the right to the recovery of sums unduly paid, … observance of the principle of effectiveness requires that the conditions under which an action may be brought for recovery of sums unduly paid be fixed by the Member States, pursuant to the principle of procedural autonomy, in such a way that the economic burden of the duty unduly paid can be neutralised ….
>
> 28. Therefore, it is on condition that the economic burden that the tax unduly paid imposed on the taxable person has been completely neutralised, that a Member State may refuse to repay part of that tax on the ground that such repayment would give rise to unjust enrichment for the benefit of the taxable person."

45. Although the Court reiterated that it is for the national court to decide whether the repayment claimed could lead to Alakor's unjust enrichment, the Court indicated that as a matter of principle, the member state could refuse to repay part of the VAT that had been subsidised by aid granted to the taxable person and funded by the European Union or by the member state, provided that the economic burden relating to the refusal to deduct VAT had been completely neutralised. That was a question for the national court to determine: [35].

46. The possibility that the member state might legitimately refuse to reimburse the direct payer of the tax has led to a consideration of who else in such circumstances might have a claim for a refund from the state. If the member state is entitled as a matter of EU law to reject a claim for reimbursement on the grounds that the trader would thereby be unjustly enriched, does the person to whom the unlawful charge was passed on itself have a claim against the member state for reimbursement? In *Reemtsma Cigarettenfabriken GmbH v Ministero delle Finanze* (Case C-35/05) [2008] STC 3448 ('*Reemtsma*') the German taxpayer had bought advertising services from an Italian company and had been charged VAT on those supplies. Reemtsma had paid the invoice including the VAT and the Italian supplier then accounted for that VAT to the Italian tax authorities. The VAT was charged in error because VAT was not due for those supplies. The Italian tax authorities refused to reimburse the tax to the German company on the grounds that it was only the Italian supplier and not the recipient of the services that was entitled to reimbursement. The questions referred by the Italian Court of Cassation included the question whether it was sufficient that the taxpayer was entitled to require reimbursement of the VAT from its supplier who had incorrectly invoiced it or whether the recipient of the services had to have a claim for reimbursement directly from the tax authorities.

47. Reemtsma argued that compliance with the principle of effectiveness made it necessary to allow the customer a direct claim against the tax authorities. Were it otherwise, the supplier might be insolvent when the customer claims against him or the supplier might find himself ordered to reimburse the customer in a civil claim against him by that customer but might fail in his claim against the tax authorities. Advocate General Sharpston said: (footnotes omitted)

> "85. … If it is possible for a supplier who has invoiced and collected VAT on a transaction in error and paid it to the tax authorities to seek reimbursement of the amount from those authorities, and for the customer in the same transaction to recover that amount from the supplier in a civil action, then the principles of the neutrality of VAT and the effectiveness of claims for the recovery of tax paid in error are respected.
>
> 86. Second, such a system is in principle sufficient. In all situations in which it can produce the required outcome — reimbursement in full to the person on whom the burden of tax paid in error has fallen — it is unnecessary to provide any additional remedy for the customer against the tax authorities. Consequently, there is no need to allow a direct claim by the customer against the tax authorities, of the kind which Reemtsma appears to have attempted to bring, *unless* the basic system of remedies has been set in train but has, as a result of material circumstances unrelated to the merits of the claim, failed to produce the normal outcome.
>
> 87. Third, there must be cases in which such failure occurs. In those cases some other solution must be available if the requirements of VAT neutrality and effectiveness are to be respected. It seems difficult to envisage any such solution other than permitting the customer, who has borne the full burden of the VAT invoiced in error, to bring a direct claim against the tax authorities, who would be unjustly enriched if they were to retain such VAT."

48. The Advocate General's view was that it was irrelevant how often such a failure occurred. What mattered was that whenever such situations did occur, they were dealt with by the member state's legal framework in accordance with the requirements of neutrality and effectiveness.

49. The CJEU in *Reemtsma* held that a system in which the supplier who has paid the VAT to the tax authorities in error may seek to be reimbursed and the recipient of the services may bring a civil action against the supplier for recovery of the sums observes the principles of neutrality and effectiveness. Such a system enables the recipient who bore the tax invoiced in error to obtain reimbursement of the sums unduly paid: [39]. However, if reimbursement of the VAT becomes impossible or excessively difficult, in particular in the case of the insolvency of the supplier, "those principles may require that the recipient of the services be able to address his application for reimbursement to the tax authorities directly." Member states must therefore provide in their procedural rules that the recipient can recover the unduly invoiced tax in order to respect the principle of effectiveness: [41].

50. The CJEU case on which the Appellants (except Standard Chartered) rely most heavily is the ruling in *Danfoss A/S and another v Skatteministeriet* (Case C-94/10) [2013] STC 1651 ('*Danfoss*'). This case concerned a tax imposed on lubricant and hydraulic oils. The tax was abolished by the Danish Government following a ruling of the CJEU in 1999 that the tax was unlawful. Danfoss had bought lubricant oil from Danish oil

companies and those companies had paid duty on the oil to the Danish state. It was not disputed that the oil companies had passed the duty on to Danfoss and the oil companies had not claimed reimbursement from the state in respect of those sales. Danfoss had itself supplied a small amount of the lubricant oils to Sauer-Danfoss ApS which used them in its production process. Danfoss in turn accepted that the price it had charged to Sauer-Danfoss had included the oil duties. Apart from those charges, Danfoss had not passed on the duty to any subsequent link in the distribution chain. Danfoss and Sauer-Danfoss claimed reimbursement from the Danish tax authorities for the overpaid duty that they had paid and in the alternative claimed damages in the same amount. The Danish authorities refused on the grounds that the claimants had not paid the oil duty direct to the state.

51. The Court set out the unjust enrichment exception to the entitlement to the repayment of unlawful charges: (citations omitted)

> "21. … the repayment of duties wrongly levied can be refused only where repayment would entail unjust enrichment of the persons concerned, that is to say, where it is established that the person required to pay such charges has actually passed them on to the purchaser directly.
>
> 22. In such circumstances, the burden of the charge levied but not due has been borne not by the taxable person, but by the purchaser to whom the cost has been passed on. Accordingly, to repay the person the amount of the charge already collected from the purchaser would be tantamount to paying him twice over, which may be described as unjust enrichment, whilst in no way remedying the consequences for the purchaser of the illegality of charge. …
>
> 23. It appears from this that the right to the recovery of sums unduly paid helps to offset the consequences of the duty's incompatibility with EU law by neutralising the economic burden which that duty has unduly imposed on the operator who, in the final analysis, has actually borne it."

52. Given the purpose of the right to recovery of sums unduly paid, the Court held that observance of the principle of effectiveness requires that the conditions under which such an action may be brought may be fixed by member states "in such a way that the economic burden of the duty unduly paid can be neutralised": [25]. It was sufficient, the Court held, if the consumer who bears the burden of the duty is able under national law to bring a civil action against the taxable person for recovery of the tax. But if that were to prove impossible or excessively difficult, the principle of effectiveness requires that the purchaser be able to bring his claim for reimbursement against the tax authorities directly.

53. Advocate General Kokott in her Opinion in *Danfoss* said that the Court has recognised that the charge levied 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: [34]. Her opinion was that:

> "37. The final consumer to whom an indirect charge levied contrary to European union law, such as the Danish lubricant oil duty, has been passed on, is therefore also to be regarded as an individual on whom rights have been conferred by the European Union provisions prohibiting such charges. He, too, must be able to obtain repayment of the charge passed on to him."

54. However, it would be rash to infer from this that the final consumer must have a right to repayment *directly from the state*. The Advocate General noted that the Court had ruled in *Comateb* that if the final consumer is able to obtain reimbursement through the taxable person of the amount of the charge passed on to him, that taxable person must in turn be able to obtain reimbursement from the state. If that occurred, passing on the charge would not have led to the taxable person becoming unjustly enriched by a repayment. Thus, she said, the consequence of, and adjunct to, the rights conferred on the final consumer by EU law may well differ from those conferred on the taxable person. There is a distinction to be made between what can be expected from a claim for reimbursement granted pursuant to EU law and what can be expected from a claim for damages based on EU law. Such claims for damages are subject to more stringent requirements.

55. In [44] Advocate General Kokott considered when, if the national rules precluded a claim from anyone other than the direct payer, that would be regarded as making the exercise of the right to repayment virtually impossible or excessively difficult and thus contrary to the principle of effectiveness. The example she gave was the example also discussed in *Reemtsma*, namely where the provider of services to the claimant becomes insolvent. She said:

> "61. In that respect the principle of effectiveness also requires that that claim actually be, by its very nature, a restitutionary claim, since it would be made excessively difficult for the final consumer to exercise his rights if he had, for example, to satisfy the more stringent conditions which apply, in accordance with case law to claims for damages based on European Union law. Nor is it possible to see why, in such a case, the state should be able to seek refuge behind those more stringent claim conditions. After all, it has still been enriched by the amount of the charge levied contrary to European Union law, and it is solely a question of repaying that amount to the person who was last to bear it economically.
>
> 62. If national law grants to the economically burdened final consumer a claim for restitution against neither the state nor the taxable person, it still follows from the principle of effectiveness that at least one of those two claims for repayment must be created, since the principle of effectiveness requires the member states to provide for the instruments and the detailed procedural rules necessary to enable the final consumer to recover the charge levied contrary to European Union law. Here again, the standard of protection required by European Union law would not be met if the final consumer was referred to any claims for damages against the state."

56. Nonetheless, Advocate General Kokott was circumspect about concluding that EU law required member states to provide a direct remedy against the state to the final consumer. She pointed out that in general, subject to the principles of equivalence and effectiveness, the EU does not lay down rules on how member states are to make repayments; different member states have set up different mechanisms: [66]. It was a matter for national law to determine whether the party to whom the taxable person has passed on a charge can claim repayment directly from the state or in principle only from the taxable person or whether he may choose. It was therefore ultimately for the referring court to consider whether the principles of equivalence and effectiveness required that a direct claim for repayment should be considered.

57. The application of the principle of effectiveness, one of the general principles of EU law, has been considered in two other cases to which we were referred. In *Marks & Spencer plc v Revenue and Customs Commissioners* (Case C-309/06) [2008] STC 1408, the Court acknowledged that EU law does not prevent the national legal system from disallowing repayment where it would lead to the unjust enrichment of the recipients. However the principle prohibiting unjust enrichment "must be implemented in accordance with principles such as that of equal treatment": [41].

58. A case where it was alleged that the principle of effectiveness had been breached by the national legislative framework was *Banca Antoniana Popolare Veneta SpA incorporating Banca Nazionale dell'Agricoltura SpA v Ministero dell'Economia e delle Finanze, Agenzia delle Entrate* (Case C-427/10) [2012] STC 526 ('*BAPV*'). BAPV charged VAT on its supplies of services and accounted for that VAT to the tax authority. Subsequently it was determined that the services were exempt from VAT. The recipients of the services successfully claimed against BAPV for a refund of the VAT they had paid. BAPV then claimed from the tax authorities a VAT refund equivalent to the sums it had paid to its customers. The claim was rejected by the Italian court on the grounds that the two-year time limit for BAPV to claim reimbursement from the state had expired. The Italian court held that the two year limitation period ran from the date when the VAT was paid and had therefore expired before the change in interpretation established that the tax had not been due. By contrast, the limitation period for civil claims by the customers of BAPV against it was 10 years.

59. The Court held that the principle of effectiveness was not infringed by setting a two-year time limit for claims against the tax authority whilst at the same time actions between individuals were subject to a 10 year time limit: [27]. However, the principle established in *Reemtsma* for recipients of services applied to providers of services as well. Given that throughout the two-year limitation period, the tax authorities had insisted that the tax was due, it would have been impossible or at the very least excessively difficult for BAPV to obtain a refund. The Italian court's decision that the two-year period ran from the payment date rather than from the date when the law was reinterpreted totally deprived BAPV of any possibility of recovering the tax. The result was that BAPV itself bore the cost of paying the VAT which was not due without being able to obtain a refund from the state even though the situation was not its fault. The Court noted at [37] that nothing in the case file suggested that BAPV had failed to "act as a prudent and alert economic operator" in charging and accounting for the VAT. Therefore although the discrepancy between the limitation periods was legitimate, the principle of effectiveness was not satisfied in this case because it was not possible for the taxable person effectively to claim reimbursement from the tax authority. The state

was therefore obliged to "take account of the particular situations of the economic operators and, where appropriate, provide for adjustments to the way in which its new legal assessments of those transactions are applied": [41].

(b) The VATA provisions for recovery of overpaid VAT

60. The provisions governing claims for the repayment of unlawfully levied VAT are set out in section 80(1) VATA (as amended):

> "**80.— Credit for, or repayment of, overstated or overpaid VAT**
>
> (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) and (1B) make equivalent provision where HMRC have wrongly assessed the tax which is then paid rather than where the taxpayer has accounted for the tax].
>
> (2) The Commissioners shall only be liable to credit or repay an amount under this section on a claim being made for the purpose."

61. Section 80(3), (3A) and (3B) provide for the defence of unjust enrichment:

> "(3) It shall be a defence, in relation to a claim under this section by virtue of subsection (1) or (1A) above, that the crediting of an amount would unjustly enrich the claimant.
>
> (3A) Subsection (3B) below applies for the purposes of subsection (3) above where—
>
> (a) an amount would (apart from subsection (3) above) fall to be credited under subsection (1) or (1A) above to any person ("the taxpayer"), and
>
> (b) the whole or a part of the amount brought into account as mentioned in paragraph (b) of that subsection has, for practical purposes, been borne by a person other than the taxpayer.
>
> (3B) Where, in a case to which this subsection applies, loss or damage has been or may be incurred by the taxpayer as a result of mistaken assumptions made in his case about the operation of any VAT provisions, that loss or damage shall be disregarded,

> except to the extent of the quantified amount, in the making of any determination—
>
> (a) of whether or to what extent the crediting of an amount to the taxpayer would enrich him; or
>
> (b) of whether or to what extent any enrichment of the taxpayer would be unjust.
>
> (3C) In subsection (3B) above—
>
> "the quantified amount" means the amount (if any) which is shown by the taxpayer to constitute the amount that would appropriately compensate him for loss or damage shown by him to have resulted, for any business carried on by him, from the making of the mistaken assumptions;
>
> …
>
> (7) Except as provided by this section …, the Commissioners shall not be liable to credit or repay any amount accounted for or paid to them by way of VAT that was not VAT due to them."

62. The parties agreed that subsection 80(3B) is designed to reflect what the CJEU decided in *Comateb* namely that if someone has suffered loss and damage as a result of reduced sales because he had to charge a higher price inclusive of the unlawful VAT, that can be recovered under section 80 but only up to the limit of the overpaid tax. Any excess damage can be recovered only by a claim for damages brought against the state.

63. Section 80A VATA introduces arrangements for the reimbursement of customers, reflecting the CJEU's judgment in *Danfoss*:

> "**80A.— Arrangements for reimbursing customers.**
>
> (1) The Commissioners may by regulations make provision for reimbursement arrangements made by any person to be disregarded for the purposes of section 80(3) except where the arrangements—
>
> (a) contain such provision as may be required by the regulations; and
>
> (b) are supported by such undertakings to comply with the provisions of the arrangements as may be required by the regulations to be given to the Commissioners.
>
> (2) In this section "reimbursement arrangements" means any arrangements for the purposes of a claim under section 80 which—

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

64. Regulations have been made under section 80A in Part VA of the Value Added Tax Regulations 1995 (SI 1995/2518) for the making of reimbursement arrangements by a section 80 claimant. The Regulations stipulate that arrangements made by a claimant must set a deadline of 90 days within which reimbursement is completed, that no fee can be charged by the claimant to the recipients of the money and that reimbursement must be made only in cash or by cheque. The claimant must repay any amount not reimbursed to the Commissioners and must keep records of the names and addresses of those consumers whom he has reimbursed or whom he intends to reimburse as well as the amounts and dates of any payments.

IV. THE PARTIES AND THE TRIBUNAL PROCEEDINGS

(a) Appeals arising out of the transactions of Chartered Trust plc

65. Two of the four appeals before us, involving four of the six Appellants, arise from a dispute over who is entitled to repayment of VAT which was accounted for over the years in respect of supplies of services by Chartered Trust plc, now called Blackhorse Ltd and now a subsidiary of Lloyds Banking Group plc ('Chartered Trust'). Chartered Trust was acquired in January 1974 by Standard Chartered plc and became a wholly owned subsidiary of Standard Chartered plc. However, Chartered Trust did not at that point join the existing Standard Chartered VAT group. Chartered Trust had been registered for VAT since April 1973 and at the time it was acquired by Standard Chartered plc, it was already a member, in fact the representative member, of its own VAT group ('the Chartered Trust VAT group'). Although Chartered Trust moved to the corporate group headed by Standard Chartered plc, it remained the representative member of the Chartered Trust VAT group until 30 June 1990. On 30 June 1990 the Chartered Trust VAT group was dissolved and Chartered Trust and the other members of the Chartered Trust VAT group joined the existing Standard Chartered VAT group of which Standard Chartered plc was and had at all relevant times been the representative member. That was the position until 1 September 2000.

66. On 1 September 2000 Chartered Trust was sold by Standard Chartered plc to Lloyds Banking Group plc and became a wholly owned subsidiary within that corporate group. With effect from 1 September 2000 Chartered Trust also left the Standard Chartered VAT group and joined the Lloyds VAT group. Lloyds Banking Group plc ('Lloyds') has at all material times been the representative member of the Lloyds VAT group. Chartered Trust changed its name to Blackhorse Ltd on 5 July 2001.

67. VAT was overpaid in respect of supplies made by Chartered Trust in part because of the tax treatment of early termination arrangements in the hire purchase contracts for cars and in part because of the unlawful imposition of VAT on administration fees charged by Chartered Trust.

68. The claims with which we are concerned relate to VAT that was paid to HMRC in respect of real world supplies by Chartered Trust during two periods. During the earlier period, Chartered Trust was both the real world supplier of those services to third parties and was also a member and the representative member of the Chartered Trust VAT group. For the later periods covered by the claims, Chartered Trust was the real world supplier but it was a member of the Standard Chartered VAT group of which Standard Chartered was the representative member. None of the VAT in dispute in these appeals was generated by supplies made by Chartered Trust during the period when it was a member of the Lloyds VAT group; the relevant supplies all date back to periods before Lloyds acquired Chartered Trust. Lloyds' role in these proceedings is therefore to advance the claims that Chartered Trust has, on the basis that Lloyds is now the owner of the Chartered Trust business.

69. HMRC have paid both Standard Chartered and Lloyds some of the overpaid VAT but not everything that they have claimed. The basis on which HMRC have acceded to their claims is not necessarily the same as the basis on which the claims were and are asserted. HMRC refunded to Standard Chartered the overpaid VAT in respect of the later periods because HMRC regard Standard Chartered as entitled to that refund in its capacity as representative member of the VAT group of which Chartered Trust was a member at the time it made those supplies. But it refused to pay Standard Chartered the VAT overpaid by Chartered Trust during the earlier periods when Chartered Trust was a member - and the representative member - of its own Chartered Trust VAT group even though Chartered Trust was, at that time, a subsidiary of Standard Chartered. HMRC regards Chartered Trust (in effect Lloyds) as entitled to claim a refund of the VAT overpaid during the earlier periods when Chartered Trust was the representative member of its own VAT group. That entitlement arises, according to HMRC, not because Chartered Trust was the real world supplier of those services but because the services were supplied by a member of the VAT group of which Chartered Trust was the last representative member before the group was dissolved on 30 June 1990.

70. Standard Chartered claims the refund of VAT which was paid during the time when Chartered Trust was a subsidiary within the Standard Chartered corporate group. As regards that earlier period, it bases its claim primarily on the ground that as the parent company of the Standard Chartered corporate group, it effectively funded the payments to HMRC of VAT even though that VAT was in fact accounted for to HMRC by Chartered Trust. Once the Chartered Trust VAT group was dissolved on 30 June 1990, Standard Chartered assert that any entitlement of Chartered Trust as representative member to a VAT refund came to an end and the person with the better claim to that money is Standard Chartered rather than Chartered Trust/Lloyds.

71. Lloyds, on behalf of Chartered Trust, also claims to be entitled to the refund of VAT paid to HMRC during both periods. It bases this claim on the fact that once Chartered Trust had left first the Chartered Trust VAT group and later the Standard Chartered VAT group, it brought with it to the Lloyds group an entitlement to claim the VAT that had been paid in respect of its earlier real world supplies.

72. Both Standard Chartered and Lloyds/Chartered Trust appealed against HMRC's refusal of parts of their claims. Those appeals were heard consecutively by the First-tier Tribunal (Judge Roger Berner and Mr Nigel Collard) and determined in a decision released on 31 March 2014 and reported at [2014] UKFTT 316 (TC), [2014] SFTD 1270. I refer to that decision as "*Chartered Trust FTT*". The FTT upheld HMRC's

interpretation of the law and concluded that Lloyds/Chartered Trust was entitled to reclaim the VAT paid in respect of its real world sales during the periods when Chartered Trust was the representative member of the Chartered Trust VAT group and that Standard Chartered was entitled to reclaim the VAT paid in respect of Chartered Trust's real world sales during the period when Chartered Trust was a member of the Standard Chartered VAT group of which Standard Chartered was the representative member.

73. Both Standard Chartered and Lloyds/Chartered Trust appealed against that decision of the FTT. That appeal was determined by the Upper Tribunal (Warren J and Judge Charles Hellier) in the decision released on 19 October 2016 and reported at [2016] UKUT 434 (TCC).

(b) Appeals in respect of overpayments by the Rover VAT group

74. MG Rover Group Ltd ('MG Rover') and BMW (UK) Holdings Ltd have asserted opposing claims to refunds of VAT paid by the Rover VAT group which was set up with effect from 1 April 1973. The facts underlying the appeal were assumed to be correct for the purpose of the preliminary issue heard by the FTT. The overpayment of VAT which is reclaimed arose from transactions by three different companies within the Rover VAT group, Rover Company Ltd, Rover Wholesale Ltd and MG Rover. They all then left the Rover VAT group. At the dates when they left, and subsequently, BMW was the representative member of the Rover VAT group.

75. MG Rover claimed the overpaid VAT from HMRC for the period April 1973 to 4 December 1996. It based its claim on the argument that it was either the real world supplier of the services itself and had now left the VAT group of which it had been a member when it made the sales, or it had taken an assignment of the rights of the real world suppliers, Rover Company Ltd and Rover Wholesale Ltd. That claim was rejected by HMRC. BMW also made a claim for the same VAT for the period 1 January 1978 to 30 June 1988, during which time it was the representative member of the Rover VAT group. The matter came before the FTT as a preliminary issue in an appeal in which MG Rover was the appellant and HMRC, BMW and Rover Company Ltd were the respondents. The issue was determined by the FTT (Judge Mosedale) in a decision released on 31 March 2014, the same day as the decision of Judge Berner and Mr Collard in *Chartered Trust FTT*. Judge Mosedale's decision is reported at [2014] UKFTT 327 (TC), [2014] SFTD 1218. I refer to that decision as "*MG Rover FTT*". The FTT held when the real world supplier left the VAT group of which it had been a member when it made those supplies and joined a different VAT group, then the representative member of that different VAT group was able to make the claim under section 80. Thus, although whilst MG Rover had remained a member of the Rover VAT group, only the representative member of that group could make a claim, once MG Rover left on 9 May 2000 it could thereafter assert the accrued section 80 rights. The preliminary issue was therefore decided in favour of MG Rover.

76. Both HMRC and BMW appealed to the Upper Tribunal against that FTT decision. Those appeals were heard together with the Standard Chartered and Chartered Trust/Lloyds appeals. By the time those appeals were determined, the Inner House of the Court of Session in Scotland had handed down its judgment in *Taylor Clark Leisure plc v Revenue and Customs Commissioners* [2016] CSIH 54, [2016] STC 2492, to which I refer later. The appeals brought by HMRC and BMW were determined by the

Upper Tribunal (Warren J and Judge Hellier) in the decision released on 19 October 2016. I shall refer to that decision as '*Chartered Trust/MG Rover UT*". They allowed HMRC's and BMW's appeals, holding that the claim to repayment of VAT in respect of sales made by a member of the VAT group remained with the representative member of that group when the member left. Thus BMW, as the current representative member of the Rover VAT group and not MG Rover was entitled to make the claim for overpaid VAT in respect of any sales made by Rover Company Ltd, MG Rover and Rover Wholesale Ltd even though all those real world suppliers had left the Rover VAT group by the time the claims came to be made.

(c) The Gala appeal

77. Gala Leisure Ltd owned and operated bingo halls. It made claims to recover overpaid VAT covering the period 1 April 1973 to 30 September 1996. It based those claims on the fact that from 15 December 1997 it had been the representative member of the Gala VAT group, the members of which included companies which had been real world suppliers of bingo services during the claim period. At the time of those supplies, those real world suppliers had been either (a) members of a different VAT group which was still in existence; or (b) members of a different VAT group which had ceased to exist prior to Gala Leisure Ltd making the claim; or (c) not in a VAT group at all but individually registered for VAT; or (d) some combination of those categories. HMRC accepted that Gala Leisure Ltd could claim in respect of the real world supplies in category (c) provided it could show that it had taken an assignment of the real world suppliers' rights. Initially HMRC also accepted that Gala Leisure Ltd could claim in respect of the real world supplies in category (b), again if it could show that it had taken an assignment of the real world suppliers' rights. HMRC rejected the claims in so far as they related to supplies made by a company that had been in a different VAT group that was still extant at the time of the claim. That was on the basis that the only person entitled to that repayment was the representative member of that VAT group.

78. Gala Leisure Ltd appealed to the FTT against HMRC's refusal to pay it the sums claimed by Gala Leisure Ltd in respect of sales made by real world suppliers who had left different VAT groups which groups still existed at the time of the claim. After an initial three day hearing in March 2014, the FTT adjourned the hearing of Gala Leisure Ltd's appeal to enable the parties to make additional submissions on the three decisions that were about to be released, namely *Chartered Trust FTT*, *MG Rover FTT* and the decision of the Upper Tribunal (Lord Doherty) in *Taylor Clark Leisure plc. v Revenue and Customs Comrs* that was released in September 2014. After those decisions had been released there was a case management hearing in March 2015, following which the FTT decided to proceed with the *Gala* appeal rather than wait for the outcome of the appeals against *Chartered Trust FTT* or *MG Rover FTT* which were pending at that stage.

79. The FTT (Judge Demack and Ms Gill Hunter) dismissed Gala Leisure Ltd's appeal in the decision released in July 2015 and reported at [2015] UKFTT 516 (TC). I shall refer to that decision as *Gala FTT*. The FTT preferred the reasoning of the FTT in *Chartered Trust FTT* to that of *MG Rover FTT*.

80. Gala Leisure Ltd appealed against the FTT's decision. Gala Leisure Ltd then assigned to Gala 1 Ltd (later renamed 2016 G1 Ltd) ('Gala') any rights it had to recover overpaid tax from HMRC and Gala replaced Gala Leisure Ltd as a party to the appeal. That

appeal was heard by the Upper Tribunal (Henry Carr J and Judge Charles Hellier). Since the decision in *Chartered Trust/MG Rover UT* had been released by the time Gala's appeal was heard, as had the decision of the Court of Session Inner House in *Taylor Clark* [2016] CSIH 54, [2016] STC 2492, 2016 SLT 873, Gala's appeal was limited to only one of the six grounds initially raised by Gala. That ground was its assertion that the circumstances of its claim were sufficiently exceptional for it to succeed despite the general principles set out in the Upper Tribunal's determinations. The Upper Tribunal dismissed the appeal in a decision released on 3 January 2017 and reported at [2016] UKUT 564 (TCC), [2017] STC 437. I refer to that decision as "*Gala UT*".

81. In summary, in the remainder of this judgment I refer to the various tribunal decisions as follows:

"*Chartered Trust FTT*" is the decision of the FTT (Judge Berner and Nigel Collard) reported at [2014] UKFTT 316 (TC), [2014] SFTD 1270.

"*MG Rover FTT*" is the decision of the FTT (Judge Mosedale) reported at [2014] UKFTT 327 (TC), [2014] SFTD 1218.

"*Gala FTT*" is the decision of the FTT (Judge Demack and Gill Hunter) reported at [2015] UKFTT 516 (TC), [2016] SFTD 56.

"*Chartered Trust/MG Rover UT*" is the decision of the Upper Tribunal (Warren J and Judge Hellier) reported at [2016] UKUT 434 (TCC), [2017] STC 41.

"*Gala UT*" is the decision of the Upper Tribunal (Henry Carr J and Judge Hellier) reported at [2016] UKUT 564 (TCC), [2017] STC 437.

(d) The decision of the Upper Tribunal

82. I intend no disrespect to the other Tribunal judges who have grappled with these cases if I focus on the reasoning of the Upper Tribunal in *Chartered Trust/MG Rover UT*. Having examined the CJEU cases that I have also analysed above, the Tribunal said:

> "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."

83. The Upper Tribunal then considered Lord Nolan's speech in *Thorn* and the Court of Appeal's decision in *Barclays Bank*. As regards Lord Nolan's speech the Tribunal did not understand his description of the representative member as dealing "on behalf of the members" to mean that it acts as an agent of each of them individually; "some real person is required to deal with HMRC, but that person deals for all members as they are to be treated as a single person": [44].

84. The Upper Tribunal then considered the *San Giorgio* line of cases. Its conclusions can be summarised as follows. Standard Chartered's submission that once the VAT group is dissolved and the single taxable person ceases to exist, the overarching principle must be that monies go to the person who bore the cost was rejected. The Upper Tribunal held at [84] that there was no reason in the words or policy of the provisions for not treating the notional single taxable person as continuing to exist in order to deal with the rights and obligations which arise in relation to the reporting and accounting for transactions which happened during the currency of group treatment, or to put it another way for treating the members as respects those transactions as if they remained a single

person. That seemed the only administratively expedient and legally certain way of dealing with the termination of a group.

85. Standard Chartered's submission that the *San Giorgio* line of cases establish a principle that whoever bears the burden of tax is entitled to repayment of the tax was also rejected. The Tribunal held that the CJEU did not indicate a wider economic enquiry into how the tax was borne other than considering who bore it "pursuant to the operation of the tax system": [88(iv)]. None of the cases indicates that merely having suffered an economic burden is sufficient grounds for such a claim. The EU law right to repayment of taxes wrongly collected did not extend beyond the supplier who accounted for those taxes and the customer: [89] – [96]. The Tribunal noted that it would be impractical or impossible to apply a condition for the exercise of the right that the holder bore the economic burden of the wrongful tax.

86. As regards MG Rover's submission that the real world supplier takes its claim with it when it leaves a VAT group, the Tribunal rejected the submission that this was required to ensure fiscal neutrality. The division of the rights and liabilities between the members who are treated as the single taxable person does not affect the neutrality of the tax: [104] – [107]. There was nothing in either the European or domestic provisions which required the VAT burden to be passed on by the representative member to the real world supplier. If that happened in the ordinary course, that was part of ordinary commercial relations between the members of the group, not part of the tax system: [112]. The *San Giorgio* right was satisfied by the repayment of the tax to the representative member:

> "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 [real world supplier] alone would ignore the fact that the burden fell on the members treated as a single person, not just the [real world supplier]. Treating the right as reverting to or remaining with a [real world supplier] is, … inconsistent with the principle that all the members should be treated as the single taxable person."

87. The Tribunal then considered the submissions of Lloyds, pursuing the claims of Chartered Trust. Lloyds argued that neither article 4 nor section 43 creates a new separate taxable person; there is no entity for the purposes of the Directive which is the VAT group. The Tribunal accepted that rights and obligations which arise in relation to transactions undertaken during the currency of the group "rest with all the members: for they are together to be treated as being the single person": [126]. But under the UK regime those rights and obligations rest in the representative member:

> "127. … 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 art 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 repayment of input tax or a *San Giorgio* right to recover wrongly collected tax.
>
> 128. … The representative member is not the notional single taxable person but mechanically fulfils the need created by any implementation of art 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 art 4(4)."

88. Further, the Tribunal held that treating rights and obligations arising from such transactions as continuing to be corralled or administered by the representative member after the real world supplier has left the group was consistent with the aim of making a permanent change to how VAT is charged on a person's transactions while it is a member of the group.

89. The Tribunal then considered the effect of the decision of the Inner House of the Court of Session in the *Taylor Clark* proceedings. The Tribunal recognised that the issues raised there included what constraints EU law and article 4(4) placed on an implementation by a member state so far as concerns the rights and liabilities of a member of the group: see [162]. The Tribunal concluded 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 of EU law in particular that of fiscal neutrality. The Tribunal went on:

> "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."

90. The Tribunal held that no provision needed to be made for reimbursement of tax or allocation of liabilities between members in order to satisfy either the objective of 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 amongst themselves or in the absence of agreement to the application of ordinary principles of UK law.

V. THE SUPREME COURT'S DECISION IN *TAYLOR CLARK*

91. On 11 July 2018 the Supreme Court handed down its judgment in *Taylor Clark*. HMRC submit that that judgment disposes of all the issues raised by these appeals and decides them all in HMRC's favour. The Appellants, unsurprisingly, beg to differ. It is important therefore to examine what was and was not considered by the Court in that case.

92. Between 1973 and 2009 Taylor Clark was the representative member of the Taylor Clark VAT group. In 1990 Taylor Clark transferred its bingo business to another member of the VAT group, Carlton Clubs Ltd ('Carlton'). Carlton left the VAT group in 1998. The Taylor Clark VAT group was disbanded in February 2009. During the period when Carlton was a member of the group, Taylor Clark accounted for the VAT in respect of Carlton's activities. In 2011 the CJEU ruled that bingo was exempt from VAT. UK legislation provided that claims for the refund of overpaid VAT in respect of periods up to 4 December 1996 would be met if the claim was made before 1 April 2009. In November 2007 Carlton submitted four claims to HMRC pursuant to section 80 VATA. Taylor Clark failed to make a claim before the deadline expired. Taylor Clark then sought a refund from HMRC relying on the claims submitted by Carlton. HMRC refused to refund the tax to Taylor Clark. When the case came before the First-tier Tribunal and the Upper Tribunal there were three issues: "the assignation issue" namely whether, as HMRC asserted, Taylor Clark's pre-1990 claims as representative member had been assigned to Carlton in 1998 when the bingo business was transferred to Carlton; "the entitlement issue" which was whether the right to repayment of the claims relating to the period 1990 to 1996 had been reinvested in Carlton when it left the VAT group in 1998; and "the claimant issue" which was whether Taylor Clark could rely on the claims made by Carlton under section 80 before the expiry of the limitation period because those claims must be treated as having been made on behalf of the VAT group.

93. The Upper Tribunal (Lord Doherty) decided the claimant issue against Taylor Clark holding that Taylor Clark could not rely on the Carlton claim as having been made on its behalf before the end of the limitation period so that Taylor Clark's claim was time-barred. He held on the assignation issue that Taylor Clark had not assigned the pre-1990 claims to Carlton as part of the asset transfer. HMRC did not cross-appeal on that issue. On the entitlement issue Lord Doherty recorded that it was common ground between HMRC and Taylor Clark that Taylor Clark was the appropriate party to seek repayment of tax accounted for between 1990 and 1996 (whilst Carlton was still a member of the Taylor Clark VAT group) even though the VAT group had been disbanded in February 2009, after Carlton's claims had been made. That issue was not the subject of an appeal. By the time Taylor Clark's appeal reached the Supreme Court, the only issue raised, therefore, was the claimant issue.

94. Lord Hodge, in a judgment with which Lord Mance, Lord Reed, Lord Carnwath and Lord Briggs SCJJ agreed, referred at [3] to the fact that the companies involved in the instant appeals before the Court had sought to intervene in the *Taylor Clark* appeal "because of concerns that the determination of this appeal would affect their outstanding claims which are due to be heard by the Court of Appeal in January 2019." He recorded that the Supreme Court had declined such interventions because the appeal in *Taylor Clark* was not directly concerned with the questions raised in these appeals as to which company has a right to claim repayment of unduly levied VAT either when

a company which has had the economic burden of paying VAT has left a VAT group or where a VAT group has been dissolved. He went on to say that he recognised, nonetheless, that his discussion of the nature of the statutory regime in the United Kingdom in relation to an extant VAT group would "indirectly have a bearing on those issues".

95. At [18] Lord Hodge recorded Taylor Clark's principal contention as being that Carlton's claims sought to vindicate the rights of the single taxable person, which was the VAT group. Carlton in EU law had no individual fiscal personality in relation to those rights. The claims must be treated as having been submitted on behalf of the VAT group, which was the only taxable person recognised by EU law. Taylor Clark as the representative member of the VAT group was entitled to rely on those claims. Thus it appears that Taylor Clark's primary basis for relying on Carlton's application was not that, as a matter of fact Carlton had made the application on Taylor Clark's behalf, indeed it was accepted that Taylor Clark had been unaware of the claims lodged by Carlton: [39]. Rather Taylor Clark argued that the nature of the EU law concept of the single taxable person meant that Carlton's claims must have been made on behalf of the VAT group and that Taylor Clark as the representative member of that group was entitled to rely on those claims.

96. When setting out article 11 PVD Lord Hodge made two points: [19]. First, article 11 is permissive and there is no obligation on a member state to implement the VAT grouping regime. Secondly, article 11 is not prescriptive: "It does not lay down a template as to how a member state will treat a group of persons as the single taxable person". Lord Hodge stated that it was clear from the wording of section 43 VATA that:

> " … the UK chose to achieve the end which the Directive authorised not by deeming the group to be a quasi-person but by treating the representative member as the person which supplied or received the supply of goods or services."

97. He said that section 43 is not concerned with the intra-group legal arrangements of group members. It is concerned with dealings in relation to VAT with entities outside the VAT group and with HMRC, including the disregard of intra-group supplies in relation to liability for VAT. In its dealings with HMRC in relation to VAT, the representative member is treated as carrying on the businesses of the other members of the group. Thus he said: "the single taxable person is the representative member". He referred to *Ampliscientifica* which, he said, explained that the VAT grouping directive provisions:

> "23. … had the effect that companies in a VAT group were no longer treated as separate taxable persons for the purpose of VAT but were to be treated as a single taxable person. This precluded such companies from submitting VAT declarations separately 'since the single taxable person alone is authorised to submit such declarations'. It followed that the national implementing legislation had to provide that 'the taxable person is a single taxable person and that a single VAT number be allocated to the group'.

> 24. In the UK the model which achieves that result is that of the representative member. The words in s 43(1) are clear beyond question: 'any business carried on by a member of the group shall be treated as carried on by the representative member'. It has not been suggested that the UK failed to consult the VAT committee before adopting this model … and no challenge has been made to the effect that the model does not faithfully implement the option which art 11 of the Principal Directive or its predecessor made available to member states. There is no reason to doubt that the model which the UK has adopted is consistent with the EU legislation."

98. Lord Hodge stated that there was no need to complicate the analysis of the UK legislation by introducing a concept of the VAT group as a quasi-persona. Although HMRC do speak of the registration of the group giving rise to a single taxable person, it is, Lord Hodge said, the appointment of a company as representative member of the group which provides the legal person which is the taxable person. The representative member is given the VAT registration number and establishes a bank account from which VAT payments can be made to HMRC and repayments made by HMRC.

99. As regards any changes in identity of the representative member, Lord Hodge described the analogy used by the Upper Tribunal in *Chartered Trust/MG Rover UT* as apt, namely that the representative member is a continuing entity akin to a corporation sole whose role is fulfilled by whoever holds the relevant office at any time: [27]. Lord Hodge said that section 43 "does not make the group a taxable person but treats the group's supplies and liabilities as those of the representative member for the time being". Turning to section 80, Lord Hodge said that it was clear that HMRC's liability to credit or repay the overpaid output tax is owed to the person who accounted to them for VAT in the relevant period. It is also clear that HMRC's liability is contingent on a claim being made. He concluded:

> "29. … It therefore follows from the operation of s 43 of VATA that where there have been overpayments of VAT by the representative member of a VAT group, the person entitled to submit a claim during the currency of a VAT group, unless the claim has been assigned, is either the current representative member of the VAT group or a person acting as agent of that representative member.
>
> 30. I therefore agree with [the Court of Session, Inner House] that it is only the representative member who has any interest in making the claim. My disagreement is simply that one does not need the complication of viewing the group as a quasi-persona to reach that conclusion."

100. Lord Hodge therefore rejected the submission by Mr Scorey on behalf of Taylor Clark that the only taxable person is the VAT group, which alone has fiscal personality and that any company within the VAT group can claim repayment of unduly levied VAT on behalf of the group. He then analysed the text of Carlton's letters to HMRC and concluded that the First-tier tribunal did not err in law in finding that the claims were made by Carlton on its own behalf and not on behalf of Taylor Clark.

101. At the end of his judgment, Lord Hodge stated that after the Court had released its judgment in draft to counsel, Taylor Clark's counsel applied to the Court to make a reference to the CJEU. This would raise the question whether the interpretation of section 43 favoured by the Court was compatible with the concept of the single taxable person in article 11 - the very question which arises in the instant appeals before us. Lord Hodge stated that he was satisfied that it was neither necessary nor appropriate to make such a reference because a ruling on the nature of the single taxable person was not necessary for the determination of the appeal. Whether in UK law the representative member is seen as the single taxable person or as the representative of a quasi-person which is the aggregate of the members of the VAT group which itself is to be recognised in domestic law, the outcome of Taylor Clark's appeal would be the same: [41].

102. It was submitted on behalf of some of the Appellants that *Taylor Clark* decided only the narrow point that Carlton had not in fact put forward its claims for repayment on behalf of Taylor Clark but on its own behalf. I do not agree. The case was put by Taylor Clark on the basis that it was because of the nature of the single taxable person created by article 11 and implemented by section 43 that Taylor Clark could rely on Carlton's claim. The claim to repayment was that of the VAT group. Since that group did not have any existence independent of its members, the claim must belong to all the members of the group so that any individual member putting forward a claim must as a matter of law be putting forward the claim on behalf of all the other members of the group. Although the payment would be made by HMRC to the representative member, any member of the group could make the claim under section 80. The Supreme Court held that that was not the correct reading of section 43 and section 80. According to section 43 the representative member is the single taxable person and it is only the legal entity that is the representative member from time to time that can bring a claim under section 80. That interpretation of section 43 is binding upon us. That leaves the more difficult question of whether the Supreme Court in *Taylor Clark* also held that section 43 was a permissible implementation of article 11 and, if it did not so decide and if we conclude that section 43 does not properly implement article 11, whether the construction of sections 43 and 80 set out by the Supreme Court can and should be modified by the application of the *Marleasing* principle.

103. The parties disagreed about the import of Lord Hodge's comment in [24], cited earlier, that there had been "no challenge" to the compliance of the UK model with article 11. Some of the Appellants argued that he was referring to the fact that none of the parties in the *Taylor Clark* appeal had argued that section 43 did not comply with article 11; it was assumed in argument that section 43 was so compliant and there was therefore no finding to that effect. Mr Glick argued that Lord Hodge was referring to the absence of any challenge by the EU Commission following the consultation with the VAT Committee. He drew our attention to passages in the skeleton arguments prepared by Taylor Clark for the hearing in the Supreme Court which stated that any construction which restricted the making of the claim to one only of the VAT group members was inconsistent with article 11 which did not distinguish between individual members of the group and would impede the exercise of the group's *San Giorgio* right.

104. In any event, I have arrived at the conclusion on the basis of the full submissions that have been made to us by the parties to the instant appeals that the model adopted by section 43 is a permissible implementation of article 11. I do not need therefore to

consider further the parties' submissions about identifying the binding aspects of the Supreme Court's judgment.

105. What is clear and recorded by Lord Hodge is that as regards the VAT that was the subject of Taylor Clark's appeal, it was common ground that Taylor Clark, as the representative member, was the correct claimant under section 80 and not Carlton, even though Carlton had left the VAT group by the time the claims were made. The Supreme Court was not, therefore considering rival claims to the money from Carlton, as the real world supplier that had left the group, and Taylor Clark as the representative member of the group. It therefore also did not consider what the consequences were of regarding the representative member as the only claimant for the effectiveness of section 80 as a route for satisfying the *San Giorgio* right and what those consequences might tell us about whether the principle of effectiveness is satisfied by section 43 and section 80. I agree with the Appellants to this extent, that *Taylor Clark* is not a short cut to determining all the issues raised in these appeals.

VI. THE APPEALS

106. The Appellants were represented at the appeal hearing as follows:

i) Mr Scorey QC appeared for Lloyds, that is to say, the First and Second Appellants advancing the claims made by Chartered Trust.

ii) Mr Hitchmough QC appeared with Mr Bremner QC for MG Rover.

iii) Mr Beal QC appeared for Standard Chartered, that is the Fourth and Fifth Appellants.

iv) Mr Peacock QC appeared with Mr Ripley for Gala.

107. Lloyds, MG Rover and Gala made common cause on the principal arguments on whether the UK's implementation of article 11 was compliant with the wording of the article and with the effective enforcement of the *San Giorgio* rights. They lodged a joint skeleton argument relating to those issues and I shall refer to them as the Joint Appellants in relation to those issues. At the hearing, they divided the submissions amongst themselves to avoid duplication:

i) Mr Peacock addressed us on (i) the meaning of the term "single taxable person" and whether section 43 VATA was a compliant implementation of article 11; and (ii) the significance of *Taylor Clark*.

ii) Mr Hitchmough addressed us on the scope of the *San Giorgio* rights and the principle of effectiveness.

iii) Mr Scorey dealt with whether it was possible, assuming that the real world supplier does have a *San Giorgio* right to claim reimbursement of the overpaid VAT, to construe sections 43 and 80 VATA as conferring a right to claim applying the principles of *Marleasing*. He also dealt with whether this court should refer questions to the CJEU for a preliminary ruling.

108. Mr Peacock also addressed us on two specific grounds raised by Gala.

109. Mr Beal on behalf of Standard Chartered focused his submissions on the identity of the claimant for reimbursement of unlawfully levied tax in respect of a VAT group where that VAT group has been dissolved before the claim is made.

110. On the Respondents' side:

i) Mr Glick QC with Ms Wakefield and Mr Rushworth appeared on behalf of BMW, the Second Respondent (having been a successful Appellant in *Chartered Trust/MG Rover UT*).

ii) Mr Macnab and Mr Mantle appeared on behalf of HMRC.

111. They, too, divided the topics amongst themselves to avoid duplication.

(a) The concept of the single taxable person in article 11

112. The Joint Appellants argue that the position under UK law as set out by the Supreme Court in *Taylor Clark* is contrary to EU law. They submit that the wording of article 11 and the concept of the single taxable person created by it, as interpreted by the CJEU, does not permit the member state to supplant the rights and obligations of the members of the VAT group by creating a legal entity separate from the collective members of the group (namely the representative member) and by then conferring *San Giorgio* rights for the repayment of unlawfully levied VAT only on that separate legal entity. They submit that the *San Giorgio* rights always belong to the real world supplier whose transactions generated the overpaid VAT. When the real world supplier leaves the VAT group, it carries those rights with it and can enforce them against the member state's tax authority. The Joint Appellants argue that although the member states have a discretion as to how precisely to implement VAT grouping, the discretion is limited to certain aspects of VAT grouping, such as the qualification for membership or the necessary intensity of the links between the members. It does not extend to the consequences of being a member of the group so far as *San Giorgio* rights are concerned and does not allow the member state to alter the rights and liabilities conferred and imposed on the members arising from their own transactions.

113. The Joint Appellants point first to the fact that article 11 provides that member states may regard any "persons" in the plural as a single taxable person, and thus prescribes that the members collectively are the single taxable person. Those members cannot be made to give up their rights to a different entity such as the representative member under the UK regime. Mr Scorey expressed the same thing by saying that article 11 empowers the member states to "regard" the members of the group as a single taxable person and article 4(4) of the Sixth Directive empowered member states to "treat" the members as a single taxable person. The "regarding" or "treating" does not he says extend to addressing who has rights consequent on that treatment. The Directive is a simplification measure and does not go so far as to take the right which would otherwise arise for the benefit of the real world supplier and give it to someone else.

114. The Joint Appellants rely on *Ampliscientifica* as authority for the proposition that the consequence of grouping is that *none* of the members is a taxable person in the strict sense for article 9. It is not permissible to provide that one of them, but only one of them, is. The fiction of the single taxable person creates, Mr Scorey submitted, a veil of unity to assist in calculating the amount of the tax due but one still sees through to

what is going on below. It does not therefore make sense to say that the single taxable person has acquired the *San Giorgio* right because the single taxable person does not exist as a separate person – there is nobody other than the individuals who are together marshalled and treated as if they are something which they are not. The Joint Appellants say, further, that this is what the CJEU meant in [28] of *Skandia* when it described Skandia's Swedish branch as forming the single taxable person "with the other members" of the group; when it said that the VAT registration number was allocated to that group; and that the supplies were made by Skandia America "not to that member but to the actual VAT group". Similarly in *Ampliscientifica* the Court held that the members of the group who are closely bound to each other are no longer to be treated as separate taxable persons and that the single taxable person is thereafter the sole person entitled to submit a VAT declaration. That rules out, the Joint Appellants argue, national provisions which treat one of the members, rather than the collective group as entitled to make a declaration in respect of all the members' supplies. Advocate General Jääskinen in *Commission v Ireland* expressed the same idea when he said at [40] and [42] that a VAT group is 'comparable' to a taxable person consisting of only one entity – he did not say that it was permissible for the VAT group in effect to be replaced by one entity.

115. In my judgment neither the wording of article 11 nor the case law of the CJEU restricts the method of implementation of VAT grouping so as to preclude the creation of the representative member and the deeming provisions in section 43. Article 11 is brief, specifying the goal to be achieved and leaving a broad discretion to the member states as to how to achieve that goal. In *Ampliscientifica* the Court set out the features that a domestic provision must display in order to constitute an implementation of article 4(4) of the Sixth Directive. It specified only that there must be consultation with the VAT Committee, that the companies grouped must be closely bound to one another, that they must no longer be treated as separate taxable persons and that they must be treated as a single taxable person to whom a single VAT identification number is allocated. Section 43 achieves all that.

116. Subsequent cases have presented for the Court's consideration a variety of restrictions imposed in national law that may or may not comply with the directive provisions. The Court has consistently held that any such restrictions are permissible provided that they meet, or at least do not run counter to, the objectives of simplifying administration and combating abuse. Thus, in *Larentia + Minerva* the Court held that a restriction denying partnerships the possibility of VAT group membership was permissible provided that it fell within the objective of the VAT grouping provision. The Court dismissed the infraction proceedings in *Commission v Sweden* because the Commission had failed to show convincingly that Sweden's decision to limit VAT grouping to the financial and insurance sector did not contribute to combating tax evasion and avoidance. The creation in section 43 of the representative member who is deemed to carry on the businesses of the group members simplifies administration and combats abuse. The VAT system operates on the basis of legal entities which buy and sell goods or services, incur input tax and charge output tax on those transactions and account for the tax to HMRC. Such contracts are not entered into by collectives of undertakings without legal personality and nor are payments made or received by collectives. As the Upper Tribunal said at [44] of *Chartered Trust/MG Rover UT*, some real person is required to deal with HMRC. There is nothing in article 11 which suggests that the single taxable person must be some unusual form of non-entity.

117. I recognise that the Commission in the 2009 Communication expressed the view that member states should implement article 11 in such a way that when a member leaves the group, it takes with it the rights and obligations that had been assumed by the single taxable person when it was a member. It may be that the Commission would prefer that the different regimes adopted by member states were harmonised so that they all had that effect. I respectfully disagree with the Commission if it is suggesting that article 11 currently requires member states to implement VAT grouping with that effect.

118. Mr Peacock accepts that if he seeks to rely on the reference in that passage to rights and obligations *reverting* to the individual member then he must accept in accordance with the first paragraph of that passage that when the individual member joins the group, it "transfers" to the VAT group the rights and obligations arising from its real world supplies before it becomes a member. HMRC submitted that that had never been HMRC's policy. Further, Mr Macnab said that that was a point that had been debated at an earlier stage of the proceedings giving rise to these appeals. Before the FTT, Standard Chartered had argued that another member of the Standard Chartered VAT group, ACL, had brought with it on joining the group the rights to a refund in respect of supplies it had made before it joined the group. The FTT had rejected that argument holding that the rights remained with ACL even if ACL was a member of the Standard Chartered VAT group at the time the claim was made. That aspect of the claim was not pursued on appeal.

119. Mr Hitchmough argued that the discretion conferred on member states when implementing article 11 is limited to questions of eligibility for membership of the group and does not extend to the consequences of VAT grouping. The Joint Appellants say this is not surprising since variations in the consequences of VAT grouping amongst the member states would undermine the commonality of the VAT system. It is true that the cases that have come before the CJEU so far are concerned with the legality of the member states' rules on who can be included (non-taxable persons in *Commission v Ireland* or branches in *Skandia*) or excluded (partnerships in *Larentia + Minerva* or businesses other than financial service providers in *Commission v Sweden*). That does not mean, however, that the discretion is limited in the way that the Joint Appellants submit.

120. The case law is also inconsistent with the Joint Appellants' submission that the VAT grouping provisions should not affect the underlying rights and obligations of the members. On the contrary, it is a key feature of VAT grouping that where companies come together to form a group there are significant changes to the tax treatment of their supplies; it is not simply a matter of the single taxable person accounting for the same amount of VAT as would have been payable on the members' transactions had they remained independently taxable persons. As Advocate General Jääskinen said in *Commission v Ireland*, [42], one important change is that a VAT group's internal transactions do not exist for VAT purposes. This can bring financial as well as administrative advantages where, for example a member of the group makes exempt supplies and can avoid incurring non-deductible input tax by obtaining inputs from a fellow group member.

121. The *Skandia* case itself is a striking example of rights and liabilities changing as a result of an entity joining a VAT group. The Advocate General and the Court recognised that transfers between the American main establishment and its Swedish branch would not have been treated as taxable supplies if the Swedish branch had not been a member of

the Swedish VAT group. What happens on the formation of the group is much more significant than an aggregation of the members' individual tax treatment.

122. I also agree with the Upper Tribunal's conclusion in *Chartered Trust/MG Rover UT* at [41] that there is no hint in the CJEU's judgments that the departure of one member from the single taxable person should unwind previous treatment so that supplies originally treated as having been made by the single taxable person are to be treated instead as having been made by the real world supplier. I also agree with their assessment that nothing in Lord Nolan's speech in *Thorn* suggests that his description of the representative member was dealing on behalf of the members was intended to mean that it dealt as their agent: see [44] of *Chartered Trust/MG Rover UT*.

123. Mr Scorey drew our attention to the domestic provisions dealing with compulsory VAT group registration. These are found in paragraph 2 of Schedule 1 to VATA. They provide that HMRC may make a direction that the persons named in the direction shall be treated as a single taxable person carrying on the activities of the business described in the direction and that taxable person shall be liable to be registered. The consequences of this are set out in subparagraphs (6) and (7) of paragraph 2. Subparagraph (6) provides that the persons who together are to be treated as the taxable person are referred to as "the constituent members" of the group. Subparagraph (7) then provides that the constituent members shall be treated as a partnership carrying on the business of the taxable person. The vires for this provision is article 11 and more accurately reflects the power in article 11 because it avoids picking a particular legal entity as the representative of the group.

124. My response to this submission is the same as Lord Hodge's in *Taylor Clark* namely that Parliament has chosen a different model for compulsory VAT grouping from the model chosen in section 43. That does not mean that section 43 (which makes no reference to constituent members or to partnership) should be construed as having the same effect as Schedule 1, nor does it support the proposition that the model chosen in section 43 is beyond the power conferred by article 11.

125. Mr Peacock argues that by necessary implication from the principle that EU law creates the concept of the single taxable person being the members of the group, it must be the case that when a company ceases to be part of the single taxable person, the remaining companies are not the same single taxable person. The Joint Appellants argue that once a member leaves the group, that single taxable person comes to an end and a new one comprising the new group of members comes into existence. Since they accept that no new VAT registration number is needed at this point, it was not clear to me what legal or practical effect was said to follow from this. In any event, I do not see any justification for construing article 11 or section 43 as requiring the demise and rebirth of the VAT group each time a new member joins or an existing member leaves. That is certainly not the basis on which section 43B(2) is drafted. That provision refers to applications for changes of membership as being different from applications for a group to be formed or to cease to exist.

126. In conclusion on this ground, I see nothing in the objectives, context or wording of article 11 as interpreted by the CJEU that rules out the model adopted in section 43. It does not run counter to the objectives of simplification and combating abuse and it does not create uncertainty. We heard submissions on whether the interpretation of the article

11 should be referred to the CJEU for a preliminary ruling in these appeals. I consider the answer is clear and there is no need for a reference to the Court.

(b) The Joint Appellants' case on *San Giorgio* rights

127. The Joint Appellants contend that the second reason why the UK domestic law does not comply with EU law is because it fails to ensure that the *San Giorgio* principle is applied in a manner that is consistent with its purpose. Mr Hitchmough describes the *San Giorgio* principle as directed to offsetting the consequences of an unlawful charge by neutralising the economic burden which the tax has unduly imposed on the operator who, in the final analysis, has actually borne it. The Joint Appellants therefore argue that it is only possible to safeguard the principle that underpins *San Giorgio* if upon the departure of the real world supplier from a VAT group it is the real world supplier that is entitled to repayment in relation to its real world supplies.

128. The scenario that the Joint Appellants urged on us was one where a customer brings a claim against the real world supplier for the return of the VAT element in the price paid for the goods or services supplied. The customer has no cause of action against the single taxable person, the Joint Appellants argue, because under the EU model, there is no distinct legal entity that constitutes the single taxable person. The real world supplier must reimburse that VAT but may not be able itself to claim against the then current representative member. That representative member may now be a legal entity with which the real world supplier never had any connection and certainly has no connection now. The real world supplier would in that situation end up bearing the economic burden of the tax because it must pay out to the customer. The representative member might claim back the tax from HMRC and be under no easily identifiable obligation to pass that money to the real world supplier. That, they argue, shows that the *San Giorgio* principle is not adequately provided for in the section 43 model of implementation.

129. I consider that to hold that such a claim exists would require a significant extension of the existing law. The context in which the CJEU discusses where the economic burden of the tax lies in cases such as *Comateb* and *Lady & Kid* is not the context of deciding who has the right to claim back the unlawfully levied tax. Rather the concept has arisen when the Court has considered in what circumstances the state can defeat the claim by the person who paid the VAT by showing that that person did not bear the economic burden but passed that burden onto someone else. *San Giorgio* itself involved the most typical situation in which the economic burden is not borne by the taxpayer, namely where the taxpayer has incorporated the VAT into the price charged to its own customers. Later cases considered whether there were other circumstances in which it could be said that repayment of the tax would result in the taxpayer's unjust enrichment. Thus in *Lady & Kid* the Court held that a financial saving in not having to pay abolished taxes was not such a circumstance and in *Accor* the Court held that a reduction in the dividend paid to shareholders was not such a circumstance. Indeed, the Court in *Accor* at [76] said that the only circumstance in which the defence of unjust enrichment arises is where the national tax regime itself leads to the passing on to a third party of the tax unduly paid by the person liable for that tax. The Court there closed down any defence of unjust enrichment more complicated than the straightforward passing on of the VAT in the price charged by the taxpayer to its customer. The decision that might appear at first sight to be inconsistent with the decision in *Alakor* where the Court held that if the non-deductible VAT had been directly financed for the taxpayer out of EU and national funds, the taxpayer would be unjustly enriched if all that VAT was then refunded.

Alakor was not therefore a case of the tax having been passed on to a third party but of the state having effectively foregone the tax by providing a subsidy that had already cancelled out the impact of the unlawful non-deductibility.

130. What the Court did not consider in those cases was whether if a defence of unjust enrichment by reason of pass on is made out, does the person to whom the tax was passed on then have a claim against the state? That is the jump that the Joint Appellants seek to make when they argue that the *San Giorgio* right can be enforced by the person who can show that he has suffered the economic burden. That question was considered briefly in *San Giorgio* itself, at [24] and in *Comateb* [24], both cited earlier. It was considered in more detail in *Reemtsma* and in *Danfoss*. In all those cases the Court, and the Advocates General, have been much more circumspect about holding that someone other than the taxpayer can claim directly from the state on the basis that he has borne the economic burden. In part this circumspection arises from a recognition that in general claims by those who have suffered loss as a result of member states' breach of EU law are subject to much more stringent threshold conditions, see the comments of Advocate General Kokott in her opinion in *Danfoss* at [49] and [61].

131. In *Reemtsma*, Advocate General Sharpston records at [81] that Reemtsma made the same submission to the CJEU that is made to us by the Joint Appellants in these appeals. It argued that compliance with the principle of effectiveness made it necessary to allow the customer a direct claim against the tax authorities. Were it otherwise, at least two potential conflicts with that principle might arise; the supplier might be insolvent when the customer claims against him or the supplier might find himself ordered to reimburse the customer in the civil courts but fail in his claim against the tax authorities in the tax courts. The Advocate General rejected this as a general proposition, preferring the Commission's analysis that the principle of effectiveness is adequately respected if the member state's procedure provides for the taxpayer to be the only person who can claim against the tax authorities, leaving the customer to seek reimbursement from the supplier in a civil action. She recognised that there may be cases where that system might fail for reasons unrelated to the merits of the claim. In those cases national law must provide a means whereby the customer can recover that amount from the tax authorities. The Court agreed that it was only in circumstances where the customer's ability to bring a civil law action to recover the sums became impossible or excessively difficult that member states must enable that recipient to recover the unduly invoiced tax from the state in order to respect the principle of effectiveness.

132. Advocate General Kokott in *Danfoss* recognised that the nature of an indirect tax is that it is ultimately borne by the final consumer but accounted for by taxpayers in the preceding distribution chain. She also concluded that the entitlement of the final consumer to claim against the state need be provided only where it is impossible or excessively difficult for the final consumer to recover against the taxable person, such as where the taxable person is insolvent. In those circumstances she considered that the customer should not be required to meet the more stringent conditions applying to a claim for damages based on EU law since the state has been enriched by the amount of the charge levied. The Court in *Danfoss* also limited the circumstances in which a member state which provides for a customer to bring a claim for reimbursement against its supplier must also provide that customer with the right against the state to circumstances in which the customer's claim against its supplier is made impossible or excessively difficult.

133. I do not read [24] of *Comateb* as saying anything more than that where a taxpayer has passed on the VAT to its customer that may give rise to an unjust enrichment defence on the part of the state to defeat the taxpayer's claim, if domestic law provides for such a defence. But where the taxpayer then has had to reimburse its customer for that passed on VAT, the taxpayer's claim against the state should revive.

134. From the case law I conclude that the Court has not established a general rule that any person who can show that they have suffered a loss or borne an economic burden as a result of the unlawful levying of VAT is entitled to make a claim against the member state for reimbursement of the tax under the *San Giorgio* principle. On the contrary, the Court has restricted the circumstances in which the principle of effectiveness requires such a remedy to those where it is impossible or excessively difficult for the bearer of the tax to claim against the person to whom it in fact paid the VAT. The neutralisation of the economic loss and the need to ensure that the state disgorges its unlawfully collected taxes are the justifications for the *San Giorgio* right but they do not dictate its scope or the circumstances in which it arises. I agree with the Upper Tribunal's conclusion at [90] and [91] of *Chartered Trust/MG Rover UT* that the language of the CJEU cannot be regarded as indicating that there is a general right available to any person who suffered an economic burden as a result of the imposition of the unlawful tax. As the Tribunal said there is a difference between asking whether the claimant taxpayer would be unduly enriched and asking who bore the economic burden: "The Court asks the former question not the latter."

135. The question of when the claim by the customer against its supplier is impossible or excessively difficult was in turn explored in *BAPV*. The *BAPV* case was strictly limited in scope since the Court was clear that if BAPV had failed to lodge a claim against the state until it was forced to pay out to its customers in civil claims, it could not have overridden a reasonable but short limitation period imposed on claims against the state by relying on the principle of effectiveness.

136. How do those principles translate to the present situation? The Joint Appellants argue that if they as real world suppliers have to pay out to their own customers and therefore bear the burden of the tax, it is very difficult to see how they could launch a claim against the representative member to whom HMRC wishes to refund the tax. They are therefore in the same position as a final customer who has paid the passed on tax but is unable under domestic law to obtain reimbursement from its supplier. The Joint Appellants say that they, like that final consumer, must therefore be accorded a claim against the state.

137. One serious flaw in this submission is that neither factual element is necessarily present in the circumstances of all the Joint Appellants. There are no findings of fact by the First-tier or Upper Tribunal and no evidence before this Court showing that each of the Joint Appellants has borne the economic burden of the tax. They have not established that it is impossible or excessively difficult for them to bring a claim against the representative member to whom HMRC have refunded the VAT.

138. As to the first element, it is common ground that the Joint Appellants did not themselves charge unlawful VAT to their customers. They have not had to satisfy, and will never have to satisfy, any claims brought by customers against them. We do not know whether all the Joint Appellants put the representative member in funds to pay the unlawfully levied VAT to HMRC; there is nothing in article 11 or section 43 that

dictates that they must have done so. The scenario is therefore based on an assumption about the nature of the internal arrangements among the members of the VAT group, namely that the real world supplier did not retain the wrongly charged VAT paid to it by its customer. But it is only if the real world supplier was required to pass that tax up to the representative member that it will be out of pocket if the sums later reimbursed by the tax authorities to the representative member do not make their way back to it.

139. As to the second element, none of the representative members involved in these appeals is insolvent or otherwise unable to meet a civil claim by the real world supplier which has left the group. There was some discussion at the hearing as to the nature of any claim that a real world supplier might be able to bring against the representative member if it were able to show that it had indeed been out of pocket. The Upper Tribunal's answer to this was that this was a matter for the internal arrangements within the VAT group which may well encompass what is to happen when real world suppliers leave the group. If such internal arrangements did not lead to a satisfactory outcome so far as a departed real world supplier was concerned, there are also the arrangements that can be made pursuant to section 80A VATA and regulation 43A of the VAT Regulations 1995 when HMRC refunds the tax to the representative member.

140. A future court may be faced with a claim brought by a departed real world supplier either against the representative member seeking to enforce the internal VAT group arrangements or asserting that HMRC failed adequately to respect its interests by making proper arrangements pursuant to regulation 43A. This Court is not in that position. What I take from the jurisprudence of the CJEU is that the possibility that that crunch point may come in a future case is no basis for constructing a general right to claim a refund from the national tax authorities on the part of those who have borne the economic burden of unlawfully levied tax.

141. Another serious flaw in the Joint Appellants' submission is that I agree with the submission made by Mr Glick that the concept of bearing the economic burden of the tax is a more specific concept than a general concept of having suffered loss as a result of the imposition of the tax. Mr Glick emphasised that it does not make sense to speak of the real world suppliers having borne that economic burden. The effect of VAT grouping is that they no longer exist as links in the chain of supply along which VAT is charged and accounted for. It is only the single taxable person - in the UK the representative member - who exists and it is only that person and its customers outside the VAT group who can be said to bear the burden of the tax. I consider this submission further in relation to Standard Chartered's appeal.

142. The Joint Appellants submit that a system that treats the *San Giorgio* right as resting with the representative member of the VAT group even though the real world supplier has left ignores the importance of the financial, economic and organisational links, the existence of which justifies the formation of the VAT group in the first place. It leads to anomalous results, they argue, because it is perfectly conceivable that the representative member of the VAT group at the time the claim is made may have no connection at all with the real world supplier. The representative member may be unaware of the existence of the claim for unlawfully levied tax and may have no interest in pursuing a refund.

143. Although that is undoubtedly true, I do not agree that it creates an anomalous situation. The Joint Appellants accepted that the *San Giorgio* right arises, if it arises at all, at the

moment that the unlawfully levied tax is paid, not from the moment when it becomes apparent because of a later court ruling that the tax was unlawful. That is why interest on the amount paid is claimed by taxpayers and paid by HMRC calculated back to the date that the tax was paid to HMRC, sometimes many decades earlier. At the date that the claim arose there must have been the financial, economic and organisational links between the real world supplier and the then representative member of the VAT group, otherwise they would not both be members of the same group. The break of the link between the real world supplier and the representative member of the VAT group is the result not of the attribution of the *San Giorgio* right to the single taxable person (under UK law, the representative member) but a result of the length of time before that right is recognised and then exercised.

144. I therefore conclude that the domestic implementation of the article 11 right does not infringe the *San Giorgio* principle or render the *San Giorgio* right ineffective in the UK by limiting the claim under section 80 to the representative member of the VAT group. The CJEU has had several opportunities to consider the incidence of the *San Giorgio* right, albeit not in the context of VAT grouping. The Court has set out the principles to be applied and emphasised that it is for the national court to assess whether, in a particular case, the application of domestic legal rights and procedures complies with the principle of effectiveness. I consider that the result in these appeals is sufficiently clear so that a reference to the CJEU is not appropriate.

(c) Standard Chartered's case on the dissolution of the VAT group

145. The salient facts of Standard Chartered's appeal are that Chartered Trust was sold by Standard Chartered to Lloyds on 1 September 2000 and on that date Chartered Trust moved from the Standard Chartered VAT group into the Lloyds VAT group. All the VAT in dispute was generated by supplies made by Chartered Trust as the real world supplier before it joined the Lloyds VAT group. Some supplies were made at a time when Chartered Trust was the representative member of the Chartered Trust VAT group, albeit that it was part of the Standard Chartered corporate group. Some were made after the Chartered Trust VAT group was dissolved and Chartered Trust joined the Standard Chartered VAT group.

146. Standard Chartered agrees with HMRC and BMW that during the currency of the VAT group, it is the representative member who is entitled to reclaim the VAT overpaid to HMRC in respect of supplies made by the real world suppliers in its group whether or not the real world supplier is still a member of the VAT group at the date of the claim. That was the basis on which Standard Chartered claimed and was refunded the overpaid VAT in respect of Chartered Trust's sales during the period when Chartered Trust was a member of the Standard Chartered VAT group (of which Standard Chartered was the representative member) and before it was sold to Lloyds. Where Standard Chartered parts company with HMRC and BMW is as to who is entitled to claim for VAT overpaid in respect of sales made by Chartered Trust at the time when Chartered Trust was owned by Standard Chartered but was still the representative member of its own Chartered Trust VAT group. HMRC say that Chartered Trust as the last representative member of that group before it dissolved in June 1990 is entitled; Standard Chartered say that once the Chartered Trust VAT group dissolved, the *San Giorgio* rights could be enforced by whoever bore the economic burden of the tax. Here that person was Standard Chartered as the parent of the corporate group.

147. Standard Chartered therefore puts forward four grounds of appeal:

i) Ground 1 is that the Upper Tribunal should have found that the person entitled to claim after the dissolution of the single taxable person is the person who bore the economic burden of the tax.

ii) Ground 2, in the alternative, is that if, after the dissolution of the group the right to claim either rests with the last representative member or reverts to the real world supplier, the Upper Tribunal should either:

a) have held that repayment to Chartered Trust in this instance would unjustly enrich Lloyds and that HMRC must therefore treat Standard Chartered as the person entitled to make a claim for repayment, because it bore the burden of the tax; or

b) have directed HMRC that when it pays Lloyds the refund, it should put in place reimbursement arrangements under section 80A VATA designed to ensure that any money paid to Lloyds is passed to Standard Chartered.

iii) Ground 3 is that the Upper Tribunal erred in deciding that a claimant could only establish that it has borne the burden of the overpaid tax if it paid the tax because it was one link in the chain by which VAT cascades from the initial manufacturer of the goods down to the final consumer or other business which cannot reclaim or deduct input tax. Standard Chartered argues that the burden of the tax can be borne in other ways, as is demonstrated by the CJEU's case law on unjust enrichment.

iv) Ground 4 alleges that the Upper Tribunal should have recognised that the uncontradicted evidence relied on by Standard Chartered before the FTT established that it had, indeed, borne the burden of the VAT that had been overpaid by Chartered Trust, as representative member of the Chartered Trust VAT group.

148. On Grounds 1 and 2, Mr Beal's primary submission is that there is no statutory provision dealing with what happens about repayments of overpaid VAT on the dissolution of a VAT group. Parliament has provided in section 43(1) VATA that all the members of the group shall be jointly and severally liable for any tax due from the representative member. This ensures that HMRC can still recover any unpaid due when the VAT group dissolves. There is no corresponding provision dealing with who takes the place of the representative member as regards claiming repayments of unlawful tax accounted for. The gap must be filled somehow. Mr Beal submits that there is no domestic statutory provision empowering HMRC to make a payment to the last representative member. There is no provision in the PVD dealing with this and hence no vires under the PVD for the UK to imply into its own statutory code the solution which HMRC now propounds. One must therefore fall back on general principles of EU law. Those principles dictate that the claimant should be the person who has borne the economic burden of the tax. That, on the evidence before the Court is Standard Chartered and not Lloyds. A payment to Lloyds would, Mr Beal submits amount to a windfall in their hands.

149. I do not accept that the absence of express provision for what happens on the dissolution of the VAT group leaves a lacuna as Mr Beal suggests. I agree that the *San Giorgio* right cannot be extinguished when that happens, a claimant must be found. Given that, as I have held, the claimant up to the point of dissolution is the representative member for the time being, there is no difficulty in that entity retaining that claim. Like the Court of Appeal in *Barclays*, I conclude that it is possible to read article 11 in a way which allows the regime to operate in a sensible and coherent way.

150. Mr Beal argues that the last representative member does not fit within section 80(1) because it only accounted for VAT because of its deemed status as a single taxable person. Once it no longer has that capacity because the group has dissolved, it is simply a limited company. I do not see any difficulty with operating section 80 on the basis that the last representative member remains the only person entitled to claim the refund of the tax after the VAT group has dissolved. The wording of section 80 does not require that the claimant be a taxable person at the time it makes the claim. All that is required is that the person who makes the claim is the same person as the person who accounted for the tax. There are many circumstances in which a claim is made under section 80 by someone who used to be but is no longer a taxable person. For example a sole trader who retires and deregisters for VAT may then discover many years later that he overpaid unlawfully levied VAT at a time when he was registered and accounting for tax. HMRC have never disputed such a person's entitlement to claim under section 80, even though he is not a taxable person at the time of lodging the claim. This being the case, Chartered Trust fits within the class of people covered by section 80 in its capacity as the former representative member of the VAT group before the group ceased to exist. There may be cases where the last representative member is a different legal entity from the one that was the representative member at the time when the unlawful VAT payments to HMRC were made. However, the Supreme Court in *Taylor Clark* held that the concept of the representative member is like a corporation sole. The rights belong to the representative member as a body, regardless of which legal entity actually fulfils that role at any particular time.

151. Mr Beal also argues that to allow Lloyds to pursue the claim for repayment of sums due to Chartered Trust would be to allow Lloyds to be a member of two VAT groups at the same time, a situation prohibited by section 43D(1). I do not agree that recognising Chartered Trust's or Lloyds' claim under section 80 amounts to treating either of them as if they are still members of the dissolved Chartered Trust VAT group. The current VAT status of the claimant under section 80 is not what is important, what matters is that at the time covered by the claim it accounted for unlawfully charged VAT.

152. If the last representative member has itself ceased to exist, all the tribunals have recognised that that is an exceptional circumstance in which some other answer will need to be found. That is not an issue that arises in the present appeals since Chartered Trust is still very much alive. In *Gala UT* the Tribunal considered whether the disbandment of the VAT group amounted of itself to an exceptional circumstance which justified recognising a *San Giorgio* right for someone other than the representative member. Mr Peacock, appearing in that appeal for Gala argued that the FTT in *Chartered Trust FTT* had suggested that a case where the group has ceased to exist may be one where it is impossible or excessively difficult for the representative member to obtain reimbursement: see [113] and [114] of *Chartered Trust FTT* discussed at [21] of *Gala UT*. The Tribunal in *Gala UT* concluded, correctly in my

view, that the Upper Tribunal in *Chartered Trust/MG Rover UT* had not endorsed the suggestion that someone other than the representative member needs to have a claim where the VAT group has ceased to exist, provided that the representative member itself is still extant.

153. I therefore dismiss Standard Chartered's first ground of appeal and the first limb of its second ground.

154. I turn then to the suggestion that the Upper Tribunal ought to have directed HMRC to make reimbursement arrangements under section 80A VATA to ensure that any refund to Lloyds/Chartered Trust is paid over to Standard Chartered. Mr Beal points out that there is nothing in section 80A VATA that limits the potential beneficiaries of the reimbursement arrangements to customers or final consumers. Regulation 43A of the VAT Regulations 1995 defines reimbursement arrangements as any arrangements made for the purpose of securing that the section 80 claimant is not unjustly enriched. It provides for:

> "the reimbursement of persons (consumers) who have, for practical purposes, borne the whole or any part of the original amount brought into account as output tax that was not output tax due".

155. The question was raised during the hearing whether the reference to "consumers" in parentheses in the definition of reimbursement arrangements was intended to limit the class of potential beneficiaries to final consumers or whether it was simply a shorthand way of referring to any persons who have for practical purposes borne the burden of the unduly levied tax. We were not told about any discussions that had taken place between any of the parties and HMRC about the possibility of making reimbursement arrangements in respect of any of the successful claims made under section 80 by these parties. We do not know what stance HMRC would take in such discussions. In those circumstances it would be premature for this Court to consider giving any directions in this regard.

156. I now turn to Ground 3 of Standard Chartered's appeal. Mr Glick, as I have stated in a different context, argued that the term "economic burden" as used by the CJEU has a limited meaning. When the CJEU considers who might have a right against the state to repayment, those regarded as having borne the "economic burden" are limited to those to whom the tax was passed on in the price charged to them by their supplier who accounted for the tax. None of the cases so far discussed show the Court addressing whether a claim can be brought by a person who is neither the taxpayer who accounted for the tax to HMRC nor someone who has paid the tax to that taxpayer.

157. I agree that the concept of economic burden which forms part of the test for establishing the defence of unjust enrichment is not as broad as Standard Chartered needs it to be. As I have described above, the Court in *Lady & Kid* and *Accor* rejected a broad concept of passing on the economic burden and restricted it to where the burden is passed on down the chain of successive taxable persons until it reaches the final consumer as a result of the operation of the VAT system. Standard Chartered relies on *Comateb* as showing that the Court recognises a broader kind of loss than simply paying the tax either to the state or to one's supplier. *Comateb* establishes what Mr Glick referred to as a 'reply' point. If a claimant taxpayer is met with an unjust enrichment defence

because it passed on the tax to its customers, it can defeat that defence by showing that passing on the tax caused it to lose sales. *Comateb* does not decide that any person who suffers a loss of sales as a result of having to add VAT to their prices has a *San Giorgio* right against the state.

158. Turning finally to Ground 4, Mr Beal told us that when the case was before the FTT, HMRC did not dispute the evidence provided in the witness statements of Mr Stephen Crosby, Group Head of Taxation for Standard Chartered. Mr Crosby was tendered for cross examination but was not cross-examined. His evidence covered the financial reporting by Chartered Trust to Standard Chartered and the degree of control and oversight which Standard Charted exercised over the corporate group, for example by setting credit limits for individual clients and approving the size of loans. Standard Chartered provided Chartered Trust with day-to-day funds for the operation of its business and later very substantial funds were injected to keep the Chartered Trust business in compliance with its regulatory obligations. Acquisition funding was provided as were guarantees for Chartered Trust's indebtedness. Chartered Trust like the other subsidiaries had to remit 100 percent of profits arising from its activities at regular intervals to Standard Chartered. Mr Beal also took us to the terms of the sale and purchase agreement by which Chartered Trust was sold by Standard Chartered to the Lloyds group. This showed, he said, that the net assets for which Lloyds paid did not include any latent right to reclaim tax from HMRC – that is unsurprising since no one at that point realised that the tax paid had not as a matter of law been due. Lloyds has not therefore borne any burden at any stage of any overpayment of tax.

159. Given my decisions on the first three grounds, success on ground 4 would not assist Standard Chartered. I will therefore deal with it more briefly. HMRC do not agree that either the FTT or the Upper Tribunal found that Standard Chartered had borne the economic burden of the VAT paid in respect of Chartered Trust's real world supplies. In *Chartered Trust FTT* at [118], the FTT said that as nothing turned on the facts set out in the evidence, they did not need to make any specific findings in relation to those facts. In *Chartered Trust/MG Rover UT* the Upper Tribunal recorded at [197] that Standard Chartered had asked that the tribunal make four findings of fact directed at establishing that it had borne the economic burden of the tax. They declined to do so for three reasons, the last of which was that there may be factors relevant to the computation of the economic burden, such as perhaps as to the extent to which Standard Chartered itself had passed on any burden in similar ways, that may be relevant. I agree with Mr Mantle that it would not be right to say that either the FTT or the Upper Tribunal had accepted that Standard Chartered had borne the economic burden of the tax on the basis of Mr Crosby's evidence. Mr Mantle drew our attention to Mr Crosby's evidence that for part of the claim period, Chartered Trust was not in fact wholly owned by Standard Chartered. This is the kind of factor that would need to be explored if Standard Chartered had succeeded as a matter of principle on the other grounds of its appeal. Since at both levels the Tribunal rejected the submission that the issue was relevant, they did not need to consider what precisely is covered by the concept of bearing the economic burden and hence what evidence would be needed to establish whether any given contender qualified. In the event I have also rejected the submission that bearing the economic burden can in the circumstances of these Appellants form the basis of a *San Giorgio* right. There is therefore no reason for this court to make findings of fact or for any remittal to the tribunal.

160. I therefore dismiss Standard Chartered's separate grounds of appeal.

(d) Gala's case on exceptional circumstances

161. Mr Peacock addressed us on Gala's specific grounds of appeal. Gala's primary case supports the other Joint Appellants in asserting that Gala's claims should be met by HMRC because Gala is the assignee of the rights held by Gala Leisure Ltd which was (a) the real world supplier of supplies unlawfully subject to VAT when it was a member (but not the representative member) of a VAT group; and (b) the assignee of the rights held by other real world suppliers who had been members of those VAT groups but not representative members of those groups. On that basis Gala argues it is entitled to repayment without having to prove that it or the assignor real world suppliers bore the economic burden of the overpaid VAT. It was common ground before the FTT that unjust enrichment was not an issue in the case as Gala could not have passed on any of the unlawfully levied VAT to its bingo customers.

162. Ground 3 of Gala's appeal is that the FTT should have found on the evidence before it from Gala's accounting expert that the burden of the unlawful VAT was borne by Gala Leisure Ltd and the other real world suppliers. In the course of the hearing before us both Gala and HMRC accepted that if this question turned out to be relevant, the appropriate course would be to remit the case back to the FTT. In the event I consider that it is not relevant and no remittal is needed.

163. Ground 4 is that if, again contrary to Gala's primary submission, the court holds that a real world supplier is not ordinarily entitled to bring a claim for VAT, this is one of the exceptional cases envisaged by the Upper Tribunal in *Chartered Trust/MG Rover UT* and that Gala should therefore be able to pursue Gala Leisure Ltd's claims. Since I have found that it is the representative member and not the real world supplier who has the only claim under section 80, I must address this alternative submission.

164. Mr Peacock noted that the Upper Tribunal recognised that there can be exceptional cases where someone other than the representative member of the VAT group should have a *San Giorgio* right of recovery against the tax authority in order to give effect to the principles on which that right is based. This appeared to be accepted by HMRC and BMW and reflects the case law of the CJEU that I have described above. The example of the exceptional case generally posited is where the representative member has been wound up or otherwise ceased to exist as a legal entity by the time the claim comes to be made. That was not the case here; the representative members of the various VAT groups of which Gala Leisure Ltd and the other assignors were members are extant.

165. Mr Peacock submitted that the only guidance available as to what should amount to exceptional circumstances is the goal that must be achieved by the *San Giorgio* right, namely the goal of neutralising the economic burden of the unlawful tax. The exceptional circumstances on which Gala relies are as follows.

166. First, the unlawful VAT was paid over a 23 year period between 1973 and 1996. It was the result of two errors on the part of HMRC namely the incorrect application of EU law applying VAT to bingo followed by the failure to provide an adequate system for recovery of the overpaid tax until 2009: see *Fleming (t/a Bodycraft) v Revenue and Customs Comrs* [2008] 1 WLR 195. Mr Peacock described HMRC's stance in this case as saying: "We wrongly collected tax from you over a 23 year period. We failed to

provide you with a proper mechanism to recover that tax for a further 13 years but if you can't prove what actually happened, we keep the money".

167. Secondly, no competing claims have been made to HMRC by representative members in respect of the tax now claimed by Gala. There is no evidence explaining why they have not made a claim and no suggestion that they would be met by HMRC raising a defence of unjust enrichment.

168. Thirdly, at the time the claim had to be made in 2009, it was not possible for Gala or any of the assignor real world suppliers to find out who the then representative members of the relevant VAT groups were. That information was not publicly available and HMRC refused and still refuse to provide them with that information on the grounds of taxpayer confidentiality. At the time the real world suppliers left their old VAT groups, they could not have known that they needed to put in place private contractual rights in case many years later a *San Giorgio* right arose. It was difficult to see how they could have put in place any such rights against whoever was the representative member in 2009, since that may well be a different legal entity from the representative member when they left the group.

169. Mr Peacock submitted that whilst each of these factors alone may not be sufficient to amount to exceptional circumstances, cumulatively they were. The principle of effectiveness was not respected if HMRC refuse to tell Gala who the current representative members of the relevant groups are but yet refuse their claim on the grounds that the only persons with a claim are those representative members.

170. Mr Mantle for HMRC relied on the decisions of the tribunals below in dealing with the 'exceptional circumstances' submission. At [162] of *Gala FTT* the Tribunal held that there was nothing in Gala's case to suggest that the VAT groups had ceased to exist or that a claim by the representative members of the continuing groups would fail to provide an effective remedy. At [26] and [27] of *Gala UT*, the Tribunal agreed that there may be circumstances other than where the VAT group and the last representative member have been dissolved where it is virtually impossible for the wrongly paid tax to be recovered through the representative member. The Tribunal agreed with what the Upper Tribunal had said in this regard in *Chartered Trust/MG Rover UT* at [184]. The Tribunal in *Gala UT* did not say, however, that even in the exceptional circumstances, the right corrective is for the real world supplier to have a right to claim the overpaid tax for itself. Rather, it would be necessary to find an alternative mechanism for enabling the members, as the single taxable person, to exercise that right: [29].

171. I agree that the case where the VAT group and the representative member have been dissolved may not be the only exceptional circumstance in which the UK framework may need to be adapted to ensure compliance with article 11 and the *San Giorgio* rights, although that is, as the Tribunal said in *Gala UT* the paradigm example: [31].

172. I do not consider that Gala's circumstances are exceptional. Certainly the first factor is not exceptional in the sense of being likely to arise only on rare occasions. On the contrary, claims are likely to stretch back over many years in every situation where it is discovered that VAT has been wrongly collected, unless the member state properly sets a limitation period. I do not see how the fact that the current representative member has not made a claim can as a matter of law result in that claim being lost and picked up by the real world supplier or its assignee. If the *San Giorgio* right lies with the

representative member it is entitled to exercise that right at any point until the right is extinguished by the expiry of the limitation period. If the representative member does not exercise the right before it is time barred, that claim cannot somehow be resuscitated so that it can be made beyond the limitation period by the real world supplier. I agree with the Tribunal at [35] of *Gala UT* that the fact that the representative member does not claim before the expiry of the limitation period does not mean that the principle of effectiveness is breached if no one then has a claim against HMRC.

173. As to the third factor, Gala did not attempt to challenge HMRC's refusal to disclose the details of the current representative members as being an unreasonable refusal in the circumstances. That refusal cannot mean that HMRC is prevented from contending that it is the representative member who has the sole claim to enforce the *San Giorgio* right. Further, the FTT was not satisfied that Gala could not identify who the representative members were. The FTT referred at [142] to the agreed fact that the identity of the representative members of the relevant VAT groups was not available from HMRC and was not otherwise in the public domain. However, the FTT did not infer from that that it had been impossible for Gala to find out who they were: there was no evidence before the FTT about private arrangements between, or the potential to obtain information from, other companies which had been members of those VAT groups including companies which had assigned their rights to Gala. The Upper Tribunal also rejected the submission that it was possible to find as a fact that Gala was unable to identify the representative members of the VAT groups: [43].

174. I agree with the assessment of the Upper Tribunal in *Gala UT* that the factors relied on by Gala do not amount either individually or cumulatively to circumstances that made it impossible or excessively difficult for the representative members of the relevant VAT groups to make their own claims for refunds against HMRC. There is no error of law identified here and this ground of Gala's appeal fails.

VII. CONCLUSION

175. In summary I would dismiss the appeals for the following reasons:

i) Neither the wording of article 11 PVD nor the jurisprudence of the CJEU precludes the model of VAT grouping adopted by the UK in sections 43 to 44 VATA whereby the VAT group appoints a member of the group to be the representative member and attributes the businesses of the other members of the group to that representative member who then accounts to HMRC for the VAT arising from all transactions in those businesses. The proper construction of article 11 does not stipulate that the single taxable person created by the VAT grouping provisions operates in such a way that any *San Giorgio* rights arising from that accounting for VAT are held by the real world suppliers so that those suppliers take the rights with them when they leave the VAT group. Sections 43 to 44 thus comply with article 11 of PVD.

ii) The UK regime whereby the representative member of the VAT group is the sole person who can bring a claim under section 80 VATA for the recovery of output tax accounted for in respect of all the businesses attributed to it under section 43 and whereby the customers of the real world suppliers in the VAT group may either recover any unlawful tax passed on to them by those real world suppliers or benefit from arrangements made under section 80A VATA respects

the *San Giorgio* rights arising from the unlawful levying of the VAT and the principle that *San Giorgio* rights must be effective. A court in future may need to consider a claim brought against a representative member by a real world supplier who has reimbursed the VAT to its own customers and seeks a remedy against the representative member who accounted for that VAT to HMRC. None of the Appellants is in that position and the possibility of such a situation arising does not justify conferring a *San Giorgio* right on these Appellants.

iii) Where the VAT group has been dissolved, the last representative member of the group has a claim under section 80 whether or not it is the same legal entity as fulfilled that role at the time of the supplies and whether or not it is still a taxable person. The question of who bore the economic burden of the tax is not a relevant consideration. The companies regarded as bearing the economic burden of the tax are in any event limited to those companies who paid the tax as one of the links in the chain by which the VAT is passed down to the final consumer.

iv) There may be exceptional circumstances in which the operation of sections 43-44 and sections 80 and 80A do not provide an adequate framework for the full enforcement of *San Giorgio* rights. None of the Appellants has established that such exceptional circumstances exist in its case.

Lord Justice Henderson

176. I agree.

Lord Justice Patten

177. I also agree.