TC04281

Appeal number: TC/2010/03120

VAT –taxpayer's supplies effectively exempt under UK law – taxpayer seeking to rely on its directly effective right to treat supplies as standard rated – output tax exceeding input tax – whether HMRC entitled to deny input tax claim - meaning of direct effect – taxpayer's right is only to net amount – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

TAYLOR WIMPEY PLC **Appellant**

- and -

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS **Respondents**

TRIBUNAL: JUDGE BARBARA MOSEDALE

Sitting in public at the Royal Courts of Justice, London on 19 and 20 January 2015

Mr J Peacock QC and Mr J Rivett, Counsel, instructed by PricewaterhouseCoopers Legal LLP for the Appellant

Mr A Macnab, Counsel, and Mr E West, Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION on PRELIMINARY ISSUE

1. On 26 February 2010 HMRC issued a decision to the appellant refusing its claim ('the Claim') made on 30 March 2009 for input tax of £33,850,109.64 (later increased to £60,808,411.37). The Claim was for input tax incurred on certain items (the 'Claim Items') installed in newly built homes by companies now in the appellant's VAT group in the period between the introduction of VAT on 1 April 1973 and 30 April 1997, which was the last date on which both the parties were agreed that the so-called three year cap on claims did not apply.

2. The appellant appealed against HMRC's decision and a preliminary issue came before me for determination in 2013 and I issued my decision on 12 June 2014 at [2014] UKFTT 575 (TC). However, that decision did not resolve the appeal in principle (putting aside other issues that arise as to quantum/timing/VAT grouping) because one issue arose on which the parties had not been prepared to address me, so it was left outstanding: [482] referring back to [187-8] where the question on which I had no submissions was:

> "HMRC accepted that if the Claim Items were not incorporated and not part of a single supply and that therefore the supply of the Claim Items was a separate, standard rated supply it would automatically follow that the appellant would be entitled to recover the claimed input tax in principle. Nevertheless, HMRC considered the claim would have to be netted off against the output tax that should have been, but was not, accounted for on the standard rated sale of the Claim Items. I refer to this as 'set off' question.
>
> HMRC, like the appellant, however, had not come to Tribunal prepared to put their case on …whether input tax must be netted off against output tax when it was many years too late for HMRC to assess the output tax. …"

3. The parties were unable to agree it themselves, and so that one outstanding matter, although in a different context, came on for determination.

4. In summary, HMRC had conceded that, if the Claim Items were incorporated into the new homes, Taylor Wimpey had made a single supply of the new home with whatever Claim Items it contained. The Tribunal found that, as a matter of UK law (ignoring the incorporation into UK law of EU law), that Taylor Wimpey was not entitled to recover the input tax because the Claim Items were 'incorporated' into the new homes and the input tax on such items, whether fixtures or fittings, was blocked by the Builder's Block [302].

5. As a matter of EU law, which applies in the UK by virtue of the European Communities Act 1972, the Tribunal found that the blocking order was probably unlawful as its effect was to make the supply of the Claim Items exempt, because UK law treated the supply as subject to 0% VAT but blocked recovery of the input tax [450]. EU law did not permit the supply of Claim Items to be treated as exempt. It

was not even clear that it permitted them to be zero rated (see [226-230]). But that is irrelevant as they were not in effect zero rated under UK law.

6. On the assumption that UK law was not in conformity with directly effective EU law, the appellant therefore had a choice whether to treat the supplies it made as exempt under UK law or standard rated under EU law [471]. Putting aside the possibility of appeals against my decision, for the purpose of the hearing in front of me, Taylor Wimpey sees its Claim made in March 2009 as an election (whether or not it understood it at the time) to rely on its EU law rights to treat the supply of the Claim Items as standard rated and reject the UK's treatment of the supplies as exempt.

7. Following this choice, it is accepted by HMRC that the input tax paid by the appellant in relation to the Claim Items is in principle recoverable as attributable to standard rated supplies. There is no question of the claim being made out of time as it was made in March 2009, in respect of years for which (at that point in time) there was no time limit on making claims. That is not in issue (see [2] of the earlier decision).

8. The question which the parties did not address at the original hearing, and which was the subject of the hearing in front of me, was whether HMRC had been entitled to refuse that Claim on the basis that the input tax had to be offset by the output tax that would have been due on the Claim Items if sold standard rated.

Should the hearing consider other issues?

9. At the start of the hearing, Mr Peacock asked the Tribunal to consider two additional issues, which he said arose out of my 2014 decision. He said that the Tribunal needed to determine if the sale of the Claim Items was a single supply together with the new homes, and if so, the effect of *Talacre* C-251/05 [2006] STC 1671 on that single supply, particularly in light of a decision which was released subsequently to my 2014 decision (*Colaingrove Limited (Verandahs)* [2015] UKUT 0002 (TCC)),

10. There was no need to consider the first of these issues as, as was recorded in the 2014 decision, HMRC had conceded that, if incorporated into the new homes, the Claim Items were part of a single supply with the new homes. Mr Macnab confirmed that remained HMRC's position. My ruling in 2014 was that all of the Claim Items were incorporated ([302]) so it follows it was conceded by HMRC that they were part of a single supply with the new homes. There was nothing for me to determine on this issue.

11. On the second additional matter, I ruled that my decision in 2014 had determined the effect of *Talacre.* In summary my conclusion was that "*Talacre* shows that even where there is a single supply, EU law does not confer zero rating on any element of that supply that was not conferred by national law. And national law did not confer zero rating on the supply of Claim Items when they were part of a single supply. It conferred exemption." [456].

12. While the appellant did not agree with this conclusion, its only remedy was to seek to appeal it. Mr Peacock clearly wanted me to review my own decision but, as I pointed out, the appellant was unable to make an application for review as there is no provision in the rules which permits it to do so. The position is that a Judge must always consider, on receiving an application for permission to appeal, whether the decision should be reviewed: Rule 40(1) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. I would therefore consider whether to review the decision when I received a valid application for permission to appeal and not before. The hearing was not to consider the application for permission to appeal and I would not deal with it at the hearing.

13. Mr Peacock's case was that at [188] of the 2014 Decision I envisaged more than one issue: but the reality was that the other issues fell away because of my decision and only the set off issue remained relevant, although in a different context to the one envisaged in [187]. In other words, the parties had considered there was a set off issue in the event my decision was that some or all of the Claim Items were not incorporated because that would mean the supply of those items was standard rated; I ruled that the Claim Items were all incorporated but a set off issue arose because, if the Blocking Order was unlawful as I thought it probably was, the appellant could claim its supplies of the Claim Items were standard rated.

14. So I ruled only the set off issue remained to be decided and I now proceed to decide it.

Set off question

Does the legal answer to this question resolve the appeal on facts?

15. I was then addressed on the set off question. I had identified in my first decision that I was not asked to resolve the question of fact whether the putative amount of output tax exceeded the input tax. In other words, I was not asked whether the Claim Items were sold at a profit. I noted there was very little evidence about this in any event: [474]. However, at the hearing now before me, the appellant conceded that the Claim Items were sold at a profit, so that *if* HMRC could set-off output tax against input tax, it would reduce the Claim to zero. Therefore, if HMRC were entitled to set-off, the appeal would stand dismissed.

The legal question

16. The issue of law resolved itself into two sections. The first was whether, without considering s 81 of the Value Added Tax Act 1994 ("VATA"), HMRC were entitled to offset the output tax against the input tax under general principles, thus reducing the claim to nil, as they had done by refusing it. It was agreed that when the Claim was made in March 2009 HMRC were out of time to assess, and they had not assessed, and so if the appellant was right that there was no set-off, HMRC would be unable under general principles to reduce the input tax claim by the output tax, and the Tribunal would have to consider s 81 VATA.

17. The second section was whether s 81(3A) applied so as to entitle HMRC to make such a set-off even if they were not otherwise entitled to do so.

18. HMRC's position was that I had already resolved the set off question at [476-469] where I considered the *MDDP* case. However, what I actually ruled was at:

> "[469]…it seems to me that [*MDDP*] is precisely in point. If the appellant rejects the (incorrect) VAT treatment of its supplies under UK law (zero rating without refund – or put more simply, exemption) and relies instead on its directly effective rights under EU law, its EU law right is to have its supplies treated as standard rated. It has no directly effective right to have white goods and carpets...treated as zero rated…."

19. While that conclusion relied in part on the *MDDP* case it was not dealing with set – off even thought I accept that the reasoning referred to below is virtually identical. Nevertheless, it was not for me to resolve the set off issue in the 2014 Decision as the parties expressly said that they were not addressing me on the set off question. It had to be left outstanding. And while HMRC thought the outcome of the set off question was inevitable from my 2014 Decision, the appellant did not. They were unable to agree the position, and so the hearing took place.

20. The starting – and it turns out ending – point for my consideration of set off is the question of direct effect under EU law.

Set off without s 81(3A)?

21. Mr Macnab's case was that there was a general principle under EU law that the appellant could not claim the benefit of the directly effective right in question without at the same time making full allowance for its liability to VAT on the output supplies. In brief, his case was that the appellant could not take the benefit without the burden. Mr Peacock did not agree that there was any such general principle of EU law. Mr Peacock's view is that the appellant could not be made to account for the output tax on the sale of the Claim Items, which it has elected to treat as standard rated, unless it either declared the VAT on a return (which it has not done so and will not do so) or has been assessed (which it has not been and HMRC accept it is too late to assess). Mr Peacock's case is that s 81(3A) VATA was introduced to specifically deal with the lack of a right to set off under EU law; it is lawful because Member States are permitted to make procedural rules on repayments (such as to introduce a time limit on claims, or to introduce set off) but its existence (says Mr Peacock) shows that there is no such procedural rule in EU law.

22. So is there a general principle? The Principle VAT Directive 2006/112/EC ("PVD") which was in force at time of the Claim provides:

> **Origin and scope of right to deduct**
>
> **Article 167**
>
> A right of deduction shall arise at the time the deductible tax becomes chargeable.

Article 168

> In so far as the goods and services are used for the purpose of the taxed transactions of a taxable person, the taxable person shall be entitled, in the Member State in which he carries out these transactions, to deduct the following from the VAT which he is liable to pay:
>
> the VAT due or paid in that Member State in respect of supplies to him of goods and services, carried out or to be carried out by another taxable person;…. (my emphasis)

23. HMRC do not suggest that the input tax at issue in this appeal was not used for the purpose of 'taxed transactions'. This must be right. Putting aside whether the UK law treatment was zero rating (with a block) or exemption, the law is that a member state cannot rely on its own failure to properly implement a directly effective Directive. They cannot plead against the appellant that the sales of the Claim Items were not standard rated.

24. HMRC pointed out that the right was a right 'to deduct' which they said presupposed that output tax had actually been paid. They said there was no freestanding right to recover input tax without accounting for output tax.

25. The appellant's view was that the right to recover input tax was freestanding and subject only to such limitations as a Member State could lawfully impose. UK law provides:

> **25 Payment by reference to accounting periods and credit for input tax against output tax**
>
> (1) A taxable person shall –
>
> …
>
> Account for and pay VAT by reference to such periods ….at such time and in such manner as may be determined by or under regulations and regulations may make different provision for different circumstances.
>
> (2) Subject to the provisions of this section, he is entitled at the end of each prescribed accounting period to credit for so much of his input tax as is allowable under section 26, and then to deduct that amount from any output tax that is due from him.

26. I consider that the answer to the question of set off was not obviously contained in either Art 168 or S 25 (but see §38 below). While these provisions referred to deduction, nevertheless if output tax was not due, the taxpayer was still entitled to recover its input tax. So the reference to deduction did not answer the question of whether there must be set off.

27. It seemed to me that the Tribunal had to consider what were the appellant's rights under EU law. It was (assuming the Builders Block was unlawful) asserting its directly effective right for the sale of the Claim Items to be standard rated. Under *Becker* C-8/81 the appellant is entitled to rely on the direct effect of EU law:

> "[25]… in the absence of duly adopted implementing measures, individuals may invoke the provisions of a directive which, from the viewpoint of content, are unconditional and sufficiently precise, against all national legislation which does not conform with it. Individuals may also invoke those provisions if they lay down rights which can be enforced against the State."

28. This hearing proceeded on the assumption that the appellant had a directly effective right to treat the sale of the Claim Items as standard rated. Did that mean the appellant could recover the input tax but not account for the output tax? Or put another way, did it have a directly effective right to recover the input tax on a supply that under EU law would have been standard rated, irrespective of that fact that treating the supply as standard rated would have given rise to an output tax liability that had not been and would not be paid, and was certainly out of time to be assessed?

MDDP C-319/12 [2014] STC 699

29. The answer to that question in my view is contained in the CJEU's decision in *MDDP* to which I referred in my 2014 Decision in respect of a similar but not identical question, as mentioned above.

30. In *MDDP*, the taxpayer provided education and training to its customers. National law treated its supplies as exempt but the taxpayer contended that they were standard rated. The national court referred two questions. The first was about the tax status of the supplies. The second was whether, if the supplies were standard rated under EU law, whether the taxpayer was entitled to recover its input tax without accounting for output tax on the supplies. See §20:

> "2. If the answer to the first question is in the affirmative, does this mean that due to the incompatibility of the exemption with the provisions of the VAT Directive, art 168 of the directive grants taxpayers both the right to apply the tax exemption and to deduct input VAT?"

31. The question was phrased in this way by the Advocate General:

> "[3]…whether a taxable person may rely subsequently on a tax liability for its transactions required by EU law in order to be able to deduct input tax, without being subject to an obligation for retrospective taxation of its transactions which it previously treated as tax-free according to the provisions of national law."

32. In essentials, on this second question, the case boiled down to one very similar to this appeal, if I proceed on the assumption (as the hearing did) that the Blocking Order unlawfully made the sale of Claim Items exempt. Here the appellant has made supplies which were treated by national law as exempt, in the sense that no output tax was due but no input tax was recoverable. MDDP's supplies were treated as exempt by national law. UK law is assumed for this hearing to be incompatible with the Directive on this point, as MDDP argued the national law was in its case. Mr Peacock considers them distinguishable: I cannot any relevant distinction between the two cases on the question in issue.

33. In *MDDP* C-319/12 at §45 the CJEU ruled:

> "[41]…it is a central principle of the VAT system that the right to deduct VAT levied on the purchase of input goods or services presupposes that the expenditure incurred in acquiring them was a component of the cost of the output transactions that gave rise to the right to deduct.
>
> [42] It is apparent from the introductory part of art 148 of the VAT Directive, which lays down the requirements for the origin and scope of the right to deduct, that only operations subject to output[1] tax may give rise to the right to deduct the VAT levied on the purchase of goods and services used to perform those operations.
>
> [43] Consequently, according to the logic of the system established by the VAT directive, the deduction of input taxes is linked to the collection of output taxes.
>
> [44] In that regard, the court has already held that …where a taxable person supplies services to another taxable person who uses them for an exempt transaction, the latter person is not entitled to deduct the input VAT paid….
>
> [45] It follows from the foregoing that, even where an exemption provided for by national law is incompatible with the VAT Directive, Article 168 of that Directive does not permit a taxable person both to benefit from that exemption and to exercise the right to deduct tax." (my emphasis)

34. At first glance, the CJEU's decision in *MDDP* sees very clearly to be in favour of HMRC, but the appellant's position is that this case is irrelevant. As a matter of EU law, it had the right to treat its supplies as standard rated, subject to output tax and entitled to input tax, and it elected to do so. As a matter of national law, however, HMRC were out of time to assess the output tax and the appellant (due to quirk in the law around the three year cap provisions) was not out of time to reclaim the input tax.

35. All *MDDP* shows, says the appellant, is that by electing to rely on direct effect, the appellant had to accept its supplies of the Claim Items were standard rated. It accepts this, it says. But, fortunately for the appellant, runs its case, HMRC can't assess it and there is no provision which compels the appellant to declare the tax.

36. HMRC, needless to say, does not agree. They considered *MDDP* an entire answer to the appellant's case.

37. So what did *MDDP* actually decide? I consider that the principle of direct effect clearly underlies what the CJEU said at [40-45]. It is clear that the CJEU had the principles of direct effect in mind as they refer to them subsequently at [47] although they do this in the context of considering whether national law had actually, in so far as MDDP was concerned, gone beyond what was permitted by the Directive.

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[1] I was referred to the report of this case in Simon's Tax Cases at [2014] STC 699 but the word it uses here is 'input' which is obviously wrong. Referring to the report of the case on the CJEU's own website the word is, as the context implies, 'output'.

However, the preceding passage at [40-45] is clearly dealing with what the taxpayer's directly effective rights were on the assumption that national law was incompatible with the directive: [40].

38. This is even more clearly seen to be the case if the Advocate General's Opinion is taken into account. At [37-41] the Advocate General was clear (see the heading, for instance) that the question was about direct effect.

39. So the question the CJEU was answering at [40-45] was what were MDDP's EU law rights if national law granted an exemption to a supply which should have been standard rated? And the answer to that is that the taxpayer has the rights granted to it in Article 168. And Art 168 "does not permit a taxable person both to benefit from that exemption and to exercise the right to deduct tax." So the CJEU did consider the answer to be in Art 168.

40. There was no suggestion that national time limits had any relevance here, and of course they do not, because the question is what was the taxpayer's directly effective right. The CJEU do not state what the right was; they state what the right was not. The right was ***not*** "both to benefit from that exemption and to exercise the right to deduct".

41. Mr Peacock's case is that Taylor Wimpey is not benefiting from the exemption because it accepts that the supply was standard rated. It is just, unfortunately for HMRC, that it is too late to assess it. But the CJEU clearly did not consider national time limits relevant to the question they answered at [40-45]. They did not mention them. They did not qualify what they said with saying 'subject to tax authorities being in time to assess the output tax is due'. What they clearly meant was that there was no directly effective right to claim the input tax without first offsetting the output tax. There was no valid *claim* to the input tax unless the output tax was offset.

42. Time limits on the tax authorities raising assessments are therefore irrelevant: there is no need to assess as the taxpayer asserting a directly effective right only has a right to the net VAT. That this is the correct analysis also appears from the Advocate General's opinion. She makes the clear point at [40] that the tax authorities were unable to assess MDDP. This was not because the national tax authorities were out of time to do so, but because national taxing authorities cannot rely on the direct effect of the Directive in order to assess tax. They were bound by national law which provided that MDDP's supplies were exempt. The CJEU must have had in mind that the national tax authorities were unable to assess MDDP when deciding the case in line with the Advocate General's Opinion.

43. Here HMRC too is unable to assess Taylor Wimpey for the output tax on the supplies of the Claim Items irrespective of the time limits. Irrespective of time limits, no national tax authority would be able to assess a taxpayer who had made a supply which was treated as exempt under national law but properly standard rated under a directly effective provision of EU law. This is because national tax authorities cannot rely on their own failure to implement a directive. So to accede to the appellant's case that the CJEU meant in [45] no more than that national tax authorities

were entitled to assess output tax if national laws permitted them to do so, would be to agree to a nonsense. Member states which exempt a standard rates supply could *never* assess the output tax where a taxpayer stands on its EU law rights, so to agree with the appellant's case on this would be to allow *every* such taxpayer to reclaim input tax without accounting for output tax. This is exactly the opposite of what the CJEU said. Therefore, it is clear that the CJEU neither expressly nor impliedly meant that a taxpayer only had to offset output tax when the national tax authorities could assess. The CJEU meant that the claim was only for the net input tax over output tax.

44. So it is clear to me that there is nothing in what Mr Peacock says here. The inability of HMRC to assess Taylor Wimpey is irrelevant; Taylor Wimpey's right under EU law is only to the ***net*** amount of input tax after output tax.

45. Mr Peacock said that HMRC confused in principle the obligation to account for output tax with HMRC's ability to give effect to that obligation. But as I have explained he is wrong. There is no question of the appellant having an obligation to account for output tax on the Claim Items: under national law their sale was free of VAT. However, as I have said, the appellant has the right to reject national law and rely on direct effective EU law rights. Its directly effective right could be described as the right to rely on the standard rated nature of the sale; but that is not perhaps the clearest explanation of its right. It is clear from what the CJEU said in *MDDP* that reliance on direct effect where a sale that should have been standard rated was exempt is a right only to recover *net* input tax off-setting output tax (in this case, nil).

46. Neither party suggested to me that I should refer this issue. Mr Peacock, of course, took the position that the question was not one of EU law. Mr Macnab took the view that the question was one of EU law but the position was clear.

47. I agree with HMRC. If I were to refer this question I would expect short shrift from the CJEU who would simply refer the tax tribunal to their decision in *MDDP* in which the point has already been decided.

48. In conclusion, assuming that the Builder's Block unlawfully made the appellant's supplies of the Claim Items exempt, the appellant has a directly effective right to rely on the EU law and treat the supply of the Claim Items as standard rated; that gives it a directly effective right to rely on the right to deduct as contained in Article 168. The exercise of that directly effective right to deduct, on the clear authority of *MDDP*, however does require an off set of the output tax because it says MDDP could not 'benefit from that exemption' if it was deducting the input tax.

49. Colloquially put, the effect of *MDDP* was that, in relying on EU law rights, a taxpayer must take the rough with the smooth. If they rely on the right for a particular supply to be standard rated then they must accept that their right to reclaim input tax on that supply is limited by an offset of the output tax.

50. Accounting periods are irrelevant. It does not matter if the input tax would have arisen in one period and the supply made in another period. The principle enunciated by the CJEU in *MDDP* arose out of consideration of the fundamental principles of

the PVD (see [41] and reference to 'central principle of the VAT system' and the reference to the introductory part of article 148 in [42] and the 'logic of the system in [43]). It was not to do with timing or accounting periods. It was simply that the 6VD "does not permit a taxable person both to benefit from that exemption and to exercise the right to deduct tax."

51. *MDDP* appears to be the end of the appellant's case on set off and therefore of its appeal overall. The appellant did not agree and referred me to a number of other cases, which I will move on to consider.

BP Supergas C-62/93

52. First, however, I mention the earlier case of *BP Supergas* which HMRC relied on as a sort of precursor to the CJEU's later decision in *MDDP*. The facts were that the appellant supplied petroleum products. 13% of what it supplied under national law was standard rated and the remaining 87% was treated as exempt. It incurred expenses in making supplies, so in line with Greek law, it only reclaimed VAT on 13% of its overheads.

53. It claimed (correctly as the CJEU found) that Greek law was incompatible with the then VAT Directive ("6VD") and that it had a directly effective right to treat all of its supplies as taxable. It made a retrospective claim for the 87% of its VAT incurred on its general overheads (see §12 of Advocate General's opinion). Unlike Taylor Wimpey, it did not attempt to reclaim the input tax directly attributable to the supplies in issue.

54. The Advocate General's Opinion was that, had BP sought to recover the directly attributable input tax on its sales, that claim would have failed because it would have had to net it off against the output tax that would have been due. The Advocate General said:

> [30] The plaintiff's claim for a refund of tax does not appear to extend to the VAT incurred on its purchases of petroleum products. In my view the appellant correctly limits its claim in that way….While under the rules of the Sixth Directive it would be entitled to deduct VAT on the purchase of the products, the benefit of that deduction would be wholly cancelled out by the output tax which it would be obliged to pay on the sale of the products. Consequently, the plaintiff does not incur any additional VAT burden as a result of being unable to deduct VAT on the petroleum products themselves.

55. So far, although anticipating it by nearly twenty years, what the Advocate General has said here is entirely consistent with the outcome of *MDDP*. A taxpayer cannot rely on direct effect to claim the input tax attributable to a transaction without offsetting the output tax on that would have been due on that transaction. There is no suggestion that *national* laws, particularly procedural rules, have any relevance to this issue. The Advocate General went on to consider potential objections to his view:

> [31] It might be objected that the Sixth Directive cannot, in the absence of implementation, impose an obligation on the plaintiff to pay tax on

> its sales of petroleum products since a directive can only confer rights on individuals and cannot impose obligations on them unless implemented in national law; the output tax which would be payable if the directive had been properly implemented must therefore be disregarded in calculating the refund to which the plaintiff is entitled under the directive. However, in the case of a directive such as the Sixth Directive, which lays down a comprehensive scheme of taxation, it is in my view possible to determine whether a taxable person has overpaid tax under national rules only by considering the combined effect of all relevant provisions of the directive on the transactions in question and by comparing the resultant liability with that arising under the national rules. The provisions determining the liability of a taxable person in respect of particular transactions must be regarded as an inseparable whole.

56. What he said here is that the 6VD (now PVD) did not impose on the taxpayer an obligation to pay the output tax, it was merely that his right under the Directive to claim input tax was only a right to claim the net overpayment (or under-reclaim). This is of course entirely consistent with what was later said by the CJEU in *MDDP*.

57. Mr Peacock said the case was of no relevance. This was not because HMRC relied on merely the Opinion of an Advocate General but because (said Mr Peacock) the Advocate General clearly considered that the right to claim input tax was limited only by national rules on procedure, specifically referring me to the last two thirds of [31]. But there is nothing in [31] which implies that the taxpayer is entitled to reclaim the full input tax without netting off subject only to national rules of procedure. The Advocate General in this passage is quite clearly giving his opinion on EU law. The Opinion was that as a matter of EU law the taxpayer is only entitled to claim the net amount. The only reference to national law is in the context of the calculation of the net amount. In other words, the Advocate General was saying look at national substantive (not procedural) law to see what was paid and compare that to what ought to have been paid had the directive been properly implemented, and only the net excess is repayable. There is nothing about national procedural rules in this.

58. The Advocate General went on to conclude that the appellant was entitled to recover its VAT on its overheads as refusing it recovery of that did cause BP "to incur an irrecoverable VAT cost contrary to the Sixth Directive". That comment makes sense on the basis that the directly attributable input tax equalled the output tax so in net terms the inability to recover VAT on overheads under national law was indeed a liability it would not have suffered had the directive been properly implemented. One curious feature of the case, which was not brought to my attention in the hearing, was that the effect of Greek law was that BP's purchase and sale price of the petrol in issue would have been equal - see [16] of the Opinion. But while that point is interesting, it is not relevant in this case where VAT on overheads is not in issue.

59. However, all this was merely an Opinion and the CJEU is not bound to follow it. Did the CJEU in its decision even refer to the issue bearing in mind that BP did not seek to recover the directly attributable input tax and so the issue which arose in *MDDP* and which arises in Taylor Wimpey's case, was not a live issue in the *BP* case? I find it made no reference to it, and that must because it was not a live issue.

60. The refund of the VAT on the overheads was a live issue and the CJEU commented, as Mr Peacock pointed out:

> "[41] While it is true that such a refund may be sought only in the framework of the substantive and procedural conditions laid down by the various national laws, the court has consistently held ….that those conditions …may not be less favourable than those relating to similar, domestic actions nor be framed in a way such as to render virtually impossible the exercise of rights conferred by Community Law."

61. Contrary to what Mr Peacock claims, this was not a rejection of what the Advocate General said at [30-31] (above). While the CJEU here was saying claims are subject to national procedural laws, it was simply making the point that there must not be discrimination between claims made relying on direct effect and those made under national law. It was saying *nothing* about how a claim relying on direct effect is quantified under EU law. The CJEU, as is so often the case, was making no comment on a legal issue that was not a live issue in that particular case, albeit it was one on which the Advocate General had commented.

62. In other words, there is nothing in *BP Supergas* to support the appellant's position. The Advocate General's position does support HMRC's position but it is just an Opinion. But, for this appeal, it does not matter, as the CJEU have dealt with the precise legal issue which arises in this case in *MDDP*. The Advocate General's Opinion on this has been shown to be right, but has been shown to be right by being superseded by the judgment of the CJEU in *MDDP*.

Ecotrade C-95/07

63. I was also referred to this case which was in some ways a mirror image of *MDDP*. The taxpayer was fully taxable and bought in services (free of VAT) from outside the member State in which it was VAT registered. Under national law, which was in compliance with the 6VD, Ecotrade should have accounted for VAT under the reverse charge procedure. That meant it should have treated itself as both supplier and customer and made self-cancelling entries in its books for an equivalent amount of input and output tax on its VAT-free purchases.

64. It failed to do so. Of course, there was no VAT loss to the member State as the entries would have been self-cancelling. However, the member State concerned had a shorter time limit for taxpayers to reclaim input tax than for the member State to assess output tax. The time limit within which Ecotrade could have made its input tax claim on its reverse charge supplies expired; but following an inspection, the taxing authorities assessed it (in time) to the undeclared output tax. Not surprisingly, it appealed.

65. So, in a kind of mirror image to *MDDP*, the taxing authorities wanted to assess output tax without making any allowance for the unclaimed input tax. Of course, this was not a case of direct effect but, like a case of direct effect, the answer did depend on the principles of the 6VD.

66. The CJEU ruled that the member State, despite the expiry of the time limit, could not assess the output tax without giving credit for the input tax (which of course in practice would reduce the assessment to nil.) It said:

> "[63] Since the reverse charge procedure was indisputably applicable to the cases in the main proceedings, the principle of fiscal neutrality requires deduction of input tax to be allowed if the substantive requirements are satisfied, even if the taxable person has failed to comply with some of the formal requirements…."

The failure to comply with formal requirements was, in that case, the failure to make the claim within the time limits permitted by national law.

67. I note that the CJEU is here adopting what the Advocate General said, but perhaps expressed more clearly, in her Opinion:

> "[48] Where deduction and liability are thus two sides of the same coin, any reassessment by the tax authority must logically take both sides into account. To enforce the liability without allowing the concomitant right to deduct would, moreover, run completely counter to the principle of neutrality which is fundamental to the whole of the VAT system."

68. There are very clear parallels in reasoning and conclusion with what the CJEU was to say later in *MDDP* in a situation that was practically a mirror image. And it is quite clear from *Ecotrade* that national time limits are irrelevant. The point in *Ecotrade* was that the Member State had no right under EU law to assess for the output tax without giving effect to the input tax claim irrespective of the provisions of national law. In *MDDP* the taxpayer's right to rely on the direct effect of EU law was a right which only permitted it to claim the input tax having first off set the output tax.

69. The answer to the preliminary issue in this appeal seems from *MDDP* to be beyond dispute, but as, I have said, Mr Peacock does not agree, and he referred me to the CJEU's later decision in *GMAC*.

GMAC C-589/12 (2014)

70. The appellant relied heavily on the case of *GMAC*. It regarded *GMAC* as a relevant qualification to what the CJEU said in *MDDP*.

71. The facts of this case were that GMAC sold cars on hire purchase ("HP"). The appeal concerned cases where the customer had defaulted. GMAC would then re-possess the car and sell it at auction. In the cases at issue, the customer would pay the balance between the outstanding HP payments and the proceeds of the auction sale, so that overall, taking into account the auction sale, GMAC received the full sale price of the car in the HP agreement. To do so, GMAC sold the same car twice, once to the original customer on HP terms, and then second hand at auction some time later to a new purchaser on ordinary terms of sale.

72. Under the law, GMAC had to account for VAT on the full sale price on the first sale (albeit it only received part up front under the hire purchase contract). When it repossessed the car, UK law denied it bad debt relief ("BDR") on the unpaid portion of the price, even though it was entitled to BDR under EU law. However, when GMAC re-sold the repossessed car at auction it was able to sell it under the margin scheme which meant it did not account for any VAT. The ability to use the margin scheme in such a sale went beyond what was permitted by EU law, but the overall effect of the UK's failure to properly implement the 6VD (the failure to give BDR coupled with the overly generous margin scheme) was that GMAC paid the 'right' amount of VAT. It paid the amount of VAT that would have been due had UK law properly implemented the 6VD.

73. Nevertheless, GMAC claimed to be entitled to rely on its right to BDR under EU law on the HP sale when the car was repossessed. HMRC defended the claim on the basis that such a claim, if successful, would give BP a windfall. The combined ability to claim BDR on the part of the price unpaid by the HP customer (ie the amount received at auction) and the lack of liability to pay output tax on the auction (margin scheme) sale, would mean that, although GMAC received the full price for the car, it would not pay VAT on that element of the price which it received from the auction sale. HMRC said, much as Mr Macnab submitted in this case, that the taxpayer could not take "the benefit of direct effect without the burden".

74. The Upper Tribunal referred the case to the CJEU. The ruling from the CJEU rejected HMRC's position:

> [42] … The consideration received by [GMAC] which is paid by a third party in the context of a different transaction – in the present case the sale at auction of the car returned by the hire purchase customer – has no effect on the conclusion that the taxable person may rely on the direct effect of the [6VD] in the context of the hire purchase contract.
>
> [43] It follows from the foregoing that the question as to whether or not the national law applicable to the auction sale is in conformity with the Sixth Directive is not relevant for the purpose of determining whether a taxable person such as GMAC is entitled to invoke the rights which it derives from the [6VD]."

75. It is clear from these two paragraphs that the CJEU was saying that GMAC could rely on its directly effective rights for one transaction, and rely on UK law in preference to EU law for the other transaction. This was the case even though it led to a windfall for GMAC.

76. Mr Peacock's proposition is that Taylor Wimpey can therefore rely on its directly effective EU law right to treat the sale of the Claim Items as standard rated in so far as the transactions in which they were purchased were concerned (ie recover the input tax) but rely on the UK tax exempt treatment of the sale of the Claim Items so far as the actual transaction of sale was concerned (ie so that there was no output tax to be set off against the input tax).

77. Yet such a proposition not only directly contradicts what the CJEU said in the earlier case of *MDDP*, there is no authority for that proposition within *GMAC*.

78. Mr Peacock tried to align the two cases by saying both involved two transactions. There were two sales in GMAC: the first and second sale of the car. In Taylor Wimpey's case (and *MDDP)*, there is a transaction of purchase of the Claim Items, and a separate transaction involving the sale of the Claim Items.

79. But *MDDP* and this case do not align with *GMAC*. Taylor Wimpey seeks to both rely on and reject its directly effective rights in respect of the same transaction (the sale). In other words, it seeks to rely on the standard rated treatment of the sale under EU law in order to recover the attributable input tax, but reject the standard rated treatment of the same sale in favour of the exempt UK treatment, in order to claim it has no output tax liability on that same sale. In other words, it wants the same transaction treated as exempt for one purpose and standard rated for another.

80. This was not what the CJEU said GMAC could do. GMAC was able to rely on the UK tax treatment of one sale (the auction sale), and the EU tax treatment of a different sale (the HP sale). It is true that the two sales were related, in that they were both sales of the same car (albeit separated in time and to different persons and on different terms). But the CJEU held the fact that the two sales involved the same car to be irrelevant. But the CJEU did not say that the taxpayer could treat the same sale as both standard rated and exempt, depending on whether it was recovering its input tax or seeking to avoid output tax.

81. The CJEU did not mention *MDDP*. That can only be because it did not consider it relevant. In other words, the two cases involved separate questions. And it is clear that they do. GMAC involves the situation of the same item being sold *twice* by the same vendor. *MDDP* involved the an item being sold *once* by the vendor. In the world of quantum physics, Schrödinger's cat could be both dead and alive at the same time, but in the world of VAT, a single transaction cannot be both standard rated and exempt.

82. I have already set out the propositions derived from *MDDP*. There is nothing in *GMAC* which qualifies what the CJEU said in *MDDP* . It remains the clear law that 'direct effect' so far as VAT cases are concerned is a right to rely on the EU law tax treatment of a transaction where the UK has failed to properly implement that tax treatment into UK law, in preference to relying on the UK law tax treatment. *GMAC* and *MDDP* make it clear that 'direct effect' is transaction by transaction (or at least type of transaction by type of transaction). So GMAC could apply EU law treatment to its HP sales while it relied on UK law for its auction sales. But having chosen EU law tax treatment for a transaction, the taxpayer must give effect to that choice in its entirety. So if the directly effective treatment is standard rating, that means input tax is recoverable subject to an offset for the output tax which would have been due had the correct treatment been adopted from the first: *MDDP*. As I have said, the directly effective right is to reclaim the *net* difference between the tax that would be due under EU law to that due under UK law.

83. There is no conflict between *GMAC* and *MDDP* and nothing in *GMAC* which entitles Taylor Wimpey to recover the input tax on the Claim Items without offsetting the output tax. Applying *MDDP,* Taylor Wimpey's Claim is for *nil*, and there is nothing in *GMAC* which affects that.

University of Sussex [2003] EWCA Civ 1448

84. Mr Peacock also relied on *University of Sussex,* as he considered that it was authority for the proposition that set off was a matter of national and not EU law. The facts of this case were that the University had chosen not to reclaim certain input tax in the periods in which a right to reclaim it had arisen. The University lodged a claim to recover it some years later. When the claim was lodged, it would have been out of time if made under s 80 VATA but in time if made under Regulation 29. The University won its appeal.

85. I was referred to [146-152] of Auld LJ's decision. From this, Mr Peacock said *University of Sussex* established the proposition that there was no obligation to deduct input tax in the first period in which it was lawful to do so: claims made later were valid claims unless out of time. And a claim for repayment of input tax is made under Regulation 29 VAT Regulations and not s 80 VATA. Mr Macnab accepted this but considered it irrelevant.

86. Mr Peacock took as an example of one of the appellant's VAT return periods in 1977. It did not overpay VAT in that period, he says. It did not reclaim input tax which now (with the benefit of hindsight) it knows it was entitled to claim in that period but that did not amount to an overpayment of VAT in that period in 1977. It eventually made the claim for that input tax in March 2009. It had to offset that claim against its liability for output tax arising out of supplies in the period ending in March 2009, says Mr Peacock, but the claim was made in the 'right' period because that is the effect of *University of Sussex*. There was nothing, says Mr Peacock, which required it to offset its claim against the output tax which arose in 1977 and which HMRC were many years out of time to assess.

87. I agree with the analysis to the extent that the Claim was made in a valid period in March 2009 and was made under Reg 29, but I find that analysis misses the point. The point is that the claim made in March 2009 was a claim made relying on the appellant's directly effective EU law rights. Its right was only to claim the net of the input tax attributable to a supply against the output tax on that supply, as per *MDDP*. So, in so far as the claim lodged with HMRC exceeded nil (input tax minus output tax) the claim was larger than the claim the appellant had a right to make. HMRC were right to refuse it.

88. Another way of putting it is that the appellant (as output tax on the supply exceeded the input tax) had a directly effective right to a claim of *nil*. Therefore, *University of Sussex,* which established the right to make that claim in a later period, is simply irrelevant. A claim for nil is a claim for nil in whatever period it can lawfully be made.

89. The netting off point did not arise in *University of Sussex.* In that case the University was not relying on a directly effective right to treat as standard rated a supply that was exempt under EU law. It was simply reclaiming input tax that it had been entitled to claim earlier but had not done so. *University of Sussex* does not deal with the issue which arises in this case. It is certainly not authority that the appellant can reclaim input tax without offsetting output tax (and if it were, of course, it would be superseded by *MDDP).*

Iveco [2013] UKFTT 763(TC)

90. I was referred to but did not find any assistance in this case although it considered *University of Sussex* and *GMAC:* it concerned a re-claim for output tax payable under domestic law but overpaid under directly effective EU law. There was no question of the claim being netted off against anything: the appellant had simply not been credited with VAT following a reduction in the sale price that under EU law it was entitled to credit for. I derived no assistance from this case.

Birmingham Hippodrome [2014] EWCA Civ 684

91. The appellant also relied on the *Birmingham Hippodrome* case to argue that there was no netting off under EU law, and that netting off was solely up to the national procedural laws on recovering under-reclaimed input tax.

92. The facts of this case were that the UK had treated sales of theatre tickets as standard rated even in cases, such as that of Birmingham Hippodrome, where under EU law the sale of the tickets should have been exempt. In that sense it is the opposite of this appeal and *MDDP.* The Hippodrome made a claim to recover overpaid output tax, but for periods where it had both sold tickets and incurred attributable input tax, it netted its claim for output tax against the input tax it had recovered. However, it made no claim for the periods in which it had sold no tickets as it was undergoing refurbishment. At the time, it had recovered very substantial amounts of input in these periods (the costs of refurbishment) but did not set this off against its later claim for net output tax claim for other periods, and that created the dispute with HMRC.

93. The case reached the Court of Appeal. Lewison LJ cited the Advocate General's Opinion from *BP Supergas* at [31] (see §54 above). He said, relying on this and on the CJEU decision in *Marks & Spencer* C-62/00 that (at [26] 'implementation of a Directive must be such as to ensure its application in full":

> "[35] If the UK had implemented [EU law correctly] the consequences would have been that (a) the taxpayer would not have charged VAT on its supplies of tickets …but (b) would not have been entitled to credit for input tax ….In my judgment to the extent that the taxpayer's claim rests on this principle, it must take the rough with the smooth….
>
> [36] It follows from this that by availing himself of an exemption from VAT the person entitled to the exemption necessarily waives the right to claim a deduction in respect of input: see *Becker*….."

94. Later he said:

> "[54]…To allow the taxpayer to advance its claim for repayment without taking into account the fact that it has received from the revenue money to which, as it turns out, it was not entitled would in my judgment breach the principle that the Directive must be applied in full; and would have the result of separating what is 'an inseparable whole'."

95. Oddly, *MDDP*, although released by the CJEU six months before the hearing in the Court of Appeal, was not cited to the judges (see [2014] 1 WLR 3868). Nevertheless, what Lewison J said here, while phrased differently, appears identical with the CJEU's ruling in *MDDP*. The right to rely on direct effect is a right to rely on the net tax position: output tax offset against input tax or input tax offset against output tax. To descend into clichés, a taxpayer cannot have its cake and eat it; it must take the rough with the smooth.

96. But the Hippodrome, as I have said, accepted that output tax had to be offset against input tax for the periods for which it made a claim. But it wanted to pick and chose for which periods it relied on direct effect and which periods it relied on UK law treatment. And that was what the case was about. On this Lewison LJ said:

> "[37]…I do not agree with the taxpayer's argument that the right is a right to be put into that position only as regards those accounting periods in respect of which it chooses to make a claim."

97. Whether a taxpayer can chose whether to rely on direct effect on a transaction by transaction basis, a period by period basis or once and for all was not something which was dealt with in *MDDP*. It is also not an issue that arises in this case.

98. What Lewison LJ goes on to say, however, was this:

> "[38] It is common ground that in interpreting domestic legislation the court ought, so far as possible, to interpret it in a manner that is consistent with the Directive. This interpretative obligation is usually known as the *Marleasing* principle…….
>
> [37] It follows, in my judgment, that section 81(3A) of the VATA ought to be interpreted, so far as it can be, to achieve the result that the taxpayer is put into the position in which it would have been if the UK had correctly implemented [the relevant EU law]..

99. So it was clear that Lewison LJ was considering these EU principles of law in order to interpret *national* legislation rather than considering the EU principles of law by themselves. In other words, he was interpreting s 81(3A) to be consistent with EU law principles: he was not considering whether the Hippodrome's claim only ever amounted to a net claim under EU law.

100. If I understand Mr Peacock correctly, his view is that *because* the Court of Appeal failed to consider the EU principles of law as freestanding principles of law, that necessarily means that they are not freestanding principles of law. I can't agree. Direct effect is a concept of EU law. By rejecting national law, a taxpayer is necessarily relying on its directly effective rights under EU law. The CJEU interprets definitively the 6VD (now PVD) to define the scope of direct effect. A taxpayer's

directly effective rights are those that the CJEU identifies the 6VD (now PVD) have given him. There is no need for any implementation in national law: it would be superfluous.

101. I do, however, think that the decision is odd, in that, as Lewison LJ clearly considered that under the EU law of direct effect the taxpayer was entitled to no more than the net amount of overpayment, calculated by taking all affected periods into account, there seems to have been no need to consider national law, and no need to consider s 81(3A) in particular. Perhaps the Court of Appeal's judgment, in centring on an interpretation of national law, merely reflects the manner in which the case was argued by the parties.

102. If Mr Peacock was suggesting that *Birmingham Hippodrome,* a later case than *MDDP*, in some way qualified the effect of *MDDP*, then *Birmingham Hippodrome* was of course per incuriam as *MDDP* was not cited to the judges.

103. What Mr Peacock might have been trying to say was that while under EU law the taxpayer only has a directly right to the net amount of any overpayment, national law can give the taxpayer a greater right. In other words, is it the case that UK's procedural rules have given Taylor Wimpey a greater right than it is entitled to under substantive EU law? Is the explanation for *Birmingham Hippodrome* that while the judges recognised the Hippodrome's limited EU rights under the substantive law of direct effect, they considered UK's procedural law allowed it to claim repayment without offset subject only to s 81(3A)?

104. If this is the case, it was not enunciated. And it is very difficult to see on what basis Taylor Wimpey could say that procedurally under UK law, while relying on EU direct effect, it has a right to input tax without set off. *MDDP* makes clear the EU right of direct effect is only a right to the net tax: I am not aware of anything in UK procedural law that could be said to increase that right.

105. While s 81(3A) exists, and was found to inhibit the Hippodrome's claim, and may or may not apply to Taylor Wimpey's claim, the existence of s 81(3A) cannot have any impact on the interpretation of EU law. Parliament when enacting s 81(3A) may or may not have fully appreciated relevant EU law and the limit of the scope of doctrine of direct effect; but s 81(3A) cannot limit the effect of EU law. It certainly can't be supposed that because s 81(3A) exists that without it the appellant necessarily can claim input tax without offsetting output tax.

106. If a taxpayer chooses to rely on the direct effect of EU law, it must accept the entirety of the doctrine of direct effect and it is clear from *MDDP* that that is that its claim is net only. There may be unresolved arguments about some aspects of *MDDP*, such as whether it applies on a transaction by transaction basis, a period by period basis or is once and for all, which, if it mattered in any particular case, would require a reference. It does not matter here as Taylor Wimpey has accepted that if its claim must be a net claim, it is a nil claim.

107. HMRC also relied on a UK case to support their position and this was *Benridge.* The two taxpayers in this case registered late for VAT. They had not registered earlier due to the UK's incorrect application of EU law so that their supplies had been treated as exempt when they should have been standard rated. The taxpayers put in global returns covering their whole period of trading, which in both cases had ceased at least a decade before registration. This, however, was at a time when in effect there was no time cap on claims.

108. The taxpayers had claimed input tax incurred during their trading period but did not include in the return any output tax that would have been due had the business been treated as standard rated at the time. HMRC reduced the input tax figure in the returns to nil.

109. Similarly to the appellant in this case, it was the taxpayers' contention that HMRC was not allowed to reduce the claims to nil: their only option, said the taxpayers, was to assess the undeclared output tax. Of course HMRC were out of time to do so.

110. The Upper Tribunal appeared to address the matter as one of UK law, which is rather odd as the taxpayers were asserting their directly effective EU law right to treat their supplies as standard rated. The largest part of the decision addressed whether the FTT had jurisdiction over the dispute, and the Upper Tribunal concluded that s 83(1)(b) did give it jurisdiction as reducing an input tax claim to nil by off-setting output tax was a decision 'with respect to …the VAT chargeable on [supplies] of services' (see [35]). The Tribunal decided that the appeal had to fail because the output tax was admitted to exceed the input tax. It concluded that HMRC were entitled to reduce a claim to nil rather than assess ([39-40]).

111. The Tribunal was concerned with the jurisdiction point: it appeared to assume that *if* it had jurisdiction, it was obvious that output tax had to be off-set as it gives no other explanation for its decision in [36] or [39-40]. There was no reference to *BP Supergas,* nor s 81(3A). *MDDP* post-dated the case.

112. It is nevertheless an Upper Tribunal decision and binding on me. It is, following *MDDP*, clearly right even if no explanation is given other than it was simply wrong to reclaim input tax attributable to supplies without offsetting output tax due on those supplies.

113. Mr Peacock sought to persuade me that the decision was distinguishable. He said that the 'critical' difference was that in *Benridge* the taxpayer was making a single long period VAT return, unlike this case, he said, where HMRC were out of time to assess. But, as I have already said, HMRC could not assess even if in time to do so: HMRC cannot rely on their own failure to properly implement EU law. They cannot treat the supply as standard rated. In neither this case nor *Benridge* could HMRC have assessed: see what I say at §§41-43 and the Opinion of the Advocate General in *MDDP* at [40].

114. The decision is not distinguishable but I do accept that it lacks reasoning, assuming that the output tax must be offset against input tax, without explaining why. It does not matter: I base my decision on *MDDP*. *Benridge* is entirely consistent with that outcome.

115. In conclusion, the other cases either support the reasoning and/or outcome of *MDDP* (*BP Supergas* (Opinion), *Ecotrade, Birmingham Hippodome* and *Benridge)*, or they do not in any way qualify it but deal with a different issue (*BP Supergas* (judgment), *GMAC, University of Sussex* and *Iveco*). The CJEU's decision in *MDDP* on the meaning of direct effect where a standard rated supply has been treated as exempt governs this aspect of Taylor Wimpey's claim which must therefore fail.

Section 81(3A) VATA

116. The second half of each party's submissions concerned s 81(3A) and was predicated on the basis that the effect of EU law, contrary to what I have found, was that the appellant could reclaim its input tax without offsetting output tax.

117. I was presented with detailed arguments on whether s 81(3A) would limit the appellant's claim as a matter of national law. The arguments are all recorded in the skeletons and transcript but in view of my decision on EU law, my opinion on this matter becomes irrelevant and I do not need to address it.

Reference to Europe

118. As I have said I consider the question of set-off where appellant is relying on directly effective right to treat a supply as standard rated when it was previously exempt is acte clair following *MDDP*. No reference is required.

119. But it seems to me that were it not for the concession by Taylor Wimpey that its output tax exceeded input tax, or if I had come to the conclusion that there was no requirement to set-off, then a reference to Europe would be necessary on the question of whether the Builders Block was unlawful under EU law. This is because my conclusion was that it was only 'probable' that the UK was in breach of EU law by introducing a de facto exemption: [475]. If the de facto exemption for the Claim Items was lawful under EU law, then HMRC would win the appeal irrespective of set off. However, at the time of my 2014 Decision there was no point in referring the question of the lawfulness of the Block as the set off issue had the potential to resolve the dispute (as it has done).

Outcome

120. The resolution of this one outstanding issue from the original hearing of the preliminary issues has resolved the entire appeal. Taylor Wimpey's entire appeal therefore stands dismissed.

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

BARBARA MOSEDALE
TRIBUNAL JUDGE

RELEASE DATE: 12 February 2015