[2019] UKUT 0100 (TCC)

Appeal number: UT/2018/0083

VALUE ADDED TAX – s80 of the Value Added Tax Act 1994 – whether appellant made a valid claim under s80(1B) – the nature of set-off between input and output tax – "set-off" provisions under s81(3) and s81(3A)

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

THE RANK GROUP PLC

Appellant

- and -

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS

Respondents

TRIBUNAL: The Honourable Mr Justice Marcus Smith
Judge Greg Sinfield

Sitting in public at The Rolls Building, Fetter Lane, London EC4A 1NL on 26 and 27 February 2019

Andrew Hitchmough, QC and Laura Poots, instructed by PwC LLP, for the Appellant

Andrew Macnab, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

A. INTRODUCTION

1. Sections 80 and 81 of the Value Added Tax Act 1994 ("VATA") provide a statutory code setting out when and how taxable persons are entitled to obtain a credit for overstated output tax or a repayment of overpaid VAT. These sections are set out in their entirety in Annex 1 to this decision. It is clear from section 80(7) VATA that the code in sections 80 and 81 is intended to be complete, and that common law claims for the recovery of overpaid tax are excluded.

2. The code provides three bases for the recovery of overpaid tax. The first is contained in section 80(1) VATA, which provides as follows:

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

3. The second provision is in similar terms, but deals with the case where the Commissioners have assessed a person to VAT. It is not material for the purposes of this appeal, and we therefore do not set it out in this decision.

4. The third provision is contained in section 80(1B) VATA, which provides as follows:

> "Where a person has for a prescribed accounting period (whenever ended) paid to the Commissioners an amount by way of VAT that was not VAT due to them, otherwise than as a result of –
>
> (a) an amount that was not output tax due being brought into account as output tax, or
>
> (b) an amount of input tax allowable under section 26 not being brought into account,
>
> the Commissioners shall be liable to repay to that person the amount so paid."

5. There are strict time limits as to when claims under sections 80(1) and 80(1B) can be made, which are set out in sections 80(4) and 80(4ZA) VATA. It will be necessary to consider these provisions in greater detail below, but for the present it is simply necessary to note that a taxable person making a claim "more than 4 years after the relevant date" will fail by reason of these time limits. The term "relevant date" is a defined term, coloured by the nature of the claim being made by the taxable person.

6. The present case concerns a claim for repayment of overpaid VAT under section 80(1B) VATA. However, that claim arises because – according to the Appellant, the Rank Group plc ("Rank") – three claims made by Rank under section 80(1) VATA were wrongly calculated by the Respondents – the Commissioners for Her Majesty's Revenue and Customs ("HMRC") – in that HMRC wrongly left out of account payments by Rank which should have been included in those claims, resulting in underpayments to Rank by HMRC. It is as a result of these underpayments, so Rank contends, that the section 80(1B) VATA claim arises.

7. It will, obviously, be necessary to describe exactly how these underpayments are said to arise. The First-tier Tribunal (the "FTT"), in a decision dated 2 May 2018 (the "Decision"), held that Rank's claim under section 80(1B) VATA failed because Rank had not "paid the Commissioners an amount by way of VAT that was not VAT due to them". The FTT reached that conclusion because it held that "payment" (as understood by section 80(1B) VATA) could not include the set-off of over-credited input tax, which is how – on Rank's case – its underpayment under its section 80(1) VATA claims arose. It will be necessary to consider this question, which was central to Rank's appeal. However, HMRC contended that whilst the FTT got this part of its Decision right, the Decision could be upheld on a number of grounds that (according to HMRC) the FTT wrongly dismissed in its Decision. It is, therefore, going to be necessary to consider the operation of sections 80(1) and 80(1B) VATA (and the rest of the statutory code) in some detail, as well as the manner in which Rank's claims under those two sections (section 80(1) and section 80(1B) VATA) are said to arise.

B. THE FACTS

8. This statement of the facts draws significantly on the findings of the FTT in the Decision at [3] to [12], which we gratefully adopt.

9. Rank is the representative member of the Rank VAT group and has, at all times, been registered for VAT. Rank operates a number of bingo clubs. At all material times, Rank made supplies of mechanised and cash bingo to members of the public. Until 2009, in accordance with HMRC's then practice, Rank treated its supplies of bingo as taxable at the standard rate and accounted for VAT accordingly.

10. Following the decision of the Court of Justice of the European Union ("CJEU") in the joined cases of *Linneweber* (C-453/02) and *Savvas Akriditis* (C-462/02), it was established that Rank's supplies should have been treated as exempt for VAT purposes. Had Rank's supplies been treated as exempt when they were made, two consequences would have flowed:

(1) Rank would not have been liable to account for output VAT on supplies that it made; and

(2) Rank would not have been entitled to credit for input tax that was connected with supplies of bingo.

11. Rank has made claims for repayment of VAT under section 80(1) VATA. HMRC paid three of those claims ("Claims (i) to (iii)"). In giving effect to the claims that it paid, HMRC have required Rank to "take the rough with the smooth" by taking into account both VAT that Rank wrongly paid and also input tax for which Rank was wrongly given credit.[1] Thus, where HMRC paid a claim under section 80(1) VATA, HMRC paid Rank a net amount that took into account, as a reduction, the amount of input tax associated with supplies of bingo for which Rank was wrongly given credit.

12. HMRC rejected a fourth claim under section 80(1) VATA ("Claim (iv)") on the grounds that it was made out of time. Rank appealed against this decision and litigation ensued in which Rank argued that the time limit in section 80 VATA breached EU law principles of equivalence, effectiveness and equal treatment. Rank's appeal was withdrawn following the Court of Appeal's decision in *Leeds City Council v. Revenue and Customs Commissioners*[2] and the proceedings before the FTT proceeded on the basis that HMRC were correct to reject Claim (iv) on the ground that it was out of time. That continues to be the position so far as this appeal is concerned.

13. A summary of Claims (i) to (iv) is set out in the following table:

(1) Claim	(2) Date	(3) Periods	(4) Over-declared output tax	(5) Associated input tax set-off (£)	(6) Amount repaid (£)	(7) Outcome
(i)	30/3/09	6/73 – 9/96	£132.18m[3]	£57.35m	£74.83m	Paid 22/3/11
(ii)	21/10/10	12/02 – 6/04	£10.13m	£3.04m	£7.09m	Paid 16/2/11
(iii)	Various	3/03 – 6/09	£24.57m	£8.48m	£16.09m	Paid 21/5/10
(iv)	9/11/11	12/96 – 12/02	£118.45m	£51.39m	Nil	Rejected
Totals (Claims (i) to (iii)			**£166.88m**	**£68.87m**	**£98.01m**	
Totals (Claims (i) to (iv)			**£285.33m**	**£120.26m**	**£98.01m**	

Table 1: Agreed figures as to amounts claimed and repaid

14. As Table 1 shows, HMRC accepted Claims (i) to (iii) as in-time valid claims and paid Rank the net sum in respect of those claims of £98.01m (representing £166.88m of over-declared output tax reduced by £68.87m of input tax overclaimed). The over-declared output tax and the associated input tax in

[1] See *Birmingham Hippodrome Theatre Trust Ltd v. Revenue and Customs* Commissioners, [2014] EWCA Civ 684 at [35].

[2] [2015] EWCA Civ 1293.

[3] For ease of reference, we have rounded all figures to two decimal places. There will, as a result, be rounding errors which we will, as necessary, correct in our disposition of this appeal.

relation to Claim (iv) were – as can be seen – entirely left out of account for the purposes of calculating Claims (i) to (iii).

15. It was common ground that, at the time HMRC made payments to Rank in respect of Claims (i) to (iii), HMRC were out of time to make assessments to recover input tax incurred in connection with supplies of bingo for which Rank was wrongly given credit. That, on Rank's case,[4] required HMRC to have recourse to section 81(3A) VATA, a significant provision to which we will return.

16. Since HMRC rejected Claim (iv) as being out of time, in respect of its VAT periods 12/96 – 12/02, Rank paid an aggregate amount of £67.05m to HMRC that it would not have been liable to pay if it had treated its supplies of bingo as exempt for VAT purposes.[5]

17. In the various letters making Claims (i) to (iii), Rank provided information on both the gross amount of output tax that it had paid on supplies of bingo and the gross amount of input tax for which it had obtained credit attributable to supplies of bingo. Rank made it clear in all of these letters that it expected HMRC to account to it only for the net sum (i.e. output tax as reduced by input tax).

18. By a letter dated 26 June 2013, and as further particularised in a letter dated 30 June 2014, Rank submitted the present claim to HMRC under section 80(1B) VATA. Rank asserted that:

> (1) In determining the amounts of the repayments of Claims (i) to (iii), HMRC had applied section 81(3A) VATA. In applying section 81(3A) VATA when the repayments of Claims (i) to (iii) were made, HMRC should have given Rank credit for the net VAT overpaid in the 12/96 to 12/02 periods – i.e. the sum of £67.05m, which was not VAT due to HMRC. Essentially, although Rank would dispute this description, HMRC should have taken into account Claim (iv) when calculating the amounts due under Claims (i) to (iii). Rather than reducing the amount of Claims (i) to (iii) by the amount of £68.87m in respect of overclaimed input tax, HMRC should only have reduced Claims (i) to (iii) by the lesser sum of £1.83m, thereby giving Rank credit for the net £67.05m that it had overpaid in the 12/96 to 12/02 periods.
>
> (2) It is an open question precisely how this sum of £67.05m should have been applied. Since, for the purposes of analysis, we are going to use worked examples to illustrate the rival contentions of Rank and HMRC, we set out the effect of this point in Table 2 below, applying the £67.05m to the claims paid by HMRC in the order that they were paid by HMRC (i.e., Claim (iii), then Claim (ii), then Claim (i)). Thus:

[4] The point was disputed by HMRC.

[5] I.e. the difference between £118.45m of output tax less recoverable associated input tax of £51.39m.

(1) Row No	(2) Description	(3) Claim (i) Paid 22/3/11	(4) Claim (ii) Paid 16/2/11	(5) Claim (iii) Paid 21/5/10	(6) Amount of £67.05m remaining
(a)	**Level of "credit"**				£67.05m
(b)	**Payment of Claim (iii)**				
(c)	Over-declared output tax			£24.57m	
(d)	Associated input tax			(£8.48m)	
(e)	Application of £67.05m "credit"			£8.48m	
(f)	Level of HMRC set-off			Nil	
(g)	Payment due to Rank			£24.57m	
(h)	**Amount of "credit" carried forward**				£58.57m
(i)	**Payment of Claim (ii)**				
(j)	Over-declared output tax		£10.13m		
(k)	Associated input tax		(£3.04m)		
(l)	Application of £67.05m "credit"		£3.04m		
(m)	Level of HMRC set-off		Nil		
(n)	Payment due to Rank		£10.13m		
(o)	**Amount of "credit" carried forward**				£55.53m
(p)	**Payment of Claim (i)**				
(q)	Over-declared output tax	£132.18m			
(r)	Associated input tax	(£57.35m)			
(s)	Application of £67.05m "credit"	£55.53m			
(t)	Level of HMRC set-off	(£1.82m)			
(u)	Payment due to Rank	£130.36m			
(v)	**Amount of "credit" carried forward**				Nil

Table 2: Counterfactual assessment: how Claims (i) to (iii) should have been treated by HMRC according to Rank

(3) HMRC's failure to give Rank credit for the sum of £67.05m meant that Rank had, when Claims (i) to (iii) were settled, made an overpayment of VAT of £67.05m which was not VAT due to HMRC.

(4) Rank therefore claimed recovery of this amount from HMRC.

19. By a letter dated 10 July 2013, HMRC rejected Rank's section 80(1B) VATA claim. Rank requested an independent review of HMRC's decision, and in a letter dated 11 September 2013, HMRC upheld their original decision. On 7 October 2013, Rank made an in-time appeal against this decision to the FTT. By its Decision, the FTT dismissed the appeal.

C. THE STRUCTURE OF THIS JUDGMENT

20. Although this is Rank's claim for repayment of overpaid VAT under section 80(1B) VATA, the overpayment said to have been made and claimed under that section arises out of HMRC's treatment of Rank's claims under section 80(1) VATA. Rank contends – and HMRC disputes – that the payments made by HMRC in respect of Claims (i), (ii) and (iii) were too low by an aggregate of £67.05m. In Table 2, these underpayments are described in Rows (e), (l) and (s) of that Table. The question of whether HMRC erred in failing to give credit for Rank's overpaid tax in this way is considered in Section D below.

21. The next question – assuming that Rank is correct, and there has been an underpayment in respect of Claims (i), (ii) and (iii) – is how, exactly, for the purposes of section 80(1B) VATA a payment of an amount by way of VAT in the aggregate amount of £67.05m (the sum claimed by Rank under section 80(1B) VATA) is said to have been made by Rank to HMRC. This question is considered in Section E below.

22. Finally, Section F considers the objection made by HMRC that this claim represented an illegitimate re-opening or appealing of Claims (i), (ii) and (iii) and an attempt to circumvent the time limits that had prevented Claim (iv) from succeeding.

D. THE CALCULATION OF CLAIMS MADE UNDER SECTION 80(1) VATA

(1) Definition of terms

23. It is necessary to be clear about a number of terms.

Input tax

24. Section 24(1) VATA defines "input tax", in relation to a taxable person, as the following tax:

> (1) VAT on the supply to him of any goods or services;
>
> (2) VAT on the acquisition by him from another member state of any goods; and
>
> (3) VAT paid or payable by him on the importation of any goods from a place outside the member states,
>
> being (in each case) goods or services used or to be used for the purpose of any business carried on or to be carried on by him.

Output tax

25. Section 24(2) VATA defines "output" tax (subject to later provisions in VATA), in relation to a taxable person, as VAT on supplies which he makes or on the acquisition by him from another member state of goods (including VAT

which is also to be counted as input tax by virtue of the provision described in paragraph 24(2) above).

Payment by reference to accounting periods

26. Section 25 VATA provides for the accounting for and payment of VAT by reference to periods determined by or under regulations, which periods are known as "prescribed accounting periods".[6]

27. Generally speaking, a taxable person is entitled, at the end of each prescribed accounting period, to credit for so much of his input tax as is allowable and then to deduct that amount from any output tax that is due from him.[7] There is, thus, a set-off, at the conclusion of each accounting period, of input tax and output tax.

28. If the amount of any input tax for a period exceeds the amount of any output tax (or if there is no output tax), then the amount of the excess is paid by HMRC to the taxable person as a "VAT credit".[8]

Assessments for VAT

29. Section 73 VATA makes provision for "assessments" of VAT. Section 73(1) VATA provides:

> "Where a person has failed to make any returns required under this Act (or under any provision repealed by this Act) or to keep any documents and afford the facilities necessary to verify such returns or where it appears to the Commissioners that such returns are incomplete or incorrect, they may assess the amount of VAT due from him to the best of their judgment and notify it to him."

30. There are, however, strict time limits for the making of assessments. The precise detail – set out in sections 73(6) and 77 VATA – does not matter, but it is important to note that HMRC is time limited as to when it can make an assessment.

(2) The operation of section 80(1) VATA: Rank's contentions

Stage 1: The section 80(1) VATA "credit"

31. According to Rank, section 80(1) VATA obliges HMRC to credit a taxable person with whatever amount of output tax that person has brought into account that was not output tax due. It was Rank's contention that the effect of section 80(1) VATA was to look only at the amount of output tax wrongly accounted for in a given prescribed accounting period and to create a credit, in that amount, to

[6] Section 25(1) VATA.

[7] Section 25(2) VATA.

[8] Section 25(3) VATA.

the benefit of the taxable person. Any input tax that the taxable person might have set off against this output tax was – at this stage – left out of account.

32. Thus, to take a concrete example in the form of Claim (iii) (the first claim paid by HMRC) the amount of the credit was the over-declared output tax of £24.57m: see Table 1, under Claim (iii), Column (4).

Stage 2: The "gateway" for a set-off

33. Rank contended that section 80(2A) VATA made provision for cross-claims or set-off applying in reduction to the credit established in section 80(1) VATA.

34. Section 80(2A) provides as follows:

> "Where –
>
> (a) as a result of a claim under this section by virtue of section (1) or (1A) above an amount falls to be credited to a person, and
>
> (b) after setting any sums against it under or by virtue of this Act, some or all of that amount remains to his credit,
>
> the Commissioners shall be liable to pay (or repay) to him so much of that amount as so remains."

35. According to Rank, section 80(2A) VATA did not of itself make any provision for cross-claims or set-off. All it did was make clear that the credit under section 80(1) VATA (in this case: this is not a section 80(1A) VATA case) would fall to be reduced "after setting any sums against it under or by virtue of this Act" and that HMRC would be obliged to pay only the net amount after set-off. The set-off provisions were, however, to be found elsewhere in VATA.

36. Thus, according to Rank, section 80(2A) VATA converts a "credit" in favour of the taxable person into a "liability" of HMRC to pay, but that liability only arises after set-off of cross-claims as envisaged elsewhere in VATA.

Stage 3: The set-off provisions: set-off of liabilities under section 81(3) VATA

37. According to Rank, the set-off provisions in VATA were contained in sections 81(3) VATA and 81(3A) VATA. Moreover, section 81(3A) VATA was supplemental to, or parasitic upon, section 81(3) VATA, and so it was necessary to begin with this provision.

38. Section 81(3) materially provides as follows:

> "…in any case where –
>
> (a) an amount is due from the Commissioners to any person under any provision of this Act, and

(b) that person is liable to pay a sum by way of VAT, penalty, interest or surcharge,

the amount referred to in paragraph (a) above shall be set against the sum referred to in paragraph (b) above and, accordingly, to the extent of the set-off, the obligations of the Commissioners, and the person concerned, shall be discharged."

39. Thus, where a liability of the taxable person to HMRC exists, this is set-off against the credit under (in this case) section 80(1) VATA and the credit is, correspondingly, reduced or extinguished. Of course, as with all cases of liability, if it exceeds the credit, the taxable person will continue to be liable for the net amount, after deduction of the credit.

40. The problem in this case – and this was common ground between Rank and HMRC – was that there was actually no liability of Rank to HMRC. This was because, although Claim (iii) had been made in time for Rank to claim a credit for its over-declared output tax in the amount of £24.57m pursuant to section 80(1) VATA, HMRC was out of time to make an assessment in relation to the input tax that Rank had set-off against this output tax. In relation to Claim (iii), this was the amount of £8.48m identified under Claim (iii) in Table 1, Column 5.

41. Accordingly, there was no applicable set-off under section 81(3) VATA, and (in the example we are using) Rank's credit under section 80(1) VATA would remain £24.57m.

Stage 4: The set-off provisions: set-off of non-liabilities under section 81(3A) VATA

42. Section 81(3A) VATA provides as follows:

"Where—

(a) the Commissioners are liable to pay or repay any amount to any person under this Act,

(b) that amount falls to be paid or repaid in consequence of a mistake previously made about whether or to what extent amounts were payable under this Act to or by that person, and

(c) by reason of that mistake a liability of that person to pay a sum by way of VAT, penalty, interest or surcharge was not assessed, was not enforced or was not satisfied,

any limitation on the time within which the Commissioners are entitled to take steps for recovering that sum shall be disregarded in determining whether that sum is required by subsection (3) above to be set against the amount mentioned in paragraph (a) above."

43. Section 81(3A) VATA requires three preconditions to be met:

(1) First, there must exist a liability to pay or repay any amount to any person under VATA: this is a reference, in this case, to the obligation to credit and pay Rank pursuant to sections 80(1) and 80(2A) VATA.

(2) Secondly, that liability must arise out of a "mistake previously made" about amounts payable under VATA to or by that person. In this case – as was common ground – the mistake was that Rank's supplies were erroneously treated as subject to VAT, when they should have been VAT exempt.

(3) Thirdly, by reason of that mistake, a liability of the taxable person to whom the payment or repayment is due was not assessed or enforced or satisfied. This is a reference to – for example – the associated input tax of £8.48m that Rank set-off when paying VAT against its output tax of £24.57m.

44. Provided these three pre-conditions are met, any limitation on the time within which HMRC are entitled to take steps for recovering that sum shall be disregarded for the purposes of calculating what amounts HMRC could set off under section 81(3) VATA.

45. Relying upon the decision of the Court of Appeal in *Birmingham Hippodrome Theatre Trust Ltd v Revenue and Customs Commissioners*[9] ("*Birmingham Hippodrome*") Rank contended that:

(1) The effect of section 81(3A) VATA was to permit HMRC to set-off against Rank's credit of £24.57m (Table 1, Claim (iii), Column (4)) the associated input tax of £8.48m (Table 1, Claim (iii), Column (5)).

(2) However, HMRC was not permitted to "cherry pick" out-of-time liabilities. Once HMRC had elected to deploy section 81(3A) VATA so as to bring into play Rank's out-of-time liability in relation to the input tax associated with its claim for over-declared output tax, all other liabilities as between Rank and HMRC, provided they arose out of the same mistake previously made, also had to be taken into account.

(3) This is best illustrated by the following example:

[9] [2014] EWCA Civ 684.

(1) Row No	(2) Description	(3) Over-declared output tax	(4) Associated input tax	(5) Net position (i.e. (3) – (4))	(6) Amount payable by HMRC
(a)	**Claim of taxable person**	£100	(£25)	£75	£100 No reduction because there is no "liability" to set-off.
(b)	**Out of time Period 1**	£100	(£100)	£0	
(c)	**Out of time Period 2**	£150	(£100)	£50	
(d)	**Out of time Period 3**	£75	(£100)	(£25)	
	Totals	£425	(£325)	£100	

Table 3: Illustration of the operation of the sections 81(3) and 81(3A) VATA set-offs according to Rank

Thus:

(a) In this hypothetical case, a taxable person makes a claim for over-declared output tax in the amount of £100. The associated input tax of £25 cannot be set-off by HMRC because HMRC is (as here) out of time to make an assessment.

(b) HMRC therefore relies upon section 81(3A) VATA to bring the out-of-time liability of £25 into account, which HMRC are entitled to do.

(c) However, that brings into play all of the cross-claims between the taxable person and HMRC. In this case, the net position – taking account of all transactions – is that the sums owed to the taxable person by HMRC exceed (by £100) the sums owed by the taxable person to HMRC. The taxable person cannot, of course, claim these sums, but the effect is to reduce HMRC's set off to nil. As a result, the taxable person recovers £100, the full amount of his or her over-declared output tax.[10]

(d) In this way, Rank contended that the payments to it, in respect of Claims (i), (ii) and (iii), should have been as described in Table 2.

(3) The operation of section 80(1) VATA: HMRC's contentions

46. We consider HMRC's contentions using the same four stages of analysis used to describe Rank's contentions.

Stage 1: The section 80(1) VATA "credit"

Stage 2: The "gateway" for a set-off

47. It is necessary to consider these two stages together to understand HMRC's contentions. It was HMRC's contention that sections 80(1) and 80(2A) VATA

[10] There are various ways in describing how the cross-claims set-off or cancel out. It could simply be said that the £25 that HMRC seeks to set-off is extinguished by the cross-claims of the taxable person.

made provision for the set-off of output and input tax where these were accounted for within the same prescribed accounting period. There was, accordingly, no need for HMRC to rely on sections 81(3) or 81(3A) VATA, which were only concerned with set-off of output and input tax accounted for in different prescribed accounting periods.

48. Thus, HMRC contended that – using Claim (iii) as an example again – the £24.57m over-declared input tax (Table 1, Claim (iii), Column (4)) could, simply by virtue of the operation of sections 80(1) and 80(2A) VATA, be reduced by the amount of the associated input-tax (Table 1, Claim (iii), Column (5)).

49. This was said by HMRC to be a necessary construction of these provisions, because a taxable person could not take the smooth without the rough. In other words, a taxable person should not be able to reclaim over-declared output tax, without giving credit for the associated input tax, otherwise this would result in an unjust enrichment of the taxable person).[11] HMRC contended that the payment of output tax and the deduction of input tax within the same prescribed accounting period were an "inseparable whole" for the purposes of sections 80(1) and 80(2A) VATA.[12]

50. If HMRC is right on this point, there is no need to consider further Stages 3 and 4. However, since HMRC did not accept Rank's contentions as regards these stages, we proceed to consider HMRC's contentions on the assumption that we reject HMRC's contentions in relation to Stages 1 and 2.

Stage 3: The set-off provisions: set-off of liabilities under section 81(3) VATA

51. On the basis that we rejected HMRC's contentions in relation to Stages 1 and 2, HMRC accepted that – in order to set-off against the credit due to Rank – it would be necessary to rely upon section 81(3) VATA. So far as this section was concerned, HMRC's approach was the same as Rank's. HMRC accepted that it would be necessary to rely not only upon section 81(3) VATA, but also section 81(3A) VATA.

Stage 4: The set-off provisions: set-off of non-liabilities under section 81(3A) VATA

52. HMRC did not consider that *Birmingham Hippodrome* provided any assistance in terms of how the set-off provisions in sections 81(3) and 81(3A) VATA operated.

53. HMRC substantially accepted Rank's contentions regarding the operation of these provisions, save that HMRC contended that:

[11] See *Birmingham Hippodrome* at [40].

[12] See *Birmingham Hippodrome* at [35] and [59].

(1) Whilst it was certainly the case that HMRC could not "cherry pick" between out-of-time liabilities, the set-off operated as between cross-claims arising in the same prescribed accounting period.

(2) If, after setting-off a credit to the taxable person against a liability owed by that person, the end result in that prescribed accounting period was a net liability owed by the taxable person to HMRC then such an amount could be applied in reduction of the taxable person's credit. However, that was the only way in which the set-off provisions could work.

(3) This is best illustrated by using a variant of the example at Table 3 above:

(1) Row No	(2) Description	(3) Over-declared output tax	(4) Associated input tax	(5) Net position (i.e. (3) – (4))	(6) Amount capable of being set-off	(7) Amount payable by HMRC
(a)	**Claim of taxable person**	£100	(£25)	£75		£50 Setting off the £25 in this period plus the £25 in Period 3
(b)	**Out of time Period 1**	£100	(£100)	£0	£0	
(c)	**Out of time Period 2**	£150	(£100)	£50	£0	
(d)	**Out of time Period 3**	£75	(£100)	(£25)	£25	

Table 4: Illustration of the operation of the sections 81(3) and 81(3A) VATA set-offs according to HMRC

(4) On our understanding of HMRC's approach,[13] the process of set-off operates within each prescribed accounting period, and is only relevant if, in that accounting period, there is a liability of the taxable person to HMRC. Thus:

(a) In Period 1 (Table 4, Row (b)), there is no set-off because output tax and associated input tax are the same. According to both the approach of Rank and HMRC this period cannot affect the claim of the taxable person.

(b) In Period 2 (Table 4, Row (c)), the set-off results in a credit to the taxable person of £50. This is left out of account, because sections 81(3)

[13] This decision was circulated in draft for the parties to identify typographical and other obvious errors. Counsel for HMRC commented that this sub-paragraph did not reflect HMRC's full argument, nor did Table 4 reflect the way in which HMRC's set-off was supposed to work. In the final version of this decision we have retained this paragraph and Table 4 in the form of the draft, which contains our understanding of HMRC's contentions. We have not substantively amended it to contain the even more complicated set-off that HMRC suggested in its comments. However, we should make clear that nothing in HMRC's comments on the draft has caused us to alter our analysis in Section D(4) below.

and 81(3A) VATA are (according to HMRC) only concerned to identify liabilities owed by the taxable person to HMRC, and not the other way round.

(c) In Period 3 (Table 4, Row (d)), the set-off results in a liability of the taxable person of £25. This is taken into account.

(5) Thus, the taxable person's credit of £100 is reduced first by the "in period" associated input tax of £25, and then further reduced by a further £25 by the "liability"[14] arising in Period 3.

(4) The operation of section 80(1) VATA: analysis

Stage 1: The section 80(1) VATA "credit"

Stage 2: The "gateway" for a set-off

54. We have no hesitation in rejecting HMRC's contentions on these points as unarguable. We accept the submissions of Rank so far as both Stages 1 and 2 are concerned. Our reasons for this are as follows:

(1) There is no need to imply into sections 80(1) and 80(2A) VATA a form of set-off to ensure that a taxable person takes the rough with the smooth, because such a mechanism already exists in the form of sections 81(3) and 81(3A) VATA.

(2) There is no basis, in the express wording of sections 80(1) and 80(2A) VATA, to read in any kind of set-off. Section 80(1) VATA expressly creates a credit in the amount of output tax wrongly accounted for by the taxable person. There is no provision, in section 80(1) VATA, for any kind of adjustment to this figure.

(3) Equally, section 80(2A) VATA simply makes clear that the section 80(1) credit becomes a liability after "setting any sums against it under or by virtue of this Act", to quote the express wording of section 80(2A) VATA. Section 80(2A) VATA itself contains no provision for set-off.

Stage 3: The set-off provisions: set-off of liabilities under section 81(3) VATA

55. The contentions of the parties in relation to section 81(3) VATA were the same, and we agree with them.

Stage 4: The set-off provisions: set-off of liabilities under section 81(3A) VATA

56. As has been described, the parties differed as to how the set-off should work. It is necessary to consider two matters:

[14] Strictly speaking, this is not a "liability". It is simply that, by virtue of section 81(3A) VATA, time periods that would otherwise apply are disregarded. For certain limited purposes, therefore, non-liabilities are treated as liabilities.

(1) First, the extent to which the decision of the Court of Appeal in *Birmingham Hippodrome* assists us in resolving this difference.

(2) Secondly, the extent to which, as a matter of construction, the wording of sections 81(3) and 81(3A) VATA – and the statutory code generally – favour one side's approach over the other's.

We consider these questions in turn below.

57. In *Birmingham Hippodrome*, as here, the taxable person (the operator of the Birmingham Hippodrome) had accounted for output tax, which it was not liable to pay. It had set-off against that output tax input tax that it had paid. As here, HMRC was out of time for making its own free-standing claim to recover input tax it had wrongly paid to the taxable person.

58. The Court of Appeal tabulated the output and input tax over various periods as follows:[15]

Item	Period		£ million
1	Jan 1990 to Nov 1996	Net overpayment – the subject of the appeal	1.1
2	Dec 1996 to Dec 1999	Net overpayment – out of time	0.9
3	Jan 2000 to Nov 2001	Net repayment of input tax – theatre closed for refurbishment	(5.0)
4	Dec 2001 to May 2004	Net overpayment – out of time	1.0
	Net position		(2.0)

Table 5: Table of payments by Birmingham Hippodrome in the *Birmingham Hippodrome* case

59. It can immediately be seen that – whether Rank's approach is adopted or whether HMRC's approach is adopted – the large repayment of input tax at Item 3 would reduce Birmingham Hippodrome's claim to nil. Birmingham Hippodrome sought to contend that:

(1) It was entitled to make a claim only in respect of Item 1. It chose, for obvious reasons, not to make a claim in respect of Item 3. Items 2 and 4 were out of time for claims.

(2) For the purpose of its claim, it was only necessary to set-off against output tax that should not have been accounted for the associated input tax. On this basis, Birmingham Hippodrome was entitled to recover £1.1m. The contention was that time limits could only be disregarded where the input tax was directly linked to the output tax.[16] HMRC's rival contention was that

[15] At [21].

[16] At [30].

section 81(3A) VATA required a netting off of underpayments and overpayments over the whole period covered by the relevant mistake.[17]

60. The Court of Appeal rejected Birmingham Hippodrome's contention and accepted that of HMRC. Before us, however, neither party sought to gainsay the Court of Appeal's holding that the whole period covered by the relevant mistake needed to be considered. However, because (whether one adopts Rank's approach or HMRC's in this case) Birmingham Hippodrome's case would fail – because of the unusually large payment of input tax in Item 3 – the distinction we are here concerned with did not arise. To this extent, therefore, the *Birmingham Hippodrome* case does not assist: it considers questions anterior to the questions here arising, which both parties took on board.

61. The question for us, therefore, is not whether the *ratio* of the *Birmingham Hippodrome* case resolves the matter before us – it clearly does not – but whether the approach of the Court of Appeal more generally assists in our determination of whether Rank's or HMRC's approach is to be preferred. As to this:

(1) European Union law requires that where tax has incorrectly been levied because of a failure (properly or at all) by a member state to implement EU law, the taxpayer is entitled to be placed in the position – so far as recovery of tax is concerned – he or she would have been in had EU law properly been implemented.[18]

(2) The function of sections 80 and 81 VATA was to provide a mechanism for the recovery of such overpaid tax.

(3) It was for the taxable person *(i)* to decide whether to make a section 80(1) VATA claim and *(ii)* if so, in respect of which period or periods. Subject to questions of time-bar, the taxable person was free to "pick and choose".[19] That is exactly what Birmingham Hippodrome did in this case, electing not to make a claim in respect of Item 3, for fear that the overall outcome would be disadvantageous to it.[20]

(4) It was permissible to impose limitation periods on a taxpayer's right to claim repayment of overpaid VAT, provided these were long enough not to infringe the principle of effectiveness.[21]

(5) Although the Court of Appeal was open to the suggestion that – in applying the set-off provisions in sections 81(3) and 81(3A) VATA – HMRC could itself "pick and choose" between periods, the Court of Appeal left this point open, because HMRC did not itself contend for this.[22]

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[17] At [26].

[18] At [37] and [39].

[19] At [56].

[20] At [56].

[21] At [57].

[22] At [58].

(6) In these circumstances, section 81(3A) VATA operated as follows:

> "59. The purpose of section 81(3A) is, in my judgment, clear. It is that where a taxpayer makes a claim for repayment of VAT which has been paid owing to a mistake, all the consequences of the mistake are to be taken into account in assessing the quantum of his claim. That purpose is consistent with the overarching scheme of VAT under the Sixth Directive which treats the payment of output tax and the deduction of input tax as an "inseparable whole". This is borne out by section 81(3A)(b) which deals with amounts payable "to or by" the taxpayer. It is clear from this that section 81(3A) was intended to allow HMRC to take into account both credits and debits. It is not, therefore, simply concerned with past claims by the taxpayer for credit of input tax. In evaluating those claims HMRC are also to look at amounts payable "by" the taxpayer: in other words output tax. Section 81(3A)(b) is not limited to particular accounting periods. The main limiting factor is that the payment "to or by" the taxpayer must derive from the same mistake as that which gave rise to the claim. Section 81(3A) is not part of the general scheme of VAT accounting, which requires a direct and immediate link between an input and an output. Rather, it is a special provision, which seeks to undo the consequences (and all the consequences) of the same mistake.
>
> 60. It is true that section 81(3A) only disapplies time limits in favour of HMRC. But it does not do so in an unlimited way. There are in fact two limitations on disapplication. The first, as mentioned, is that HMRC are confined to taking into account payments deriving from the same mistake. The second is that HMRC must credit the taxpayer with overpayments made by him. If section 81(3A) is seen as a limitation on what would otherwise be HMRC's ability to set off rather than a disapplication of time limits in favour of the HMRC, then there is no difficulty with the grain of the legislation. Under the *Marleasing* principle there is no need for the national court to pinpoint the precise verbal interpolations needed to bring the national measure into conformity with EU law. In my judgment the interpretation adopted by the Upper Tribunal was well within the bounds of the principle."

(7) In this regard, it is worth noting what the Upper Tribunal – whose decision was being appealed – actually said. At [85] of the Upper Tribunal's decision – quoted at [50] of the Court of Appeal's decision – the Upper Tribunal said this:

> "The effect of time limits is to curtail the objects of the Directive but such curtailment is permissible. The effect of section 81(3A) is to modify the effect of otherwise absolute time limits in favour of the state. That modification must be done in a way which does not violate fundamental principles of Community law and is in conformity with the object of the Directive. If section 81(3A) permitted the state to pick and choose between out-of-time periods so that it could choose only those in which the amounts were due to HMRC for the purpose of the set-off the result would not conform to that object. Thus if possible section 83(1A) should be construed so as to require all the amounts which would be due to or from HMRC if time limitations were disregarded to be taken into account for the purposes of this setting off."

62. Although by no means deciding the issue before us, we consider that the Court of Appeal's decision contains several very clear pointers in favour of Rank's approach and contrary to the approach contended for by HMRC:

(1) The aim of EU law in this context is to entitle a taxpayer to claim repayment of wrongly paid tax, taking into account all the consequences of that mistake.

(2) VATA permits HMRC to disapply time limits in order to take into account certain transactions in diminution or extinction of the taxpayer's claim. However:

(a) Such transactions must derive from the same mistake; and

(b) HMRC must take account of transactions going both ways, i.e. taking account of overpayments by the taxpayer as well as overpayments by HMRC.

(3) In these circumstances, asymmetric set-off of cross-claims is difficult to defend. By "asymmetric", we mean the approach contended for by HMRC, as illustrated in Table 4 above. Given that the purpose of the statutory code is to provide for the reversal of a mistaken payment of tax, applying set-off on a prescribed accounting period basis which leaves out of account overpayments by the taxpayer seems contrary to principle and wrong. Of course, assessing set-off by reference to prescribed accounting periods but leaving the taxpayers' overpayments in play renders the distinction between Rank's approach and HMRC's approach one without a difference.

63. We conclude that unless there is something in the wording of sections 80 and 81 that compels the contrary conclusion, Rank's approach is clearly to be preferred. So far as the question of construction is concerned:

(1) We accept that VAT is accounted for by reference to prescribed accounting periods and that, when accounting for a given period, a taxable person will account for his or her output tax, setting off the associated input tax.

(2) However, as the Court of Appeal noted, section 81(3A) VATA is not limited to particular accounting periods,[23] and there is nothing in sections 81(3) or 81(3A) VATA to compel such a conclusion. Of course, it is very likely that a claim under section 80(1) VATA will comprise a claim in relation to a single prescribed accounting period or a number of such prescribed accounting periods set together. That is simply a reflection of the manner in which VAT is accounted for generally and fails to recognise (as the Court of Appeal stressed) that section 81(3A) VATA "is not part of the general scheme of VAT accounting".[24]

[23] *Birmingham Hippodrome* at [59].

[24] At [59].

(3) Given that HMRC's ability to disregard time limits is limited by two factors expressly arising out of sections 81(3) and 81(3A) VATA – namely, those identified in [60] of the Court of Appeal's decision (see paragraph 61(6) above) – it would be anomalous to imply an application of a periodic form of set-off, the effect of which would be to leave out of account those periods where the taxpayer had made a net overpayment to HMRC.

64. Accordingly, we conclude that HMRC miscalculated the amount that it was liable to pay to Rank in relation to Claims (i), (ii) and (iii) by leaving out of account the £67.05m difference between output tax accounted for and input tax deducted in relation to "Claim (iv)". We conclude that HMRC has made an under-payment in relation to Claims (i), (ii) and (iii) of a total of £67.05m.

E. WHAT WAS THE PAYMENT FOR THE PURPOSES OF SECTION 80(1B) VATA?

(1) The need for "payment"

65. Section 80(1B) VATA provides for the recovery of VAT where "a person has for a prescribed accounting period (whenever ended) paid to the Commissioners an amount by way of VAT that was not VAT due to them…".[25] This Section considers whether, and if so how, Rank "paid" to HMRC an amount by way of VAT that was not VAT.

66. Rank could, of course, have appealed HMRC's determination of Claims (i), (ii) and (iii). The reason it did not do so is because the Court of Appeal's decision in *Birmingham Hippodrome* was made after the time for appeal had expired.

67. Rank, therefore, brings this claim, for £67.05m, under section 80(1B) VATA. In order to bring itself within section 80(1B) VATA, Rank must show that for a prescribed accounting period, whenever ended, it paid to HMRC an amount by way of VAT that was not VAT due. The critical question that arises is what – exactly – has Rank "paid" to HMRC that it now seeks to recover.

(2) The "payment" in this case

68. Taking Claim (iii), once again, as an illustration, Rank contended that it had made a payment of £8.48m in respect of this claim in the following way:[26]

[25] Emphasis added.

[26] After the hearing, we invited Rank to state exactly how – by way of a worked example in relation to Claim (i) – payment had been made by Rank. Table 6 is based on Rank's response, albeit that we have transposed the illustration from Claim (i) to Claim (iii).

(1) Item	(2) Description of transaction	(3) Liability of HMRC <u>to</u> Rank
(a)	**Credit pursuant to section 80(1)** Credit representing over-declared output tax	£24.57m
(b)	**Set-off pursuant to sections 81(3) and 81(3A) VATA** Set-off of associated input tax pursuant to sections 81(3) and 81(3A) VATA But reduced to zero, by application of part of the "Claim (iv)" credit Amount to be set off	 £8.48m (£8.48m) 0
(c)	Payment of Claim (iii)	£16.9m
(d)	**Sum unpaid by HMRC**	£8.48m

<u>Table 6</u>: Payment by Rank

69. Rank contended that this constituted a "set-off" of cross-claims. *Jowitt's Dictionary of English Law*[27] defines "set-off" as:

> "In an action to recover money, a set-off is a cross-claim for money by the defendant, for which he might sue the claimant. It has the effect of reducing or extinguishing the claimant's claim by the amount of the cross-claim, so that he can only recover against the defendant the balance of his claim after deducting the amount owed by him to the defendant. Thus, if A sues B for £100, while he owes B £75, a set-off would have the effect of reducing A's claim to £25. The object of this is to prevent cross-actions."

70. The FTT, at [53] of the Decision, considered that whilst this was a case of set-off, set-off was <u>not</u> a payment within the meaning of section 80(1B) VATA. Rank's case failed for that reason. We reach precisely converse conclusions on both points:

> (1) There is, in our view, no good reason to exclude from the ambit of section 80(1B) VATA cases where mutual cross-claims are extinguished by way of set off. As Mellish LJ stated in *Re Harmony and Montague Tin and Copper Mining Company, Spargo's Case*:[28]
>
> > "In the present case, I am of opinion that if an action were brought at law for the amount originally payable on these shares, there would be a valid defence, under a plea of payment. Nothing is clearer than that if parties account with each other, and sums are stated to be due on one side, and sums to an equal amount due on the other side on that account, and those accounts are settled by both parties, it is exactly the same thing as if the sums due on both sides had been paid. Indeed, it is a general rule of law, that in every case where a transaction resolves itself into paying money by *A* to *B*, and then handing it back again by *B* to *A*, if the parties meet together and agree to set one demand against the other, they need not go through the form and ceremony of handing the money backwards and forwards."
>
> (2) However, we do not consider this to be a case of set-off. There are no cross-claims at all. Rather, section 80(1) VATA creates a <u>liability</u> in HMRC,

[27] Greenberg (ed), *Jowitt's Dictionary of English Law*, 4th ed (2015): see under "set-off".

[28] (1873) 8 Ch App 407 at 414.

reduced by the set-off in sections 81(3) and 81(3A) VATA, resulting in a liability to pay by virtue of section 80(2A). All that has happened in this case is that HMRC has underpaid (in respect of Claim (iii)) by an amount of £8.48m. Suppose *A* borrows £100 from bank *B*, and (when the time for repayment comes) pays back only £75. The £25 shortfall arises not because *B* has a cross-claim against *A*, but because *A* has failed to pay his or her debt.

That is the case here, and we consider that the error that was made by HMRC could only have been corrected by way of an appeal.

F. RE-OPENING CLAIMS ALREADY DETERMINED

71. HMRC contended that Rank's section 80(1B) VATA claim constituted an illegitimate re-opening or appealing of Claims (i), (ii) and (iii) and an attempt to circumvent the time limits that had prevented Claim (iv) from succeeding.

72. We deal with this point very shortly. Because of our conclusion on the question of whether Rank has made a payment under section 80(1B), Rank's claim fails. In this sense, therefore, Rank has failed to "re-open" Claims (i), (ii), (iii) and (iv).

73. However, we stress that but for the question of "payment" (and subject to the relevant time-limits applicable to section 80(1B) VATA claims being complied with) we see do not see why Rank's section 80(1B) VATA claim would constitute an illegitimate re-opening of claims already determined. The fact is that there is a close link between a claim made under section 80(1) VATA and the set-off provisions – which draw in transactions related because they arise out of the same mistake. If, contrary to the present case, misapplication of these provisions by HMRC resulted in a payment by a taxable person of an amount by way of VAT that was not VAT due, which was not reimbursed – or not fully reimbursed – by a claim under section 80(1) VATA, then we consider a further claim based upon section 80(1B) VATA would not be illegitimate at all.

G. DISPOSITION AND COSTS

74. For the reasons we have given, the appeal is dismissed.

75. Any application for costs in relation to this appeal must be made in writing within one month after the date of release of this decision. As any order in respect of costs will, if not agreed, be for a detailed assessment, the party making an application for such an order need not provide a schedule of costs claimed with the application as required by rule 10(5)(b) of the Tribunal Procedure (Upper Tribunal) Rules 2008.

The Hon Mr Justice Marcus Smith
Judge Greg Sinfield

Release date: 1 April2019

ANNEX 1

SECTIONS 80 AND 81 VATA

80. **Credit for, or repayment of, overstated or overpaid VAT**

(1) Where a person **–**

(a) has accounted to the Commissioners for VAT for a prescribed accounting period (whenever ended), and

(b) in doing so, has brought into account as output tax an amount that was not output tax due,

the Commissioners shall be liable to credit the person with that amount.

(1A) Where the Commissioners –

(a) have assessed a person to VAT for a prescribed accounting period (whenever ended), and

(b) in doing so, have brought into account as output tax an amount that was not output tax due,

they shall be liable to credit the person with that amount.

(1B) Where a person has for a prescribed accounting period (whenever ended) paid to the Commissioners an amount by way of VAT that was not VAT due to them, otherwise than as a result of –

(a) an amount that was not output tax due being brought into account as output tax, or

(b) an amount of input tax allowable under section 26 not being brought into account,

the Commissioners shall be liable to repay to that person the amount so paid.

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

(2A) Where –

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

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

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

(3) It shall be a defence, in relation to a claim [under this section by virtue of subsection (1) or (1A) above, that the crediting of an amount would unjustly enrich the claimant.

(3A) Subsection (3B) below applies for the purposes of subsection (3) above where –

(a) an amount would (apart from subsection (3) above) fall to be credited under subsection (1) or (1A) above to any person ("the taxpayer"), and

(b) the whole or a part of the amount brought into account as mentioned in paragraph (b) of that subsection has, for practical purposes, been borne by a person other than the taxpayer.

(3B) Where, in a case to which this subsection applies, loss or damage has been or may be incurred by the taxpayer as a result of mistaken assumptions made in his case about the operation of any VAT provisions, that loss or damage shall be disregarded, except to the extent of the quantified amount, in the making of any determination –

(a) of whether or to what extent the crediting of an amount to the taxpayer would enrich him; or

(b) of whether or to what extent any enrichment of the taxpayer would be unjust.

(3C) In subsection (3B) above –

'the quantified amount' means the amount (if any) which is shown by the taxpayer to constitute the amount that would appropriately compensate him for loss or damage shown by him to have resulted, for any business carried on by him, from the making of the mistaken assumptions; and

'VAT provisions' means the provisions of— any enactment, subordinate legislation or EU legislation (whether or not still in force) which relates to VAT or to any matter connected with VAT; or any notice published by the Commissioners under or for the purposes of any such enactment or subordinate legislation.

(4) The Commissioners shall not be liable on a claim under this section –

(a) to credit an amount to a person under subsection (1) or (1A) above, or

(b) to repay an amount to a person under subsection (1B) above,

if the claim is made more than 4 years after the relevant date.

(4ZA) The relevant date is –

(a) in the case of a claim by virtue of subsection (1) above, the end of the prescribed accounting period mentioned in that subsection, unless paragraph (b) below applies;

(b) in the case of a claim by virtue of subsection (1) above in respect of an erroneous voluntary disclosure, the end of the prescribed accounting period in which the disclosure was made;

(c) in the case of a claim by virtue of subsection (1A) above in respect of an assessment issued on the basis of an erroneous voluntary disclosure, the end of the prescribed accounting period in which the disclosure was made;

(d) in the case of a claim by virtue of subsection (1A) above in any other case, the end of the prescribed accounting period in which the assessment was made;

(e) in the case of a claim by virtue of subsection (1B) above, the date on which the payment was made.

In the case of a person who has ceased to be registered under this Act, any reference in paragraphs (b) to (d) above to a prescribed accounting period includes a reference to a period that would have been a prescribed accounting period had the person continued to be registered under this Act.

(4ZB) For the purposes of this section the cases where there is an erroneous voluntary disclosure are those cases where –

(a) a person discloses to the Commissioners that he has not brought into account for a prescribed accounting period (whenever ended) an amount of output tax due for the period;

(b) the disclosure is made in a later prescribed accounting period (whenever ended); and

(c) some or all of the amount is not output tax due.

(4A) Where –

(a) an amount has been credited under subsection (1) or (1A) above to any person at any time on or after 26th May 2005, and

(b) the amount so credited exceeded the amount which the Commissioners were liable at that time to credit to that person,

the Commissioners may, to the best of their judgement, assess the excess credited to that person and notify it to him.

(4AA) An assessment under subsection (4A) shall not be made more than 2 years after the later of –

(a) the end of the prescribed accounting period in which the amount was credited to the person, and

(b) the time when evidence of facts sufficient in the opinion of the Commissioners to justify the making of the assessment comes to the knowledge of the Commissioners.

(4C) Subsections (3) to (8) of section 78A apply in the case of an assessment under subsection (4A) above as they apply in the case of an assessment under section 78A(1).

(6) A claim under this section shall be made in such form and manner and shall be supported by such documentary evidence as the Commissioners prescribe by regulations; and regulations under this subsection may make different provision for different cases.

(7) Except as provided by this section (and paragraph 16I of Schedule 3B and paragraph 29 of Schedule 3BA), the Commissioners shall not be liable to credit or repay any amount accounted for or paid to them by way of VAT that was not VAT due to them.

…

81. **Interest given by way of credit and set-off of credits**

(1) Any interest payable by the Commissioners (whether under an enactment or instrument or otherwise) to a person on a sum due to him under or by virtue of any provision of this Act shall be treated as an amount due by way of credit under section 25(3).

(2) Subsection (1) above shall be disregarded for the purpose of determining a person's entitlement to interest or the amount of interest to which he is entitled.

(3) Subject to subsection (1) above, in any case where –

(a) an amount is due from the Commissioners to any person under any provision of this Act, and

(b) that person is liable to pay a sum by way of VAT, penalty, interest or surcharge,

the amount referred to in paragraph (a) above shall be set against the sum referred to in paragraph (b) above and, accordingly, to the extent of the

set-off, the obligations of the Commissioners, and the person concerned shall be discharged.

(3A) Where –

(a) the Commissioners are liable to pay or repay any amount to any person under this Act,

(b) that amount falls to be paid or repaid in consequence of a mistake previously made about whether or to what extent amounts were payable under this Act to or by that person, and

(c) by reason of that mistake a liability of that person to pay a sum by way of VAT, penalty, interest or surcharge was not assessed, was not enforced or was not satisfied,

any limitation on the time within which the Commissioners are entitled to take steps for recovering that sum shall be disregarded in determining whether that sum is required by subsection (3) above to be set against the amount mentioned in paragraph (a) above.

(4A) Subsection (3) above shall not require any such amount as is mentioned in paragraph (a) of that subsection (`the credit') to be set against any such sum as is mentioned in paragraph (b) of that subsection (`the debit') in any case where –

(a) an insolvency procedure has been applied to the person entitled to the credit;

(b) the credit became due after that procedure was so applied; and

(c) the liability to pay the debit either arose before that procedure was so applied or (having arisen afterwards) relates to, or to matters occurring in the course of, the carrying on of any business at times before the procedure was so applied.

(4B) Subject to subsection (4C) below, the following are the times when an insolvency procedure is to be taken, for the purposes of this section, to be applied to any person, that is to say –

(a) when a bankruptcy order or winding-up order or award of sequestration is made or an administrator is appointed in relation to that person;

(b) when that person is put into administrative receivership;

(c) when that person, being a corporation, passes a resolution for voluntary winding up;

(d) when any voluntary arrangement approved in accordance with Part I or VIII of the Insolvency Act 1986, or Part II or Chapter II of Part VIII of the Insolvency (Northern Ireland) Order 1989, comes into force in relation to that person;

(e) when a deed of arrangement registered in accordance with Chapter I of Part VIII of that Order of 1989 takes effect in relation to that person;

(f) when that person's estate becomes vested in any other person as that person's trustee under a trust deed.

(4C) In this section, references to the application of an insolvency procedure to a person do not include –

(a) the application of an insolvency procedure to a person at a time when another insolvency procedure applies to the person, or

(b) the application of an insolvency procedure to a person immediately upon another insolvency procedure ceasing to have effect.

(4D) For the purposes of this section a person shall be regarded as being in administrative receivership throughout any continuous period for which (disregarding any temporary vacancy in the office of receiver) there is an administrative receiver of that person, and the reference in subsection (4B) above to a person being put into administrative receivership shall be construed accordingly.

(5) In this section –

(b) *"administrative receiver"* means an administrative receiver within the meaning of section 251 of the Insolvency Act 1986 or Article 5(1) of the Insolvency (Northern Ireland) Order 1989;

(ba) *"administrator"* means a person appointed to manage the affairs, business and property of another person under Schedule B1 to that Act or to that Order; and

(c) *"trust deed"* has the same meaning as in the Bankruptcy (Scotland) Act 2016.