Case No: A3/2013/1211 & 1208

Neutral Citation Number: [2014] EWCA Civ 23
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL
(TAX AND CHANCERY CHAMBER)

FTC/91 & 922011

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17/01/2014

Before :

LORD JUSTICE LONGMORE
LORD JUSTICE LEWISON
and
LORD JUSTICE BRIGGS

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Between :

THE TRUSTEES OF THE BT PENSION SCHEME	**Appellant**
- and -	
THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS	**Respondent**

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MR M GAMMIE QC & MR C McDONNELL (instructed by **Pinsent Masons LLP**) for the **Appellant**
MR R BALDRY QC & MR J RIVETT (instructed by **HMRC Solicitor's Office**) for the **Respondent**

Hearing date: 19 December 2013

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Judgment

Lord Justice Lewison:

Introduction

1. The preliminary issue raised on this part of the appeal is whether section 43 of the Taxes Management Act 1970 ("TMA"), which imposes time limits on claims, applies to a claim for payments made by the Trustees of the BT Pension Scheme ("the Trustees") under section 231 of the Income and Corporation Taxes Act 1988 ("ICTA"). If it does then, subject to questions of community law which remain to be decided, many of those claims are time barred. At the hearing before the First Tier Tribunal the Trustees accepted that, subject to arguments of community law, section 43 did apply. But on appeal to the Upper Tribunal (Tax and Chancery Chamber) (Warren P and Judge Herrington) the Trustees took the point that, simply as a matter of interpretation, it did not. The Upper Tribunal held, contrary to the Trustees' submission, that section 43 of the TMA did apply. Their decision was promulgated on 28 February 2013 and is at [2013] UKUT 105 (TCC), [2013] STC 1781. The Upper Tribunal considered a number of issues, some of which will have to be referred to the CJEU in due course. But the parties were unable to agree on the form of the questions to be referred to the CJEU. Although it had been thought that a one day hearing would suffice to resolve those issues, the parties agreed that it would not. However since this court had already reserved a day's hearing, we considered that the day could best be used in determining the preliminary issue I have described, which if decided against HMRC would reduce the number of questions that had to be referred to the CJEU.

2. Mr Malcolm Gammie QC and Mr Conrad McDonnell presented the appeal on behalf of the Trustees; and Mr Rupert Baldry QC and Mr James Rivett presented HMRC's response. In the end the argument occupied the morning.

3. For the reasons that follow I would dismiss the appeal.

Background

4. As my references to the CJEU suggest the appeal takes place against a background of both domestic and community law. The context in which it arises is the regime that applied to the tax treatment of dividends received by UK residents from overseas companies either directly from those companies, or indirectly from UK companies which had designated dividends as representing the onward distribution of foreign profits. I will call both kinds of dividends "foreign dividends". It is unnecessary to distinguish between the two for the purposes of the preliminary issue.

5. At the time with which we are concerned there was a difference in the domestic tax treatment of these kinds of dividends and dividends received from UK companies on UK profits. We are to assume, for the purposes of the preliminary issue, that on the basis of a ruling by the CJEU this differential treatment was a breach by the UK government of community law, to the extent that it applied to foreign dividends from companies established in member states. On that assumption, the tax treatment of foreign dividends from companies established in member states had to be treated in the same way as dividends received from UK companies on UK profits.

Tax treatment of dividends

6. The Upper Tribunal explained the operation of the system in paragraphs [8] to [16] of their decision, drawing on the lucid summary given by Henderson J in *Test Claimants in the FII Group Litigation v Revenue and Customs Commissioners* [2008] EWHC 2893 (Ch). Stripped to its bare essentials it worked like this.

7. When a UK-resident company paid a dividend to its shareholders it had to pay an amount of advance corporation tax ("ACT") to the Revenue. The rate of ACT was initially linked to the basic rate of income tax, and subsequently the lower rate. Thus, when the basic rate of income tax was 25%, the ACT rate was 25/75 (or 1/3) of the amount of the distribution. The company which paid the ACT was in due course entitled to set that ACT against its corporation tax liability for its annual accounting period. Individual shareholders were liable to income tax on dividends received. Their liability arose under Schedule F (that is, section 20 of ICTA). The ACT paid by the company was "imputed" to the shareholders. What this meant was that the measure of the shareholder's income for tax purposes was the aggregate of the dividend plus the ACT which the company had paid to the Revenue. However, the shareholder was entitled to a tax credit for the amount of the ACT that had been imputed to him in this way; and that tax credit went to reduce his own liability to tax. In some cases the procedure might result in the Revenue making a payment to the claimant. The overall objective was to prevent double taxation: once in the hands of the company and once again in the hands of the shareholder.

The legislation

8. The relevant legislation in force at the time of the events with which we are concerned was section 231 of ICTA (before its amendment by the Finance (No 2) Act 1997). That provided, so far as material:

> "**Tax credits for certain recipients of qualifying distributions**
>
> (1) Subject to sections 247 and 441A, where a company resident in the United Kingdom makes a qualifying distribution and the person receiving the distribution is another such company or a person resident in the United Kingdom, not being a company, the recipient of the distribution shall be entitled to a tax credit equal to such proportion of the amount or value of the distribution as corresponds to the rate of advance corporation tax in force for the financial year in which the distribution is made.
>
> …
>
> (3) A person not being a company resident in the United Kingdom, who is entitled to a tax credit in respect of a distribution may claim to have the credit set against the income tax chargeable to his income under section 3 or on his total income for the year of assessment in which the distribution is made and, subject to subsections (3A) to (3D) below, where the credit exceeds that income tax, to have the excess paid to him."

9. Section 42 of the TMA provides:

> "(1) Where any provision of the Taxes Acts provides for relief to be given, or any other thing to be done, on the making of a claim, this section shall, unless otherwise provided, have effect in relation to the claim."

10. Section 43 provides:

> "(1) Subject to any provisions of the Taxes Acts prescribing a longer or shorter period, no claim for relief under the Taxes Acts shall be allowed unless it is made within six years from the end of the chargeable period to which it relates."

11. These provisions were amended once the self-assessment scheme was introduced; but the amended legislation is not relevant to this appeal.

The taxation of pension funds

12. Staff pension schemes which are secured by a trust and which meet certain additional requirements specified by HMRC or their predecessor body, the Commissioners of Inland Revenue, are called "exempt approved schemes". The pension scheme in our case is one such scheme. Exempt approved schemes do not have to pay tax on investment income held for the purposes of the scheme. This was achieved by section 592 (2) of ICTA which provides:

> "Exemption from income tax shall, on a claim being made in that behalf, be allowed in respect of income derived from investments or deposits if, or to such extent as the Board are satisfied that, it is income from investments or deposits held for the purposes of the scheme."

The issues

13. The Trustees' argument is that no claim is needed in order to become entitled to a tax credit under section 231. The entitlement arises automatically because of section 231 (1). Section 231 (1) says that "the recipient of the distribution shall be *entitled* to a tax credit."

14. HMRC, by contrast, argue that what is claimed under section 231 (3) is the tax credit itself. In order to take advantage of the tax credit a claim must be made. Without a claim being made, neither set off nor repayment will happen. Since the essence of the tax credit is either a set off or a payment, the substance of what is being claimed is the tax credit itself.

15. The second issue is, in a sense, a reformulation of the first issue. The Trustees argue that a claim made under section 231 (3) is not a claim for "relief." Section 42 of the TMA distinguishes between a claim for relief and a claim for "any other thing to be done." The claim in our case was a claim for payment, and hence was an "other thing". Section 43, by contrast, imposes the time limit applies only to claims for relief; and does not apply to claims for other things to be done.

16. HMRC argue that a claim for a repayment because of an entitlement to a tax credit is a claim for relief, and hence falls within section 43.

17. The third issue, on the assumption that a claim for relief is needed, is the Trustees' argument that the relevant claim for relief was their original claim for exemption from income tax under section 592 of ICTA, alternatively its filing of an annual return making the same claim. This was a claim to which a time limit applied. But no further claim was needed. HMRC argue that a specific claim under section 231 (3) must be made.

Is the claim a claim for a tax credit?

18. Mr Gammie argued that the tax credit automatically attaches to the grossed up dividend and is available to the recipient without limit of time. He illustrated this by an example. Take the case of an employed taxpayer, who pays income tax through the PAYE system, as the majority of taxpayers do. Suppose that such a taxpayer also receives dividends, but that his total income falls within the basic rate. Under section 231 (1) his liability to pay income tax on the grossed up amount of the dividends is exactly matched by the tax credit. There is nothing more that he needs to do. He need make no claim because the tax credit applies automatically. He may not even have to file a tax return. Suppose now that the Revenue make an assessment to tax on such a person, perhaps because he should have been paying higher rate tax, after the time at which a claim for the tax credit could have been made under section 43. It cannot be the case that the taxpayer would lose his entitlement to the tax credit simply because he had not made a claim. In my judgment the force of this point is blunted by Mr Baldry's riposte that section 43 (2) and section 43A allow a claim for relief to be made if the Revenue raise a further assessment. Moreover, to the extent that the tax credit may be used as a set-off it would go by way of defence in reduction of any further claim advanced by HMRC.

19. What, then, is the claim to which section 231 (3) refers? A claim under section 231 (3) is either a claim for a set-off against income tax, or a claim for payment. In the case of an exempt approved scheme, which pays no income tax on investment income applied for the purposes of the scheme, the claim is predominantly a claim for payment. As Mr Gammie accepted in the course of his reply, making the claim is giving practical effect to the entitlement or, as Briggs LJ put it in the course of argument, turning the tax credit into something usable. The Trustees thus say that the claim is for the *consequences* of the entitlement, to be distinguished from the entitlement itself.

20. Although there is a linguistic attraction to the Trustees' argument I do not, in the end, accept it. First, it makes little sense to make a claim to something to which you are not entitled, so the fact that section 231 (1) refers to entitlement is by no means conclusive. Second, how are HMRC to know how much to credit (or pay) unless a claim is made? The fact that a basic rate PAYE taxpayer neither makes a return nor a specific claim under section 232 does not, in my judgment, carry the argument further, since such a taxpayer is not asking for anything to be done.

21. The Upper Tribunal dealt with this question at [294] as follows:

> "In the first place, we consider that the claim made by BTPS for the tax credits to which we have held… it is entitled, are 'claims' within s 43. We accept Mr Baldry's submissions concerning the structure of s 231 and consider that a taxpayer is entitled to the set-off or payment referred to s 231(3) if, but only if, he makes a claim. The formal claim will, ordinarily, be made in a tax return. But even if Mr McDonnell is right in saying that set-off is automatic and does not need to be claimed, he cannot, we think, be right in saying that a request or demand by a taxpayer for payment under s 231(3) is not a claim. That of itself lends strong support to the view that even a set-off has to be claimed, otherwise a distinction—unwarranted, it seems to us—would have to be drawn between set-off and payment in terms of time limits."

22. I agree.

Is a claim for payment of tax credit a claim for relief?

23. The argument under this head is that the claim under section 42 is not a claim for relief: it is a claim for payment. A relief is the reduction (or extinction) of an amount which a taxpayer would otherwise be liable to pay. Since the Trustees never had any such liability they cannot have claimed relief.

24. There are, I think, a number of answers to this argument. First, giving effect to section 231 (3) may take one of two forms. Either it reduces the amount which a taxpayer is liable to pay, or it results in a payment. It is in my judgment the case that a claim by a taxpayer to the tax credit in order to reduce the amount of tax which he would otherwise be liable to pay is a claim for relief. That is a strong pointer towards the conclusion that the invocation of section 231 (3) by anyone is a claim for relief. It seems to me that it is no less a claim for relief if, in the case of an ordinary taxpayer, he has so little taxable income that the result of invoking section 231 (3) will, on the facts, result in a repayment. I cannot see why it should make a difference if the reason why the invocation of section 231 (3) results in a payment is that the claimant is an exempt approved scheme, or is even not a taxpayer at all. It would hardly be a rational policy to ascribe to Parliament to discriminate between taxpayers and non-taxpayers in that way, especially over a question of time limits for making claims. Second, I agree with Mr Baldry that the obvious purpose of the statutory time limit in section 43 is to prevent the exchequer from being exposed to late claims. It is also an unlikely intention to ascribe to Parliament that it intended to impose a time limit for claims for relief (in the sense of reduction in tax liability), but to exclude from that time limit claims which required the exchequer to pay out funds, thereby leaving the exchequer completely exposed to claims for payment of tax without any limitation in time at all. The language of section 43 of the TMA must be approached with these considerations in mind. Third, there is high authority for the proposition that the word "relief" is not a term of art, and the mechanism by which relief is given may take a variety of forms: *Taylor v MEPC Holdings Ltd* [2003] UKHL 70, [2004] 1 WLR 82 at [10] and [13]. The word can also be used more generally. For instance, some people call an injunction "injunctive relief". It used to be the practice (and perhaps still is) that a writ or claim form issued in the Chancery Division included as a matter of routine a claim for "further or other relief". Neither is a misuse of language. I can see no objection to

describing the consequences of a tax credit, even one which results in payment to a non-tax payer, as "relief". A repayment of overpaid tax was so described in section 33 of the TMA before its amendment by the Finance Act 2009. Fourth, contrary to the Trustees' argument I think that the decision of this court in *UBS AG v HMRC* [2007] EWCA Civ 119, [2007] STC 588 supports that conclusion. In that case Moses LJ (with whom Sedley LJ agreed) expressly approved at [32] the decision of the Special Commissioners (at [37] and [38] of their decision, reproduced at [2006] STC 716, 737) that a claim to a tax credit by a Swiss company was a claim to "relief". However, because the Swiss company was not liable to pay corporation tax, it was not a claim to relief "from corporation tax". In our case, however, the words of section 43 are wider. They refer to any relief "under the Taxes Acts." So it is not necessary for the claim in question to be a claim for relief "from" tax. The entitlement to tax credits is an entitlement that arises under the Taxes Acts, and consequently in my judgment a claim to a payment of those credits is a claim to relief "under" the Taxes Acts. Lastly, as Mr Baldry pointed out, the Trustees did in fact have some taxable income, and the tax credits should first have been set against that income.

25. The Upper Tribunal dealt with this question at [295] as follows:

> "In the second place, we consider that the claim to a tax credit is a claim to a relief. As already mentioned, the term 'relief' is not a term of art. We do not feel constrained by the authorities relied on by Mr McDonnell to conclude that the claim to a tax credit is not a 'relief'. Quite the reverse: it seems to us that *UBS AG* lends strong support to the conclusion that it is a 'relief'. Indeed, it may even be that we are bound by the judgment of Moses LJ expressly agreeing with the conclusions of the Special Commissioners as we have pointed out, binds us to reach the conclusion that there is a 'relief'. There is nothing, in our view, in *Sema*, which points to a contrary conclusion."

26. Again, I agree.

Has the claim already been made?

27. Mr Gammie recognised the court's reluctance to accept the argument that there was no time limit at all which curtailed the Trustees' right to seek payment of tax credits. Paragraph 42 (c) of the Trustees' skeleton argument asserted that the Trustees' claim "was a notification to HMRC that it required a payment in respect of the excess of tax credits, as provided for in s. 231 (3)." If that is so, then my decision on the first two issues would lead to the conclusion that section 43 applied to that notification.

28. However, in the course of his oral submissions Mr Gammie argued that the relevant claim was not that notification, but was either the Trustees' original claim for exemption from tax under section 592 or, alternatively, was the filing of annual returns.

29. So far as the first of these is concerned, the exemption from income tax on income applied for the purposes of the exempt approved scheme does not turn on any particular form that the income takes. It applies just as much to income from property (e.g. rents) as to dividends. I do not consider that this kind of exemption from income

tax can be regarded as a claim to tax credits. Whether a claim of the latter kind can be made, and if so for how much, will depend on the make-up of the Trustees' income in any particular year of assessment. Moreover, this argument does not overcome the more general objection to a claim for money that can be made without limit of time.

30. So far as the second argument is concerned, the problem here, as I see it, is that the annual returns did not in fact claim tax credits in respect of foreign dividends. That is not surprising, because until the CJEU's ruling, no one thought that they could be claimed. But I do not see how a failure (or omission) to claim something can amount to a claim to the very thing that has been omitted.

Result

31. I would dismiss the appeal. This means that the Trustees' arguments about the compatibility of domestic time limits with community law remain live; and may need to be referred to the CJEU. But that will have to wait for another day.

Lord Justice Briggs:

32. I agree.

Lord Justice Longmore:

33. I also agree.