Neutral Citation Number: [2015] EWCA Civ 1293

Case No: A3/2014/0308

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL TAX AND CHANCERY CHAMBER
FTC/27/2012

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17/12/2015

Before :

LORD JUSTICE LEWISON
LORD JUSTICE RYDER, SENIOR PRESIDENT OF TRIBUNALS
and
LORD JUSTICE CHRISTOPHER CLARKE

- -

Between :

LEEDS CITY COUNCIL	**Appellant**
- and -	
THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS	**Respondents**

- -

MR JULIAN GHOSH QC & MR JONATHAN BREMNER (instructed by Shepherd and Wedderburn LLP) for the **Appellant**
MR ANDREW MACNAB (instructed by Solicitors Office HMRC) for the **Respondent**

Hearing date : 8 December 2015

- -

Approved Judgment

Lord Justice Lewison:

1. On 11 May 2007 and 27 March 2009 Leeds City Council ("Leeds") made claims to the Commissioners for Her Majesty's Revenue and Customs ("HMRC") for the repayment of VAT which it said it had wrongly paid. HMRC were willing in principle to repay VAT for which Leeds had accounted before 4 December 1996, but not VAT for which Leeds had accounted after that date. The reason for HMRC's position was the combined effect of section 80 (4) of the VAT Act 1994 and section 121 of the Finance Act 2008. The former section (in force from 4 December 1996) imposes a three year limitation period for the making of claims for the repayment of wrongly paid VAT, while the latter section (in force from 19 March 2008) disapplied that limitation period in relation to VAT accounted for or paid before 4 December 1996, provided that the claim was made before 1 April 2009.

2. The Upper Tribunal upheld HMRC's position in a closely reasoned decision which can be found at [2013] UKUT 596 (TCC), [2014] STC 789. With the permission of Kitchin LJ, Leeds appeals.

3. As is well-known, VAT has a European origin. As the time of the events with which we are concerned the European provisions in question were contained in the Sixth VAT Directive (77/388/EEC) and are now contained in the Principal VAT Directive (2006/112/EC). The Directives are addressed to the Member States and it is the latter's responsibility for transposing the Directives correctly into national law. However, the rights conferred by the Directives are directly effective in Member States, with the consequence that those rights exist even if the member state in question fails to transpose a Directive (whether in whole or in part) or transposes it incorrectly.

4. The administration and collection of VAT in this country is under the management of HMRC (formerly the Commissioners for Customs & Excise). There are many problems of interpretation arising out of the VAT code and HMRC provide the public with their own interpretation of points of difficulty; and information about the practice they adopt in various areas. These are variously contained in Notices, Business Briefs and the VAT Manual. They are not law: they are no more than HMRC's interpretation of the law. HMRC are not of course infallible, and so Parliament has legislated for a system of tribunals to decide contested points. As and when cases are decided against HMRC they will often revise their opinion and inform the public accordingly. Sometimes, of course, HMRC disagree with a tribunal decision, in which event they may choose to appeal.

5. The background to this appeal lies mainly in the provisions of article 4.5 of the Sixth Directive. Put shortly, this applies to local government authorities (among others) in respect of their activities as public authorities. When they engage in such activities they are not to be considered as taxable persons, unless treatment as non-taxable persons would lead to significant distortions of competition. The United Kingdom has not transposed article 4.5 into domestic law. However, it is common ground that it is (and always has been) directly effective.

6. Leeds is a local government authority. It is now common ground in this appeal that almost all the activities with which this appeal is concerned fall within article 4.5 and that treatment of Leeds as a non-taxable person would not give rise to significant

distortions of competition. That is why HMRC have paid Leeds' claims for VAT for periods before 4 December 1996. However that has not always been common ground; and that fact is a significant part of Leeds' complaint.

7. The UT set out the history of HMRC's changes of position. Only a summary is needed for the purposes of this appeal.

8. The first category of supply concerned fees for the placing of memorial plaques in cemeteries and crematoria. HMRC's published Notice simply stated that the supplies in question were standard rate, without explaining why. The published Notice did not refer to article 4.5 at all. Leeds argued that the operation of cemeteries and crematoria was not a business activity; but HMRC disagreed. However, in February 2000 a VAT & Duties Tribunal took a different view, holding that a local authority was not to be considered a taxable person when providing and maintaining cemeteries. This was not a question of whether or not the supplies were supplies for a consideration, which had been the focus of the argument between Leeds and HMRC. Rather it turned on the application of article 4.5. In consequence HMRC changed their position. They accepted the Tribunal's decision as far as it went, but maintained that services offered by a local authority in addition to the operation of the cemetery remained outside the special statutory regime underpinning its non-business status, and therefore continued to be business activities of the local authority. In September 2004 Leeds made a claim in respect of those services supplied for the three years from August 2001. That claim has been paid, so HMRC have moved from that fall back position. But HMRC declined to pay the similar claim that was made in May 2007 in so far as it relates to accounting periods ending on or after 4 December 1996.

9. The second category of supply concerns loans of pictures, cassettes and videos. HMRC's original position was that all these loans were standard rated supplies. Again their published Notice simply stated that the supplies were standard rated, without any supporting reasoning, and again without reference to article 4.5 They changed their position after lobbying; and by 1999 they agreed that the loan of spoken word cassettes by public libraries was a non-business activity, but made no greater concession. Further lobbying led to a further change of position. In December 2003 HMRC accepted that all such loans constituted non-business activities, because of the statutory obligation of local authorities to lend, and that the competition proviso was not engaged. In January 2004, Leeds made a claim for repayment of VAT on library charges for the period from January 2001 to December 2003. That claim has also been paid. It is, again, only the May 2007 claim which HMRC decline to pay in so far as it relates to accounting periods ending on or after 4 December 1996.

10. The third category of supply concerns excess parking charges. From at least 1977 HMRC's position was that excess charges made for off-street car parks were standard rated. These supplies are nothing to do with article 4.5. However in May 2002 a Tribunal disagreed with HMRC and held that charges of that kind were not consideration for a supply and hence were not taxable. HMRC accepted that their earlier stance that the excess parking charges were taxable was wrong, and changed their published position following that decision. Leeds made a claim for repayment of VAT on excess parking charges levied at off-street car parks for the period from September 1999 to August 2002. That claim has been paid. Here, too, it is the May 2007 claim which HMRC decline to pay in so far as it relates to accounting periods ending on or after 4 December 1996.

11. The fourth category of supply concerns trade waste collection charges. Whether these charges are standard rated has been a matter of debate between HMRC and the professional accountants. HMRC's public stance has always been that that charges for the collection of commercial waste were the consideration for a standard-rated business activity. However, despite this continuing debate, on 27 March 2009 Leeds made a claim for repayment of VAT accounted for on trade waste charges, with a view to resolving the outstanding question whether such activities were business activities or not. The claim was for the period from March 1974 to March 2008. On 13 December 2010, HMRC wrote to Leeds to the effect that they were now of the view that the collection of trade waste was a non-business activity when conducted by a local authority and that the levels of competition within the market were insufficient to invoke the second paragraph of what was by then article 13 of the Principal VAT Directive. HMRC have therefore paid the claim except in relation to accounting periods beginning on and after 4 December 1996 and ending more than three years before the claim was made.

12. The last category of supply concerns administration charges in connection with the assessment of eligibility for home improvement grants. HMRC have adopted a variety of positions over the years. In the light of a High Court decision in 2001, by 2002 HMRC's position was that the whole of the administration fee was a standard rated supply. On 27 March 2009 Leeds made a claim for repayment, asserting that HMRC's position was wrong. That claim related to the periods from October 1999 to March 2009. In May 2009 Leeds made another such claim for the period from April 2009 to March 2010. HMRC deny that they are liable to pay any of these claims; but say that if they are wrong about that, then they are not liable to pay claims for any period on or after December 1996 and more than three years before the making of the claims.

13. It is now necessary to set out the story to explain why the domestic legislation takes the form that it does. Section 80 of the VAT Act is intended to be a complete statutory code for the repayment of overpaid VAT. When it was originally enacted the limitation period for the making of a claim was six years. Time began to run from the date when the VAT was paid, but section 80 (5) extended time where the payment had been made because of a mistake. In such a case time did not begin to run until the claimant discovered the mistake or could with reasonable diligence have discovered it. On 18 July 1996 the Paymaster General announced in Parliament the government's intention to reduce the limitation period governing claims for the recovery of overpaid output tax to three years with immediate effect. On 3 December 1996 the House of Commons resolved in accordance with the Provisional Collection of Taxes Act 1968 that the new time limit should take effect from the following day. Section 80 was amended by the Finance Act 1997 so as to provide for a fixed time limit of three years from the date of payment; and the possibility of an extension of time in the case of a mistake was removed. Section 47 (2) of the Finance Act 1997 provided that the amendments would have effect from 18 July 1996 (the date of the announcement rather than the date of the resolution). The new time limit was said to apply to all claims brought under section 80, including claims made before that date which had not already been paid, and claims relating to payments made before that date. One effect of this was that a person who had made a claim say four years after payment, but whose claim had not been paid, found himself deprived of his claim, even though at the time when the claim was made it was plainly in time.

14. Not surprisingly the effect of the legislation led to litigation before the European Court of Justice. In *Marks & Spencer plc v Customs and Excise Comrs* (Case C-62/00) [2003] QB 866, [2002] ECR I-6325 ("*Marks & Spencer*") the Court ruled that, although the reduction in the time limit was compatible with EU law, retrospectively depriving taxpayers of hitherto valid claims, without any transitional period to enable such claims to be made, was not. It also expressed the view at [35] that a three year limitation period appeared to be reasonable. The legal effect of that decision was not to strike down or invalidate the amended section 80. Rather, its effect was that the national courts would be required to disapply the amended section 80 in so far as it conflicted with any directly enforceable rights under EU law: *Fleming v HMRC* [2008] UKHL 2, [2008] 1 WLR 195 ("*Fleming*") at [24] (Lord Walker of Gestingthorpe). A person who argues that a national court should disapply domestic legislation must demonstrate that his own directly enforceable EU rights would be infringed if the legislation in question is not disapplied in his case: *Trustees of the BT Pension Scheme v HMRC* [2015] EWCA Civ 713 at [37].

15. The immediate practical effect of that ruling was that HMRC introduced an extra-statutory concession under which they invited claims under section 80 for output tax overpaid before the three-year limitation period was introduced. Following the decision of this court in 2006 in *Fleming* to the effect that claims for repayment in respect of amounts paid before the enactment of the three-year cap (i.e. before 4 December 1996) were not subject to any effective time limit, HMRC issued another public statement saying that they would meet such claims, subject to recovery if the House of Lords reversed the Court of Appeal. The House of Lords reached its decision in *Fleming* on 23 January 2008. It did not reverse the Court of Appeal. In the light of the decision of the House of Lords, HMRC introduced a revised extra-statutory concession which (so far as relevant for present purposes) invited claims for output tax overpaid or over-declared in pre-implementation periods, that is periods ending before 4 December 1996, the date from which the House of Commons resolution took effect.

16. On 18 March 2008, the House of Commons passed a further resolution under the Provisional Collection of Taxes Act 1968, giving effect to section 121 of the Finance Act 2008 from 19 March 2008. That section provided as follows:

> "(1) The requirement in section 80(4) of VATA 1994 that a claim under that section be made within 3 years of the relevant date does not apply to a claim in respect of an amount brought into account, or paid, for a prescribed accounting period ending before 4 December 1996 if the claim is made before 1 April 2009."

17. The chronology of Leeds' claims and their content is as follows. The first claim was made on 11 May 2007. That was a claim for VAT over-declared on the following charges:

    i) Charges for memorial items at cemeteries, for the VAT periods from April 1977 to July 2001;

    ii) Library charges, for the VAT periods between April 1990 and December 2000; and

iii) Excess parking charges, for the VAT periods between January 1984 and August 1999.

18. The second claim was made on 17 March 2009. This was a claim for overpaid VAT on the following charges:

i) Trade waste collection charges, for the VAT periods from March 1974 to March 2008; and

ii) Administration charges in respect of housing improvement loans, for the VAT periods from October 1999 to March 2009.

19. It is common ground that as a matter of EU law a taxable person has a right to recover overpaid VAT: *Amministrazione delle Finanze dello Stato v SpA San Giorgio* (Case 199/82) [1983] ECR 3595, [1985] 2 CMLR 658 at [12]. Such a claim is often known in the jargon as a *San Giorgio* claim. It is also common ground that domestic law may validly impose time limits on when a *San Giorgio* claim may be made.

20. Leeds relies on a number of principles of EU law in arguing that the domestic limitation period is invalid: the principles of effectiveness, equivalence, proportionality, legal certainty and legitimate expectation. The existence of these principles is not in dispute. What is disputed is whether their application leads to the conclusion that the domestic limitation period infringes those principles. We have been referred to a large number of decisions of the CJEU and its predecessor. But, while admiring the learning and industry involved, in my judgment we need not look much further than *Fleming*.

21. In *Fleming* at [79] Lord Neuberger distilled a number of propositions from the jurisprudence of the CJEU (derived largely from *Marks & Spencer* and (Case C-255/00) *Grundig Italiana SpA v Ministero delle Finanze* [2002] ECR I-8003). I quote them without the supporting citations:

> "(a) it is open to the legislature of a Member State to impose a time limit within which a claim for input tax must be bought:…; (b) it is further open to the legislature to introduce a new time limit, or to shorten an existing time limit, within which such a claim must be brought, even where the right to claim has already arisen (an 'accrued right') when the new time limit (a 'retrospective time limit') is introduced…; (c) any such time limits must, however, be 'fixed in advance' if they are to 'serve their purpose of legal certainty'…; (d) where a retrospective time limit is introduced, the legislation must include transitional provisions to accord those with accrued rights a reasonable time within which to make their claims before the new retrospective time limit applies…; (e) in so far as the legislature introduces a retrospective time limit without a reasonable transitional provision … or without any transitional provision …, the national courts cannot enforce the retrospective time limit in relation to accrued right, at least for a reasonable period; otherwise, there would be a breach of Community law…; (f) the adequacy of the period accorded by

> the transitional provision ('the transitional period') is to be determined by reference, inter alia, to the principles of effectiveness and legitimate expectation…; in particular, it must not be so short as to render it 'practically impossible or excessively difficult' for a person with an accrued right to make a claim…; (g) it is primarily a matter for the national courts to decide whether the length of any transitional period is adequate, although the ECJ will give a view if the transitional period is 'clearly' so short as to be inconsistent with Community law:…; (h) the absence of a transitional period of adequate length is not, however, automatically fatal to the enforcement of the retrospective time limit…; (i) where there is no adequate transitional period, it is for the national court to fashion the remedy necessary to avoid an infringement of Community law:…; (j) that remedy would, at least normally, be to disapply (perhaps only for a period) the operation of, the retrospective application of the new time limit to claims based on accrued rights…"

22. The expression "transitional period" may be misleading in some circumstances. What is really in issue is a prospective period from the date of the legislative change in which a valid claim may be made. In *Test Claimants in the FII Group Litigation v HMRC* [2012] UKSC 19, [2012] 2 AC 337 ("*FII*") at [153] Lord Sumption put it thus:

> "EU law might have taken an absolute line on national legislation retrospectively extinguishing the possibility of enforcing existing rights to recover money charged contrary to EU law. In fact, it has taken a more flexible and nuanced position. It follows from the liberty given to Member States to devise their own domestic law means of giving effect to EU rights, that national legislatures are in principle entitled to change their laws. Because they are not obliged to provide more than the minimum level of protection for EU rights necessary to make them effective, the changes may adversely affect claims to assert EU rights, provided that the new law still provides an effective means of doing so. The compromise which EU law has adopted between these conflicting considerations is to allow the retrospective curtailment of limitation periods within limits set by the principle of the protection of legitimate expectations. Legislation curtailing limitation periods is in principle consistent with the principle of effectiveness provided that a period of grace, which may be quite short, is allowed, either by giving sufficient advance notice of the change or by including transitional provisions in the legislation."

23. From this extract it can be seen that a short period of advance notice is an acceptable alternative to transitional provisions.

24. *Fleming* was principally concerned with regulation 29 (1A) of the VAT Regulations 1995 which concerned claims to repayments of input tax (rather than claims to

repayments of overpaid output tax). Like the changes made to section 80 of the VAT Act by the Finance Act 1997 it curtailed a limitation period retrospectively and was introduced without any transitional provisions. As mentioned, in the wake of the decision of the CJEU in *Marks & Spencer* HMRC promulgated a number of extra-statutory concessions inviting claims which, on the face of it, were not permitted by the legislation. One of the questions before the House was whether the invalidity under EU law of the impugned provision meant that the court could itself disapply the offending provision for a limited period. By a majority the House decided that it could not; and that the period of disapplication was still running. The main reason was that a decision of the court would itself be retrospective and that would infringe the principle of legal certainty which requires any such period to be "fixed in advance". As Lord Neuberger put it at [88] the purpose of a period of grace (or transitional period) is:

> "… to enable people with a certain type of claim (in this case a claim based on an accrued right) to know what period they have to bring their claims."

25. The vice of a retrospective period of limitation is that a person who has a valid claim on Day 1 sees it disappear on Day 2 in a puff of smoke.

26. At bottom, therefore, it seems to me that in the first instance the dispute in our case boils down to a relatively narrow issue. Has Leeds been given a readily ascertainable prospective opportunity of a reasonable length within which to bring the claims that it makes (assuming them to be well-founded in law)? If it has, then in the absence of special circumstances, none of the applicable principles of EU law will have been breached. If it has not, they will have been.

27. We must remind ourselves that all the live claims relate to payments on or after 4 December 1996. By 4 December 1996 the House of Commons had passed its resolution shortening the applicable limitation period to three years and removing the extended limitation period in cases of mistake. A reader of that resolution would have known that as regards any overpayment of VAT made on, say, 5 December 1996 he had until 4 December 1999 within which to make a claim. On the face of it that is a readily ascertainable prospective period of a reasonable length. Since the live claims all relate to VAT in accounting periods after 4 December 1996, those claims have never had the benefit of any longer limitation period than the three years allowed under the House of Commons' resolution. In short, therefore, there has been no retrospective alteration of the limitation period applicable to these claims.

28. In essence this was the reasoning of the Upper Tribunal at [98]:

> "It must have been clear to Leeds on 18 July 1996 (and if it was not, should have been) that the then government intended to implement a three-year limitation period for s 80 claims. From that day on, Leeds could have had no more than a hope that Parliament might not enact the necessary legislation; it could certainly not assume that it would not. In fact, on 3 December 1996 Parliament passed a resolution, as we have said, which brought the three-year cap into effect; and from the passing of that resolution the only possible expectation which Leeds could

> have held, in respect of claims arising thereafter, was that they would be affected by a three-year time limit, and that Parliament would in due course pass (as it did) the legislation which provided for it."

29. That reasoning is, in my judgment, on the face of it impeccable. Are there any special factors which should lead to a contrary conclusion?

30. Mr Ghosh QC relied on a combination of factors as amounting to special circumstances. They were (a) that the UK had not implemented article 4.5; (b) article 4.5 is very difficult both to understand and to apply; (c) HMRC's published position was not only wrong in law, but led a reasonably attentive trader down the wrong path because it failed to mention article 4.5 at all and instead focussed attention on what ultimately turned out to be irrelevant questions, namely whether the supply was made for a consideration and whether it was made in the course of business; and (d) when the claims were made the limitation period was, for practical purposes, unknown and unknowable.

31. In support of his argument Mr Ghosh relied heavily on the decision of the ECJ in (Case C-427/10) *Banca Antoniana Popolare Veneta SpA, v Ministero dell'Economia e delle Finanze, Agenzia delle Entrate* [2012] STC 526. BAPV supplied a service collecting contributions from members of land reclamation consortia between 1984 and 1994. BAPV charged VAT on the supply to the members of the consortia. The members paid the VAT to BAPV which in turn accounted for it to the tax authority. Thus at the time when the supplies were made BAPV's expectation, in accordance with the principle of fiscal neutrality, was that it would not bear the economic burden of VAT, which it passed on to the recipients of its supplies. In 1999, the tax authority issued a circular (No 52/E) by which it announced that the collection of contributions was now regarded as exempt from VAT (with retrospective effect). It appears that the circular was issued following "the new direction taken by the case law": see Opinion of Mazák A-G at [3]. As a result, the consortia claimed against BAPV in the civil court in Ferrara for the repayment of the VAT they had paid to BAPV; and the court ordered BAPV to repay the money. The civil action was governed by a ten year time limit under the Italian Civil Code. BAPV then brought a claim against the tax authority in the Provincial Tax Court of Rome for a refund equivalent to the amount that it had been ordered to pay to the consortia. The Provincial Tax Court of Rome upheld BAPV's claim but the tax authority appealed to the Regional Tax Court of Lazio. That court held that a two-year time limit applied to recovery claims against the tax authority and that consequently the claim was time-barred. The Italian Supreme Court referred two questions to the CJEU, although the court only found it necessary to answer one of them. As is common the CJEU reformulated the question that it had been asked. The question it posed at [20] was:

> "whether the principles of effectiveness, tax neutrality and non-discrimination preclude national rules governing the recovery of sums paid but not due, such as those at issue in the main proceedings, under which the specific time limits for bringing a claim for a tax refund are narrower than the time limits for bringing a civil law action for recovery of sums paid but not due, with the result that a recipient of services bringing such an action against the provider of those services can obtain a refund

> from that provider of VAT paid but not due, whereas the provider cannot in turn obtain a refund from the tax authority."

32. The court's subsequent observations must be seen in the light of the question that it was answering. The court began by restating its position about time limits, holding at [23] that parallel civil remedies for the ultimate consumer against the supplier on the one hand and taxation remedies for the supplier against the tax authorities were permissible under EU law. It held at [25] that a two year time limit for tax claims was acceptable. It went on to say at [27]:

> "Consequently, to prescribe by way of specific time limit a two-year period during which the taxable person may claim from the tax authority a refund of VAT paid but not due, while at the same time actions between individuals for the recovery of sums paid but not due are subject to a time limit of ten years, is not as such contrary to the principle of effectiveness."

33. So far, then, the court accepted that asymmetric time limits will not necessarily infringe EU law. However, at [30] the court went on to hold:

> "… the principle of effectiveness would be infringed if the taxable person had neither the right to obtain reimbursement of the tax concerned during the period allowed for bringing a claim against the tax authority, nor—after an action for recovery of sums paid but not due has been brought against him by his clients subsequent to the expiry of that period—the possibility of bringing proceedings against the tax authority, with the result that the consequences of the VAT payments made but not due, attributable to the state, would be borne by the taxable person alone."

34. It is clear that under Italian law BAPV would not have been entitled to make a claim for repayment of VAT following the civil claim against it, which is one of the two alternatives mentioned by the court. Mr Ghosh relies on what the court said at [32] about the possibility of a claim within the two year limitation period applicable to claims against the taxation authorities:

> "In the case before the referring court, it should be noted, first of all, that—as the European Commission pointed out at the hearing—it would have been impossible or, at the very least, excessively difficult for BAPV to obtain, by means of an action brought within the two-year time limit, a refund of the VAT paid in the years from 1984 to 1994, particularly in view of the position adopted by the tax authority—and confirmed, according to the information provided by the referring court, by the case law of the national courts—which dismissed the possibility that the services supplied by BAPV fell within the exemption provided for under art 10(5) of DPR No 633/72."

35. The court did not explain why it would have been excessively difficult for BAPV to have made its claim within the two year time limit. It may have been because until it

had repaid its own customers it had not suffered any economic loss; or it may have been because of Italian procedural requirements. At all events, Mr Ghosh argues that the court held that the fact that the tax authority adopts a position that is wrong in law means that it is excessively difficult for a tax payer to secure the refund of VAT to which he would otherwise be entitled. That reasoning should have been directly applied to the facts of our case. Consequently the Upper Tribunal were wrong in law to distinguish *Banca Antoniana*. I do not agree with Mr Ghosh that the position taken by the tax authority was the sole factor that influenced the court. The court also took into account changes in the domestic case law (as the A-G had advised it to: see A-G's opinion at [32]). If it were the case that whenever the tax authorities misinterpreted a provision of the VAT code that led to a disapplication of the time limits for making a claim, the consequences would be very far-reaching indeed. I cannot accept that that is what the CJEU decided, and Mr Ghosh did not suggest that it was. That as I understand it was also the conclusion of this court in *Trustees of the BT Pension Scheme v HMRC* at [119] and [120]. In *Banca Antoniana* the court also considered and placed considerable weight on the consequences for BAPV of the changed interpretation. Thus the court continued:

> "[33] Also, by attributing retroactive effect to the circular of 26 February 1999, the interpretation provided by the referring court and by the court decision referred to in para 16 above [i.e. the Regional Court of Lazio which had upheld the time limit] has the result of moving the starting point of actions for recovery back to the date on which the VAT was paid, which—given that the service provider had no more than two years in which to bring an action against the tax authority for the recovery of sums paid but not due—totally deprived the provider of any possibility of recovering the tax paid but not due.
>
> [34] Lastly, it is common ground that the consortia brought an action for the recovery of sums paid but not due after the expiry of the two-year specific limitation period during which it was open to BAPV, with effect—according to the case law interpretation mentioned above—from the date on which the VAT was paid, to claim a refund from the tax authority of the VAT paid but not due."

36. This, as I see it, was the real mischief in the case. BAPV was an intermediary which had not expected to bear the economic burden of VAT, because at the time of the supplies it had the expectation of passing on the VAT to the ultimate consumer. The combination of the retrospective reinterpretation of VAT law, and the asymmetric limitation periods which enabled the end users to recover the VAT from BAPV but precluded BAPV from reclaiming the VAT from the tax authorities meant, in the words of the court, that BAPV "was totally deprived" of its right to reclaim the overpaid VAT from the tax authorities.

37. It was this combination that led to the court's ultimate answer to the question that it posed at [42]:

> "It is apparent from the above considerations that the principle of effectiveness does not preclude national rules governing the recovery of sums paid but not due, under which the time limits for a civil law action for recovery of sums paid but not due, brought by the recipient of services against the supplier, a taxable person for the purposes of VAT, are more generous than the specific time limits for a fiscal law action for a tax refund, brought by the supplier against the tax authority, provided that it is possible for that taxable person effectively to claim reimbursement of the VAT from the tax authority. *That condition is not satisfied where the application of such rules has the effect of totally depriving the taxable person of the right to obtain from the tax authority a refund of the VAT paid but not due, which the taxable person has himself had to pay back to the recipient of his services*." (Emphasis added)

38. This answer was repeated in the *dispositif*. It is only that part of the court's decision which is binding on a national court, although the ruling must be interpreted in the light of the court's reasoning. A national court is not bound by the CJEU's factual findings, but only by its legal rulings. I therefore respectfully agree with the decision of this court in *Trustees of the BT Pension Scheme v HMRC* at [122] that the reason why an exception to the limitation period need to be made was because:

> "[the] Claimant had been specifically disadvantaged by the disparity in treatment under national law between the limitation period which applied to the bank's claim against the tax authority and that which governed its own liability to its customers."

39. Our case is, in my judgment, quite different. In the first place at the time when it made the supplies in question, Leeds expected to bear the VAT burden because of the way in which the law had been interpreted by HMRC (and if it disagreed with that interpretation it could have appealed). So there has been no disappointment of legitimate expectations. Second, Leeds has in fact borne the economic burden of VAT from the outset, unlike BAPV which only bore that burden once it had repaid its own customers in accordance with the ruling of the civil court. Third, in fact HMRC's changes of position have been progressively more accommodating to the taxpayer, with the result that the correct tax treatment is now agreed, except for the administrative fees relating to improvement grants. So whereas in *Banca Antoniana* the result of the change in interpretation was to *increase* BAPV's economic burden, in our case the change in interpretation has resulted in a *decrease* in Leeds' burden. Fourth, as I have said, the live claims have always been subject to a prospective three year limitation period, and that period has not been shortened. I do not, therefore consider that *Banca Antoniana* is as decisive as Mr Ghosh suggests.

40. I can return, then, to the points on which Mr Ghosh relies as necessitating a relaxation of the limitation period in Leeds' particular case.

41. So far as the first point is concerned, it is clear as a matter of EU law that the fact that a member state has not properly transposed a Directive does not preclude the taxing authorities of that state from relying on a limitation period against a person asserting a

directly effective EU right: (Case C-188/95) *Fantask A/S v Industriministeriet (Erhverministeriet)* [1997] ECR 1-6783 at [52]. That case concerned a provision in a Directive that had been wrongly transposed, rather than a case in which a provision had not been transposed at all. Mr Ghosh says that in principle there can be no difference between the two cases. Mr Macnab agrees, and so do I. There is nothing in this point.

42. So far as the second point is concerned, article 4.5 may indeed be difficult to understand or to apply. I express no view one way or the other. But the fact that a piece of European legislation is difficult to understand or apply cannot justify an extension of the limitation period. If the meaning of a piece of European legislation is unclear it can be referred to the CJEU which sometimes manages to clarify its meaning. If and in so far as there was a perceived problem it arose because of uncertainties about the law, and had nothing to do with any shortcomings in domestic procedure for claims for repayment of VAT.

43. So far as the third point is concerned, there is no rule of EU law requiring the running of a limitation period to be deferred until the existence of a right to recover the payment has been judicially established. It is not uncommon for a claim to repayment to have become time-barred in national law while proceedings are still in progress to determine whether the member state was in breach of EU law: *FII* at [151] (Lord Sumption). Thus the fact that HMRC advanced a view of the law which is now conceded to be wrong does not preclude reliance on the limitation period. If a taxpayer is dissatisfied with HMRC's view of the law, the proper course is to appeal to the appropriate tribunal. That course has always been open to Leeds. Mr Ghosh accepted that not every contested case would justify an extension of the limitation period. Ignorance of one's legal rights is not a ground for disapplying a limitation period: *British Telecommunications plc v HMRC* [2014] EWCA Civ 433, [2014] STC 1926 at [106] and [123]. But Mr Ghosh argued that he was complaining not merely that HMRC were wrong, but that they had thrown Leeds off the scent by failing to mention article 4.5 at all and focussing on what turned out to be legally irrelevant arguments. I cannot see that this makes any difference. The provisions of the Sixth Directive were readily available and were (and were known to be) directly effective. If (as was the case) HMRC were barking up the wrong tree, Leeds could readily have identified the right tree: *British Telecommunications plc v HMRC* at [123]. Mr Ghosh suggested that there was a difference between a case in which HMRC's erroneous view of the law was rejected by a tax tribunal, and a case in which HMRC acknowledged the error of their ways without such a ruling. In the former case there would be no warrant for any extension of the limitation period, but in the latter case there would. I reject that submission, which would have the consequence that HMRC would be compelled to defend what they knew to be their own erroneous interpretations in the tax tribunals, merely for the sake of not having to concede an extension of the limitation period.

44. The fourth point relies on what Mr Ghosh called "the saga of *Scottish Equitable*". This refers to a decision of the VAT & Duties Tribunal in Scotland, issued on 10 January 2006: *Scottish Equitable plc v HMRC* [2006] UKVAT V19418. That case involved a claim for repayment of overpaid VAT, some of which was attributable to periods post-dating 3 December 1996. The claim was made more than three years after the last of the payments in question. The Tribunal held that the amended section

80 had to be disapplied and that the extra-statutory concessions introduced by HMRC in the wake of *Marks & Spencer* were of not legally curative effect. Mr Ghosh's complaint is that HMRC refused to give effect to that decision even though, as he accepts, it was wrong. The reasoning of the Tribunal is flatly inconsistent with *Fleming*; and indeed the Inner House of the Court of Session allowed HMRC's appeal (by consent) in a reasoned order on 25 June 2009.

45. It would in my judgment be perverse for substantive rights to accrue as the result of an erroneous decision by a first instance tribunal. Almost any developed legal system has a hierarchy of courts or tribunals in which a higher court or tribunal can overrule an erroneous decision of a lower court or tribunal. Save in exceptional circumstances such decisions have retrospective effect. The fact that a first instance tribunal arrives at a decision which is later held to be wrong simply shows that the system is working as it should: cf *BCL Old Co Ltd v BASF SE* [2012] UKSC 45, [2012] 1 WLR 2922 at [42]. Mr Ghosh was, I think, inclined to accept that this was so, once an appeal tribunal had in fact decided that the earlier decision was wrong. But he said that unless and until that happened the first instance decision stood, and HMRC were wrong not to consider themselves bound by it. That submission, if correct, would have the bizarre consequence that, as between the parties to the appeal itself, the decision of the appeal tribunal would have retrospective effect; but as against third parties who were not parties to the appeal the erroneous decision of the first instance tribunal would continue to hold sway. No authority was proffered in support of that submission; and I reject it.

46. If a limitation period were held to apply only to ill-founded claims it would serve very little purpose. It must follow that it is permissible for claims that are well-founded in law to be barred for limitation reasons alone. Moreover the principle of effectiveness means not that it must be easy to obtain a remedy, but that it must not be "excessively difficult" to do so. Where, as in the UK, there is a specialist tax tribunal system whose principal purpose is to allow the taxpayer to challenge decisions by HMRC I cannot see that it is "excessively difficult" to obtain a remedy.

47. The last consideration that Mr Ghosh urged on us under this head was the principle of proportionality. In short this principle requires a member state not to do more than is necessary. Mr Ghosh argued that Parliament should have left room for cases like this one, where (a) a provision in a directive had not been transposed; (b) there was no context given in HMRC's published guidance; and (c) the only visible limitation period was one that HMRC refused to apply. Alternatively, he said, the limitation period should not begin to run until Leeds could have discovered the true position with reasonable diligence. This combination of circumstances, he said, meant that either Parliament should have enacted a "good" limitation period following the decision in *Scottish Equitable* or HMRC should have applied *Scottish Equitable* unless and until there was a successful appeal. With respect to Mr Ghosh, I cannot see that relabelling this argument as one of proportionality adds to the other arguments, which I have already rejected.

48. I reject Mr Ghosh's argument under this head.

49. If, therefore, the three year limitation period is valid, Leeds cannot escape from it. That brings me to the last point, which is that of equivalence. It is a free-standing point which is not dependent on any particular facts affecting Leeds. The argument

here is that the three year limitation period applicable to claims for repayment of VAT is shorter than the six year period allowed for claims for repayment of overpaid domestic direct taxes (e.g. income tax) which, in general, is six years with possibility of extension in cases of mistake. The principle of equivalence, so the argument goes, is that claims for VAT should also be subject to a similar limitation period.

50. Whether domestic procedural rules for the enforcement of a person's EU rights infringe the principles of equivalence or effectiveness is essentially a question of fact which, in this sphere, is particularly suitable for determination by a specialist tax tribunal, with whose decision this court should not interfere unless there has been a clear error of law: *Trustees of the BT Pension Scheme v HMRC* at [112]. In our case the Upper Tribunal held that there was no breach of the principle of equivalence because the same time limit applied whether or not the claim for repayment of VAT was based on EU rights or domestic law. That reasoning is confirmed by the decision of this court in *Littlewoods Ltd v HMRC* [2015] EWCA Civ 515, [2015] STC 2014, decided after the decision of the Upper Tribunal in our case. The judgment of the court held at [133] to [135] that because section 80 (7) of the VAT Act applied indiscriminately to both domestic and EU law claims for the repayment of overpaid VAT, it could not be said that there was any disparity between remedies for infringement of domestic law and infringement of EU law. The court also rejected the argument that the correct comparator was a claim for repayment of domestic direct tax generally. It followed therefore that there was no breach of the principle of equivalence. Mr Ghosh accepted that we were bound by that decision, which in my judgment also accords with the view of both the Advocate-General and the CJEU in (Case C-35/05) *Reemtsma Cigarettenfabriken GmbH v Minstero delle Finanze* [2008] STC 3448 at [94] (A-G) and [45] (the Court).

51. Mr Ghosh urged us, if we were against him on the arguments he presented, to make a reference to the CJEU. I would decline that invitation. The principles applicable to a prospective limitation period are *acte clair* and need no further elucidation. Whether the facts in an individual case should cause the national authorities to relax the period is a question of fact; and facts are for the national court rather than the CJEU. Whether the domestic procedure for allowing claims to be made satisfies the principle of effectiveness is, as Mr Ghosh rightly submitted, a question of judgment for the national court. Whether the principle of equivalence is satisfied is likewise a question of judgment for the national court; and in any event so far as that point is concerned, we are bound by *Littlewoods*.

52. I would dismiss the appeal.

Lord Justice Ryder, Senior President of Tribunals:

53. I agree.

Lord Justice Christopher Clarke:

54. I also agree.