Neutral Citation Number: [2021] EWCA Civ 186

Case No: A3/2020/0204

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
REVENUE LIST (ChD)
Mr Justice Fancourt
[2020] EWHC 11 (Ch)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17/02/2021

Before:

LORD JUSTICE UNDERHILL
(Vice-President of the Court of Appeal, Civil Division)
LORD JUSTICE NEWEY
and
LORD JUSTICE BAKER

- -

Between:

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS	**Appellants**
- and -	
MCX DUNLIN (UK) LIMITED	**Respondent**

- -
- -

David Ewart QC and Elizabeth Wilson (instructed by **General Counsel and Solicitor to HM Revenue and Customs**) for the **Appellants**
David Goldberg QC (instructed by **Ernst & Young LLP**) for the **Respondent**

Hearing dates: 19 & 20 January 2021

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Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be Wednesday 17 February 2021 at 10:30am

Lord Justice Newey:

1. During the 1980s, Shell UK Limited and Esso Exploration and Production Limited ("the old participators") paid advance petroleum revenue tax ("APRT") and petroleum revenue tax ("PRT") as participators in the Dunlin oil field in the North Sea. Losses having been incurred in respect of the field in more recent years, HM Revenue and Customs ("HMRC") have made refunds. The substantive question raised by the present appeal is whether those refunds were entirely of PRT (as the respondent, MCX Dunlin (UK) Limited ("MCX"), contends) or represented a mixture of PRT and APRT (as HMRC argue). The point matters since it is common ground that interest is payable on repayments of PRT but would not be if and to the extent that it was APRT that was repaid. The other issue to which the appeal gives rise is procedural: whether it was open to MCX to challenge HMRC's treatment of the refunds by way of a claim under CPR Part 8 (as it has sought to do).

Basic facts

2. For a period during the 1980s, participators in certain oil fields were liable to pay both PRT and APRT. One such oil field was the Dunlin field, in respect of which the old participators made payments of APRT and PRT before, in 2008, selling their interests in the field. MCX was one of the purchasers and in time it also acquired, by way of forfeiture, the interest of the other purchaser.

3. Oil production from the Dunlin field ceased in the middle of 2015. By that stage, large losses had accumulated in respect of the field and these were carried back and served to reduce profits which the old participators had made from the field in the 1980s. As a result, HMRC made refunds to the old participators which, in accordance with the contracts under which they sold their interests in the field, the old participators have passed on to MCX. HMRC treated the refunds as attributable in part to PRT and in part to APRT. In so far as the repayments were considered to be of PRT, interest was paid. However, HMRC have denied any liability for interest on the balance of the refunds.

4. We were supplied by way of illustration with assessments relating to the Dunlin field for the period from 1 July 1986 to 31 December 1986. On 29 May 1987, Esso Exploration and Production UK Limited ("Esso") was assessed as liable to PRT of £1,659,021 on the basis of an assessable profit of £6,129,942. After deduction of "APRT credit" of £422,061, the net amount payable was specified as £1,236,960. On 7 February 1990, however, a further assessment was issued, in which assessable profit and net amount payable were shown in the slightly lower sums of, respectively, £6,126,011 and £1,234,011, in consequence of which £2,949 fell to be returned. A couple of years later, on 3 June 1992, another assessment recorded an assessable profit of £5,935,588, a net amount payable of £1,094,110 and a repayment of £139,901. On 12 April 1995, a yet further assessment was issued, this time on the footing that there was an assessable profit of £6,036,363 and a net amount payable of £1,169,691, as a result of which additional PRT of £75,581 was due. In the following year, on 1 May 1996, an assessment gave assessable profit as £6,020,738, net amount payable as £1,157,973 and Esso as entitled to £11,718. Come 2015, an assessment dated 26 August revised the net amount payable to zero on the basis that the assessable profit had been extinguished by more recent losses and showed Esso as accordingly due £1,157,973. A final assessment, dated 18 December 2015, restated the amount of losses required to offset the assessable profit but left the net amount payable as zero. Esso thus had

refunded to it as PRT the £1,157,973 which had previously been calculated to be the "net amount payable". The "APRT credit" of £422,061 by which successive "net amount payable" figures had been reduced was not included in the £1,157,973 depicted as due to Esso but was instead, according to HMRC, repaid to Esso as excess APRT credit. On that basis, HMRC have paid interest on just the £1,157,973.

5. On 12 February 2019, MCX issued a claim against HMRC in the High Court under CPR Part 8 seeking a declaration that the sums on which HMRC had refused to pay interest in fact carried it. The matter came before Fancourt J ("the Judge") who, in a judgment dated 13 January 2020, concluded that he should grant a declaration as sought. He held that the totality of the sums which had been repaid to the old participators was overpaid PRT rather than excess APRT credit and so carried interest. He also rejected submissions on the part of HMRC that the Part 8 proceedings were an abuse of process or otherwise inappropriate for the grant of relief on procedural grounds.

6. HMRC now challenge the Judge's decision in this Court.

The statutory framework

Petroleum revenue tax

7. PRT was introduced by the Oil Taxation Act 1975 ("OTA 1975"). By section 1(2) of that Act, a "participator" in an oil field is to be charged PRT on:

> "the assessable profit accruing to him in any chargeable period from that field, as reduced under section 7 of this Act by any allowable losses and under section 8 of this Act by reference to his share, if any, of the oil allowance for that period, subject however to the limit imposed in his case by section 9 of this Act".

"Chargeable periods" are the half years to the end of June and December of each year.

8. As section 1(2) indicates, sections 7 and 8 of OTA 1975 provide respectively, as their headings say, for "Relief for allowable losses" and "Oil allowance". Section 7 states:

> "(1) Where the Board have determined under Schedule 2 to this Act that an allowable loss has accrued to a participator in a chargeable period from an oil field, then subject to the following provisions of this section, the assessable profit accruing to him from the field in any succeeding chargeable period shall be treated as reduced by the amount of that allowable loss, or by so much of that amount as cannot, under this subsection or on a claim (if made) under subsection (2) below, be relieved against the assessable profit accruing to him from the field in any earlier chargeable period.
>
> (2) Where the Board have determined under Schedule 2 to this Act that an allowable loss has accrued to a participator in a chargeable period from an oil field, the participator may make a claim requiring that the loss be in the first instance set against

> any assessable profit which accrued to him from the field in any preceding chargeable period; and the assessable profit which so accrued to him in any such period shall then be treated as reduced by the amount of the loss, or by so much of that amount as cannot be relieved under this subsection against any assessable profit accruing to him from the field in a later chargeable period.
>
> (3) Where—
>
> (a) the Board have determined under Schedule 2 to this Act that an allowable loss has accrued to a participator in a chargeable period from an oil field; and
>
> (b) the winning of oil from that field has permanently ceased,
>
> then so much of that allowable loss as cannot under subsection (1) or (2) above be relieved against assessable profits accruing to the participator from the field shall be relieved under this subsection by treating the assessable profit accruing to him from the field in any chargeable period as reduced by the amount of the loss, or by so much of that amount as cannot be relieved under this section against the assessable profit so accruing to him in a later chargeable period."

Section 8 provides for a participator's liability to PRT to be reduced by the cash equivalent of his share of an allowance of 250,000 metric tonnes per oil field per chargeable period, provided that the total allowance for an oil field is not to exceed a specified figure (5 million metric tonnes following the amendment of section 8 by the Finance (No. 2) Act 1979).

9. By virtue of section 1(5) of OTA 1975, schedule 2 to the Act has effect with respect to the management and collection of PRT. Paragraph 2 of schedule 2 obliges a participator to deliver to HMRC a return for each chargeable period. Paragraphs 10-12B deal with assessments to tax and determinations of loss. Paragraph 10 provides for HMRC to make assessments and determinations, stating:

> "(1) Where it appears to the Board that, in accordance with the provisions of this Part of this Act, an assessable profit has accrued to a participator in a chargeable period from a taxable field, they shall make an assessment to tax on the participator and shall give him notice of the assessment.
>
> …
>
> (2) Where it appears to the Board that, in accordance with those provisions, an allowable loss has accrued to a participator in a chargeable period from a taxable field, they shall make a determination that the loss is allowable to the participator and shall give him notice of the determination.

> (3) Where it appears to the Board that, in accordance with those provisions, neither an assessable profit nor an allowable loss has accrued to a participator in a chargeable period, they shall make a determination to that effect and shall give him notice of the determination.
>
> (4) A notice of assessment for a chargeable period shall state the amount of any allowable losses which, in accordance with those provisions, have been set against the assessable profit for that period.
>
> (5) A notice of assessment or determination shall state that the participator may appeal against the assessment or determination in accordance with paragraph 14 below.
>
> (6) After the service of the notice of assessment or the notice of determination the assessment or determination, as the case may be, shall not be altered except in accordance with the express provisions of this Part of this Act (including the provisions applied by paragraph 1 above)."

Paragraph 12 allows assessments and determinations to be supplemented or amended. Before it was amended by the Finance Act 2009, paragraph 12 provided:

> "(1) Where it appears to the Board—
>
> > (a) that the assessable profit charged to tax by or stated in an assessment ought to be or to have been larger or smaller; or
> >
> > (b) that the allowable loss stated in an assessment or a determination of loss ought to be or to have been larger or smaller; or
> >
> > (c) that, where they made a determination that neither an assessable profit nor an allowable loss accrued in a chargeable period, they ought to have made an assessment to tax or a determination of loss for that period; or
> >
> > (d) that for any chargeable period they ought to have made an assessment to tax instead of a determination of loss or a determination of loss instead of an assessment to tax,
>
> the Board may make such assessments or determinations or such amendments of assessments or determinations as may be necessary; and where the Board exercise any of their powers under this paragraph in relation to a chargeable period, they may make such assessments or determinations or amendments of assessments or determinations for other chargeable periods as may be necessary in consequence of the exercise of those powers.

> (2) Where under sub-paragraph (1) above it appears to the Board that the assessable profit for a chargeable period ought to have been larger and that the deficiency resulted from an excessive allowable loss accruing in a subsequent period having been set against the profit for that period, the Board may (notwithstanding anything in section 34 of the Taxes Management Act 1970 (ordinary time limit for assessments)) make a further assessment by virtue of sub-paragraph (1) above at any time not later than six years after the end of the chargeable period in which the allowable loss accrued.
>
> (3) Where under this paragraph the Board make an assessment or determination or amend an assessment or determination they shall give notice thereof to the participator concerned; and sub-paragraphs (4), (5) and (6) of paragraph 10 above shall apply in relation to any such assessment, determination or amendment as they apply in relation to an assessment or determination under that paragraph."

The "provisions applied by paragraph 1" to which there is reference in paragraph 10(6) are provisions of the Taxes Management Act 1970 ("TMA 1970"), with specified modifications.

10. Paragraph 13 of schedule 2 to OTA 1975 provides that, subject to paragraph 14, tax charged in an assessment is due within six months after the end of the relevant chargeable period or, if later, 30 days after the date of issue of the notice of assessment. Paragraph 14 allows a participator to "appeal against an assessment or determination or an amendment of an assessment or determination made on or in relation to him by notice of appeal in writing given to HMRC within thirty days after the date of issue of the notice of assessment or determination or of the notice of the amendment". Paragraph 14(3) permits a participator to withhold PRT while an appeal is pending. Paragraph 14(10) states:

> "If an appeal under subparagraph (1) is notified to the tribunal and it appears to the tribunal that the assessment, determination or amendment is wrong—
>
> > (a) because no, or a smaller, assessable profit or a, or a larger, allowable loss has accrued for the chargeable period in question; or
> >
> > (b) because a, or a larger, assessable profit or no, or a smaller, allowable loss has accrued for that period,
>
> the tribunal shall vary the assessment, determination or amendment in such manner, or substitute such assessment or determination, as may be required; and it shall be for the participator to satisfy the tribunal as to any matter within paragraph (a) above."

11. Paragraphs 15-17 of schedule 2 to OTA 1975 relate to interest. Paragraph 15 provides for tax charged in an assessment to carry interest and paragraph 16 for interest "where any amount of tax charged by an assessment to tax or paid on account of tax so charged becomes repayable". In its present form, paragraph 17 is in these terms:

> "(1) This paragraph applies where—
>
> (a) an assessment made on a participator for a chargeable period or an amendment of such an assessment (in this paragraph referred to as 'the relevant assessment or amendment') gives effect to relief under subsection (2) or subsection (3) of section 7 of this Act for one or more allowable losses accruing in a later chargeable period (in this paragraph referred to, in relation to the relevant assessment or amendment, as 'the relief for losses carried back'); and
>
> (b) the later chargeable period referred to in paragraph (a) above ends after 30th June 1991; and
>
> (c) an amount of tax becomes repayable to the participator by virtue of the relevant assessment or amendment (whether wholly or partly by reason of giving effect to the relief for losses carried back).
>
> (2) In the following provisions of this paragraph, so much of the repayment of tax referred to in sub-paragraph (1)(c) above as is attributable to giving effect to the relief for losses carried back is referred to as 'the appropriate repayment' and, in relation to the appropriate repayment, the chargeable period for which the relevant assessment or amendment is made is referred to as 'the repayment period'.
>
> …
>
> (4) Subject to sub-paragraph (6) below where this paragraph applies, the amount of interest which, by virtue of paragraph 16 above, is carried by the appropriate repayment shall not exceed the difference between—
>
> (a) the relevant percentage of the amount of the allowable loss or losses referred to in sub-paragraph (1)(a) above which is treated as reducing the assessable profit of the repayment period; and
>
> (b) the amount of an appropriate repayment.
>
> (5) For the purposes of sub-paragraph (4)(a) above—
>
> (a) where the repayment period ends on or before 30th June 1993, the relevant percentage, in relation to the amount of the loss or losses which is treated as reducing

the assessable profit accruing to the participator for that period is 85 per cent.; and

(b) in relation to the amount of the loss or losses which is treated as reducing the assessable profit accruing to the participator for any later repayment period, the relevant percentage is 60 per cent.

(6) If, in order to give effect to the relief for losses carried back, a repayment of APRT falls, or will on the making of a claim fall, to be made with respect to a chargeable period which is the repayment period in relation to the appropriate repayment, the reference in sub-paragraph (4)(b) above to the appropriate repayment shall be construed as a reference to the aggregate of that repayment and the repayment of APRT.

(7) In sub-paragraph (6) above 'APRT' means advance petroleum revenue tax paid under Chapter II of Part VI of the Finance Act 1982."

12. Schedule 17 to the Finance Act 1980 ("FA 1980") contains provisions relating to transfers of interests in oil fields. Paragraph 15 of schedule 17, headed "Terminal losses", makes it possible for a loss incurred by a current participator to be used to reduce a predecessor's assessable profits. It states:

"(1) This paragraph applies in any case where—

(a) such an allowable loss as falls to be relieved under section 7(3) [of OTA 1975] accrues to the new participator from the field in a chargeable period ending after 17th March 2004, but

(b) some or all of the loss cannot be relieved under section 7(3) against assessable profits accruing to him from the field.

(2) So much of the loss as cannot be so relieved ('the remaining loss') shall be regarded as an allowable unrelievable field loss in relation to the new participator ('the loss-maker') only to the extent that—

(a) so much of it as cannot be relieved in accordance with sub-paragraphs (3) to (6) below, exceeds

(b) the aggregate of any relevant previous participators' expenditure unrelated to the field (see sub-paragraphs (10) and (11) below).

(3) The remaining loss shall be treated as an allowable loss which falls to be relieved under section 7(3) against so much of any assessable profits accruing to the old participator from the

field as is attributable to his represented interest (see sub-paragraphs (9) and (12) below).

…

(5) Any relief by virtue of sub-paragraph (3) above shall be given against the assessable profits accruing to the old participator in an earlier chargeable period only to the extent to which it cannot be given against the assessable profits accruing to him in a later chargeable period….”

13. PRT is taken into account when assessing a participator’s liability to corporation tax. In the 1980s, following the advent of APRT but before the Income and Corporation Taxes Act 1988 (“ICTA 1988”) took effect, OTA 1975 included a section 17 in these terms:

“**Corporation tax: deduction of petroleum revenue tax in computing income**

(1) Where a participator in an oil field has paid or is treated by virtue of subsection (1A) below as having paid any petroleum revenue tax with which he was chargeable for a chargeable period not being advance petroleum revenue tax, then, in computing for corporation tax the amount of his income arising in the relevant accounting period from oil extraction activities or oil rights, there shall be deducted an amount equal to that petroleum revenue tax; and there shall be made all such adjustments of assessments to corporation tax as are required in order to give effect to this subsection.

For the purposes of this subsection the relevant accounting period, in relation to any petroleum revenue tax paid or treated as having been paid by a company, is

(a) the accounting period of the company in or at the end of which the chargeable period for which that tax was charged ends; or

(b) if that chargeable period ends after the accounting period of the company in or at the end of which the trade giving rise to the income referred to above is permanently discontinued, that accounting period.

(1A) If and so far as any liability to an amount of petroleum revenue tax for any chargeable period is satisfied by an amount of advance petroleum tax paid for that or any earlier chargeable period, that amount of petroleum revenue tax shall be treated for the purposes of this section as having been paid on the date on which it became due.

(2) If some or all of the petroleum revenue tax in respect of which a deduction has been made under subsection (1) above is

> subsequently repaid, that deduction shall be reduced or extinguished accordingly; and any additional assessment to corporation tax required in order to give effect to this subsection may be made at any time not later than six years after the end of the accounting period in which the first-mentioned tax was repaid…."

Advance petroleum revenue tax

14. APRT was introduced by chapter II of part VI of the Finance Act 1982 ("FA 1982"). It replaced supplementary petroleum duty, which had itself come into being pursuant to the Finance Act 1981. Section 139 of FA 1982 provides for a "participator" in an oil field to pay "an amount of petroleum revenue tax (to be known as 'advance petroleum revenue tax' and in this Chapter referred to as 'APRT')" on the "gross profit" accruing to him from the oil field in a "chargeable period". The first relevant "chargeable period" ran from January to June of 1983 and each subsequent half year was also to be a "chargeable period". In the event, there were only eight chargeable periods as APRT ceased to be levied with effect from the end of 1986.

15. There is provision for APRT to be set against liability for PRT and for any excess to be carried forward. Thus, section 139 of FA 1982 (as amended by the Finance Act 1983), which lies at the heart of the present appeal, states:

> "(3) The aggregate of—
>
> > (a) any APRT which is payable and paid by a participator in respect of any chargeable period and not repaid, and
> >
> > (b) any APRT which is carried forward from the previous chargeable period by virtue of subsection (4) below,
>
> shall be set against the participator's liability for petroleum revenue tax charged in any assessment made on him in respect of the assessable profit accruing to him in the period referred to in paragraph (a) above from the oil field in question (which liability is in this Chapter referred to as his liability for petroleum revenue tax for a chargeable period) and shall, accordingly, discharge a corresponding amount of that liability.
>
> (4) If, for any chargeable period, the aggregate of—
>
> > (a) any APRT which is payable and paid by a participator for that period and not repaid, and
> >
> > (b) any APRT carried forward from the previous chargeable period by virtue of this subsection,
>
> exceeds the participator's liability for petroleum revenue tax for that period, the excess shall be carried forward as an accretion to any APRT paid (and not repaid) for the next chargeable period; and any reference in this Chapter to a participator's APRT credit for a chargeable period is a reference to the

> aggregate of any APRT paid for that period and not repaid and any APRT carried forward from the previous chargeable period by virtue of this subsection."

16. Section 142 of FA 1982 concerns, in the words of its heading, "Consequences of crediting APRT against liability for petroleum revenue tax". It reads as follows:

> "(1) If it appears to the Board—
>
> > (a) that any amount of APRT credit which has been set off against a participator's assessed liability to petroleum revenue tax for any chargeable period ought not to have been so set off, or that the amount so set off has become excessive, or
> >
> > (b) that, disregarding any liability to or credit for APRT, a participator is entitled to a repayment of petroleum revenue tax for any chargeable period,
>
> then, for the purpose of securing that the liabilities of the participator to petroleum revenue tax and APRT (including interest on unpaid tax) for the chargeable period in question are what they ought to have been, the Board may make such assessments to, and shall make such repayments of, petroleum revenue tax and APRT as in their judgment are necessary in the circumstances.
>
> (2) In a case falling within paragraph (a) of subsection (1) above, any necessary assessment to petroleum revenue tax may, where the revised amount of set off is ascertained as a result of an appeal, be made at any time before the expiry of the period of six years beginning at the end of the chargeable period in which the appeal is finally determined; and in a case falling within paragraph (b) of that subsection any necessary assessment to APRT may be made at any time before the expiry of the period of six years beginning at the end of the chargeable period in which the participator became entitled as mentioned in that paragraph.
>
> (5) Paragraphs 13, 14 and 15 of Schedule 2 to the principal Act [i.e. OTA 1975] (payment of tax, appeals and interest on tax) apply in relation to an assessment to petroleum revenue tax under subsection (1) above as they apply to an assessment under that Schedule."

17. Pursuant to section 139(6) of FA 1982, section 139 is supplemented by schedule 19 to the Act. Paragraph 1 of schedule 19 requires a participator in an oil field to deliver to HMRC a statement showing whether any, and if so what, APRT is payable for a chargeable period and, subject to the following provisions of the schedule, to pay that amount. Where it appears to HMRC that any APRT payable in accordance with paragraph 1 has not been paid, paragraph 5 enables them to make an assessment to tax

on the participator. Paragraph 6 empowers HMRC to amend or withdraw an assessment. Paragraph 7 of schedule 19 contains provision for appeals.

18. Paragraphs 9 and 10 of schedule 19 to FA 1982 are concerned with overpayments and interest. Paragraph 9 stipulates that, where a participator in an oil field has paid "an amount of APRT for a chargeable period which exceeds the amount of APRT payable therefor" or instalments exceeding his liabilities, the excess is to be repaid to him. Under paragraph 10, such an amount is to:

> "carry interest from—
>
> > (a) two months after the end of the chargeable period in respect of which the APRT or the instalment was paid, or
> >
> > (b) the date on which the amount was paid,
>
> whichever is the later, until the order for repayment is issued".

19. Paragraph 14 of schedule 19 to FA 1982 deals with repayment of APRT. As amended by the Finance Act 1983, paragraph 14 reads as follows:

> "(1) If a participator in an oil field has an excess of APRT credit for the ninth chargeable period following the first chargeable period referred to in section 139(1)(a) of this Act, then, on the making of a claim the amount of that excess shall be repaid to him.
>
> (2) For the purposes of this paragraph there is an excess of APRT credit for the ninth chargeable period referred to in sub-paragraph (1) above if any of that credit would, apart from this paragraph, fall to be carried forward to the next chargeable period in accordance with section 139(4) of this Act; and the amount of the excess is the amount of the credit which would fall to be so carried forward.
>
> (3) A claim under sub-paragraph (1) above shall be made not earlier than two months after the expiry of the ninth chargeable period referred to in that sub-paragraph.
>
> ..
>
> (5) Paragraph 10(4) above shall not apply to any amount of APRT which is repayable only on the making of a claim under sub-paragraph (1) above.
>
> (6) Amounts repaid to a participator by virtue of this paragraph shall be disregarded in computing his income for the purposes of income tax or corporation tax."

In other words, a participator could from 1987 claim repayment of any excess of APRT credit, but no interest would be due.

The issues

20. There are two issues:

    i) Were the repayments on which HMRC have declined to pay interest of APRT or PRT?

    ii) Was it appropriate for MCX to bring a claim under CPR Part 8?

21. As already mentioned, the Judge determined both issues in favour of MCX. With regard to the first of them, he arrived at this conclusion in paragraph 48 of his judgment:

> "I consider that [MCX] is correct and that the tax repaid to the old participators in 2015 was overpaid PRT, not excess APRT credit. There was no excess APRT credit capable of being the subject of a claim by the old participators in 1987 because all the APRT paid was in law validly used before then to discharge PRT liability. It is only as a result of the loss carry back provisions that the PRT liability is seen to have been excessive, with the simple consequence that a repayment of PRT was due and should have been repaid with interest."

Turning to the second issue, HMRC had argued that "the old participators (or [MCX] standing in their shoes) [had] a statutory right of appeal against HMRC's amended assessment that they were required to pursue if they wished to challenge the refusal to pay interest on part of the repaid tax" or, alternatively, that any claim "should … have been brought by way of judicial review within the time limit applying to such claims" (see paragraph 54 of the judgment). The Judge, however, "reject[ed] the argument that the old participators could and should have appealed one or other of the amended assessments, if they wished to challenge a decision made by HMRC about what sums were to be repaid" (paragraph 58 of the judgment) and further considered that "[t]he dispute – which is purely one about the meaning and effect of a tax statute – is one that was appropriate for the Chancery Division to determine in the way that it has done" (paragraph 59 of the judgment).

22. Logically, it might make sense to address the procedural point before the substantive one. Like the Judge, however, I find it convenient to take the substantive issue first.

Were the repayments on which HMRC have declined to pay interest of APRT or PRT?

23. Section 139(3) of FA 1982 provides for APRT to be set against a participator's liability for PRT. It was on that basis that, when Esso was assessed as liable to PRT of £1,659,021 in respect of the period from 1 July 1986 to 31 December 1986, the amount payable was reduced by £422,061 on account of "APRT credit". Once, however, oil production from the Dunlin field had ceased in 2015, losses which had by then accrued fell to be carried back pursuant to section 7(3) of OTA 1975 (supplemented, since the old participators had long since ceased to be such, by paragraph 15 of schedule 17 to FA 1980). The result, as regards for example the period between July and December of 1986, was that the assessable profits which had previously been considered to have accrued to the old participators were extinguished and the PRT chargeable for the period was reduced to nil.

24. It is HMRC's case that the carry back of losses had implications not only for the old participators' liability for PRT, but for the extent to which APRT is to be viewed as set against PRT under section 139(3) of FA 1982. Mr David Ewart QC, who appeared for HMRC with Miss Elizabeth Wilson, submitted that, when the PRT charged to the old participators was reduced, the APRT set against it was as well. Under section 139(3), APRT is to be "set against the participator's liability for petroleum revenue tax charged in an assessment made on him in respect of the assessable profit accruing to him". When a participator's liability is revised downwards by a fresh assessment, so, according to Mr Ewart, must the APRT set against that liability be if the new PRT figure is less than the amount of APRT hitherto set against PRT. Take July-December 1986. The 26 August 2015 assessment showed both the amount chargeable to PRT and the amount payable in respect of that period as nil. Applying section 139(3) of FA 1982, there is no "liability for petroleum revenue tax charged in an assessment" against which APRT can be set, Mr Ewart argued. The result is that the £422,061 of APRT formerly deemed to have been set against PRT is instead to be considered to have been carried forward under section 139(4) of FA 1982 and ultimately to have become repayable in pursuance of paragraph 14 of schedule 19 to FA 1982. That being the case, the old participators were entitled to have (and have in fact had) PRT of £1,157,973 repaid to them with interest. In contrast, the £422,061 was repaid as APRT and, in the light of paragraph 14(5) of schedule 19, does not bear interest.

25. In contrast, MCX's case, which the Judge accepted, is that everything that was repaid to the old participators was PRT rather than APRT. Mr David Goldberg QC, who appeared for MCX, argued that, once APRT has been used to discharge a liability to PRT, it cannot be turned back into APRT. If the PRT liability is subsequently reduced, with the result that tax must be repaid, the repayment will necessarily be of PRT, not APRT. When losses are carried back, earlier profits are treated as reduced, but the reduction takes place when the loss relief is given. The consequences are determined by reference to past events, but the application of the relief does not change history. It remains the case, Mr Goldberg submitted, that there were profits and that APRT was set against PRT due on them. APRT cannot be both paid and unpaid in the manner of Schrödinger's cat.

26. Both sides sought support for their submissions in the case law. For his part, Mr Ewart cited *Elf Enterprise Caledonia Ltd v Inland Revenue Commissioners* [1994] STC 785 ("*Elf*"), which concerned the cap on interest for which paragraph 17(4) of schedule 2 to OTA 1975 provides. In the course of his judgment, Sir Donald Nicholls V-C said at 795 that until paragraph 17 was amended by the Finance Act 1993:

> "Relief of a loss by setting it against an assessable profit of an earlier chargeable period could trigger repayment of APRT as well as a repayment of petroleum revenue tax. APRT was a tax paid on gross profits and, as its name suggests, was a tax which could be set against a participator's liability for petroleum revenue tax for the relevant chargeable period (see s 139 of the Finance Act 1982). But in the cap calculation, as originally enacted, 'the amount of the appropriate repayment' in item (*b*) was a reference to petroleum revenue tax alone. Thus the impact of the cap differed according to whether the tax being repaid was solely petroleum revenue tax, as was the position before APRT

> was introduced in 1982, or was part petroleum revenue tax and part APRT. In the latter case, but not the former, a claim for loss relief could trigger aggregate payments to the taxpayer in excess of 85% of the loss in question—indeed, in excess of 100% of the loss. On top of the 85% cap would be a repayment of APRT, which was payable at rates varying between 5% and 20%."

27. Mr Ewart stressed that Sir Donald Nicholls spoke of the carrying back of a loss triggering repayment of APRT as well as PRT. On the other hand, Mr Goldberg, who was himself one of the counsel in *Elf*, said that he did not remember there being any issue in the case about repayments of APRT and Sir Donald Nicholls' remarks were not on any view necessary to his decision.

28. Mr Ewart also referred us to *Procter & Gamble Ltd v Taylerson* [1988] STC 854 (Vinelott J) and [1990] STC 624 (Court of Appeal) ("*Procter & Gamble*") and *Prudential Assurance Co Ltd v Revenue and Customs Commissioners* [2018] UKSC 39, [2019] AC 929 ("*Prudential*"), each of which related to advance corporation tax ("ACT"). Before ICTA 1988 was enacted, ACT was provided for by Part V of the Finance Act 1972 ("FA 1972"). Section 85 of FA 1972, which was to be found in Part V, stated as follows:

> "(1) Subject to subsection (2) below, advance corporation tax paid by a company (and not repaid) in respect of any distribution made by it in an accounting period shall be set against its liability to corporation tax on any income charged to corporation tax for that accounting period and shall accordingly discharge a corresponding amount of that liability.
>
> …
>
> (3) Where in the case of any accounting period of a company there is an amount of surplus advance corporation tax (that is to say, advance corporation tax which cannot be set against the company's liability to corporation tax for that period because the company has no income charged to corporation tax for that period or because of subsection (2) above) the company may, within two years after the end of that period, claim to have the whole or any part of that amount treated for the purposes of this section (but not of any further application of this subsection) as if it were advance corporation tax paid in respect of distributions made by the company in any of its accounting periods beginning in the two years preceding that period (but so that the amount which is the subject of the claim is set, so far as possible, against the company's liability for a more recent accounting period before a more remote one) and corporation tax shall, so far as may be required, be repaid accordingly …."

29. In *Procter & Gamble*, the taxpayer company had made a claim in 1979 under section 85(3) of FA 1972 to carry back surplus ACT to the previous accounting period. In 1982, the company incurred losses which it elected to set off against its profits for the three preceding years, thus reducing the 1979 profits. The issue in the case was whether the

claim which the company had made to carry back surplus ACT extended to extra surplus ACT which was said to have arisen with the reduction in the 1979 profits. Vinelott J rejected the company's contentions, and his decision was upheld by the Court of Appeal. However, both Vinelott J and the Court of Appeal proceeded on the basis that the carrying back of the losses had served to increase surplus ACT. Vinelott J said at 866 that the deduction of losses from the profits of the year to 30 June 1979 "of course, reduced the amount of ACT that could be set off against the corporation tax paid for that year and so increased the surplus ACT".

30. Mr Ewart pointed out that the wording of section 85(1) of FA 1972 was very similar to that of section 139(3) of FA 1982, suggesting that, if a carry back of losses could result in less ACT being set against liability to corporation tax and so in increased surplus ACT, a carry back of losses could similarly result in less APRT being set against liability to PRT and so in increased APRT credit. However, Mr Goldberg argued that there are significant differences between APRT and ACT and, perhaps more importantly, neither Vinelott J nor the Court of Appeal was asked to rule in *Procter & Gamble* on whether surplus ACT had been increased by the carrying back of losses. It seems, rather, to have been common ground that that was the position.

31. Turning to *Prudential*, one of the issues in that case was whether a claim for restitution lay to recover ACT which had been set against "mainstream" corporation tax ("MCT") in circumstances in which the MCT, but not the ACT, had been levied contrary to European Union law. By the relevant times, section 85(1) of FA 1972 had been superseded by section 239(1) of ICTA 1988, but there was no material difference between the two provisions. Lord Reed, Lord Hodge and Lord Mance explained HMRC's case in these terms in paragraph 94 of their judgment:

> "The revenue's case is simple. They argue that if a taxpaying company included relevant details of ACT paid in its tax return, section 239(1) (5) mandated an automatic set-off of the ACT against the company's liability for MCT. If, on a proper understanding of the law, the company did not owe sufficient MCT in the relevant accounting period, the ACT remained surplus and available to be set off in the next accounting period under section 239(4). In other words, the revenue argue that the law treats an unlawful MCT charge as a nullity, with the result that there is no set off under section 239(1) and no enrichment of the revenue by the payment of the ACT, which remained available to offset the taxpaying company's lawful MCT in other accounting periods."

32. Having noted in paragraph 98 that the Supreme Court was "concerned with ACT which is unquestionably lawful but which has purportedly been set against an unlawful MCT charge", Lord Reed, Lord Hodge and Lord Mance said in paragraph 101:

> "In our view, the revenue are correct in their submission that, if an apparent charge to MCT was unlawful, that charge was a nullity. The ACT could not have been set against a nullity but remained available to be carried back if a claim were made under section 239(3) or for automatic set-off against lawful MCT in a

> subsequent accounting period under section 239(4) or otherwise to be utilised."

33. Mr Ewart argued that the present case is analogous. However, he also fairly noted that it had not been argued in *Prudential* that the ACT had been irrevocably transformed into MCT. As, moreover, Mr Goldberg observed, the analogy between the present case and *Prudential* is by no means exact. In the present case, PRT liabilities were reduced as a result of losses in later years being carried back. In *Prudential*, by contrast there was never a true liability to MCT at all.

34. The upshot, I think, is that *Elf*, *Procter & Gamble* and *Prudential* lend a degree of support to Mr Ewart's submissions, but (as Mr Ewart accepted) there is no question of their providing binding authority on the issue before us.

35. For his part, Mr Goldberg took us to *Marshall v Kerr* [1995] 1 AC 148 and *Burton v Mellham* [2006] UKHL 6, [2006] 1 WLR 2820. Mr Goldberg submitted that *Marshall v Kerr* illustrates that you do not ignore what has happened in the past when applying a deeming provision. However, the facts of *Marshall v Kerr* were far removed from those of the present case and, to my mind, the decision is principally notable for Lord Browne-Wilkinson's endorsement at 164 of the following passage from the judgment of Peter Gibson J in the Court of Appeal:

> "For my part I take the correct approach in construing a deeming provision to be to give the words used their ordinary and natural meaning, consistent so far as possible with the policy of the Act and the purposes of the provisions so far as such policy and purposes can be ascertained; but if such construction would lead to injustice or absurdity, the application of the statutory fiction should be limited to the extent needed to avoid such injustice or absurdity, unless such application would clearly be within the purposes of the fiction. I further bear in mind that because one must treat as real that which is only deemed to be so, one must treat as real the consequences and incidents inevitably flowing from or accompanying that deemed state of affairs, unless prohibited from doing so."

In an appropriate case, therefore, "one must treat as real the consequences and incidents inevitably flowing from" a deemed state of affairs.

36. Turning to *Burton v Mellham*, the taxpayer company there had failed to pay some ACT, but, had there been due payment, the sum in question would have been taken into account in determining the company's liability to MCT nine months later. The issue before the House of Lords concerned the extent to which the company was liable for interest on the ACT under section 87(1) of the TMA 1970, which provides for tax to carry interest "from the date when the tax becomes due and payable until payment". HMRC contended that there had never been "payment" of the relevant ACT. As, however, Lord Walker noted in paragraph 19, HMRC's approach implied that "a failure to pay tax should carry a statutory liability to pay interest forever afterwards, if the principal liability is discharged or satisfied otherwise than by payment", a proposition which Lord Walker unsurprisingly thought "so startling as to suggest that it would be a good reason for construing the statute more flexibly". Lord Walker went on to observe

in paragraph 20 that section 246N(2) of ICTA 1988, in "a clear echo of the familiar process under s 239(1) of the 1988 Act", "treat[ed] a payment of ACT by a company to the Revenue as discharging in advance a liability for MCT to be paid by the same company to the Revenue" before expressing the view in paragraph 23 that there "is no good reason why 'payment' in s 87(1) [of the TMA 1970] should not include other forms of discharge or satisfaction".

37. Mr Goldberg said that *Burton v Mellham* indicates that PRT can be considered to have been "paid" where APRT is set against liability for PRT under section 139(3) of FA 1982. That may be so, but I do not think the point matters in the context of the present appeal, where the central question is whether APRT should still be considered to be set against a liability to PRT when there has ceased to be any such liability.

38. In that connection, Mr Goldberg relied on the "then" to be found in section 7(3) of OTA 1975. Section 7(3) states that "Where … the Board have determined … that an allowable loss has accrued to a participator in a chargeable period from an oil field; and … the winning of oil from that field has permanently ceased, *then* so much of that allowable loss as cannot … be relieved against assessable profits accruing to the participator from the field shall be relieved … by treating the assessable profit accruing to him from the field in any chargeable period as reduced by the amount of the loss, or by so much of that amount as cannot be relieved … against the assessable profit so accruing to him in a later chargeable period" (emphasis added). Mr Goldberg argued that the "then" indicates that a loss is to be treated as reducing profit only when the relief is given, not with retrospective effect. In my view, however, the "then" is merely intended to explain that, where the conditions specified earlier in the subsection are satisfied, the consequences are as stated in what follows. I do not think the inclusion of the "then" says anything about whether the provision is to operate retrospectively, and it is in fact plain that the subsection can be said to have at least some retrospective effect. Thus, where section 7(3) applies, a loss is "carried back" (to quote paragraph 17 of schedule 2) and serves to reduce the assessable profit and, hence, PRT attributable to a past period. More than that, interest is payable on any refund of PRT from either two months after the end of the original chargeable period or the date on which the tax was paid (see paragraph 16 of schedule 2 to OTA 1975), not just from either the date on which the loss carried back was incurred or that on which it was determined that the loss had accrued. Take the present case. It is common ground that the old participators became entitled to interest on PRT repayments back to the 1980s even though the losses did not arise until decades later. The question is whether, where the carrying back of a loss brings about a reduction in the PRT for a chargeable period, that can also affect the APRT set against PRT under section 139(3) of FA 1982.

39. The answer to that question according to MCX is, of course, "No": a set off under section 139(3) of FA 1982 is permanent. However, Mr Goldberg himself accepted that such a set off might be affected by a correction to a company's APRT position. Suppose that APRT of a certain amount was set against PRT and it was subsequently discovered that the company had only been liable for a lesser amount of APRT. Mr Goldberg agreed that, the APRT "payable and paid" now being known to be smaller, only that figure could be seen as "set against the participator's liability for petroleum revenue tax" under section 139(3).

40. On balance, it seems to me that the better view is that the extent (if any) to which APRT is to be considered to be set against PRT under section 139(3) of FA 1982 can also be

revisited where liability to PRT is cut or extinguished as a result of a loss being carried back under section 7(3) of OTA 1975. Section 139(3) of FA 1982 provides for APRT to be set against "liability for petroleum revenue tax charged in any assessment". I can see no good reason why that provision should be applied by reference to an assessment that has since been superseded. Just as the impact of section 139(3) may be affected by a reduction in APRT "payable and paid", so may it be affected by a reduction in "liability for petroleum revenue tax charged in any assessment".

41. Liability to PRT depends on assessments. PRT is payable only after an assessment has been issued: see paragraph 13 of schedule 2 to OTA 1975. For so long as an assessment stands, it will be conclusive, but if a new assessment is substituted under paragraph 12 or paragraph 14 of schedule 2 that will itself be determinative. Once, therefore, the PRT for a chargeable period has been assessed in a lower amount, that will be definitive and fix the amount of PRT against which APRT can be set under section 139(3) of FA 1982. The fact that a now invalidated earlier assessment gave a higher PRT figure, implying the setting off of more APRT, will be immaterial.

42. That analysis is consistent with *Elf*, *Procter & Gamble* and *Prudential*. More significantly, perhaps, its correctness is suggested by considering some hypothetical situations. As I have mentioned, four assessments were issued to Esso during the 1980s and 1990s in respect of the Dunlin field for July-December 1986 as the assessable profit was adjusted up and down. Suppose that the first assessment had proceeded on the basis that there was an assessable profit of, say, £400,000 which was fully discharged from APRT and that, subsequently, the profit had been corrected to £395,000. On Mr Ewart's case, the amount of APRT set against PRT would similarly be reduced by £5,000 and the excess APRT carried forward correspondingly increased by £5,000. On Mr Goldberg's case, in contrast, the initial £400,000 would be set in stone and Esso would be entitled to a repayment of £5,000 with interest. That would seem particularly odd when (a) the change in profit from £400,000 to £395,000 might have been necessitated by a mistake on Esso's part and (b) there would have been no question of Esso receiving interest on the £5,000 if it had given its profit as £395,000 in the first place.

43. Suppose now that APRT had been set against a company's PRT in 1983 but that in 1985 the company had incurred losses which, when carried back, cancelled out the profit on which PRT had been charged in 1983. On Mr Goldberg's case, HMRC would have been obliged to refund the amount of the PRT plus interest. If, on the other hand, no assessment had been made for the relevant 1983 period by the time the company made losses in 1985, no APRT would ever have been set against PRT and excess APRT would have been carried forward. Likewise, if an appeal against an assessment for the 1983 period had still been pending when the 1985 losses emerged, the 1983 assessment could have been revised to show no liability to PRT and, once again, there would have been no set off of APRT. The outcome would thus have depended on accidents of timing.

44. Now imagine that a company is assessed to PRT of £1 million for each of two successive chargeable periods and that the liabilities are discharged from APRT of £2 million which had been carried forward to the earlier of the periods. If it were later realised that the company had made larger profits and so was liable for PRT of £2 million rather than £1 million for the first period, all the APRT should, on the face of it, be set against that £2 million liability pursuant to section 139(3) of FA 1982, with the result that there would after all be no APRT to carry forward to the next period and

the company would have to pay the PRT for that period in cash. In other words, the £1 million of APRT which had hitherto been thought to be set against the PRT for the second period should now be set against PRT for the first period. Yet, on Mr Goldberg's case, a set off cannot be undone.

45. The Judge said in paragraph 46 of his judgment that the following difficulty arises from HMRC's case:

> "Section 17 of [OTA 1975], as amended, provides that an amount equal to any PRT paid will be deducted from income arising for the purposes of CT [i.e. corporation tax] in that year; further, that if PRT is so deducted but subsequently repaid, the deduction is thereupon reduced or extinguished and an additional assessment to CT for the year of the losses may be made. It is understood to be HMRC's case that the repayment of tax to the old participators (including what HMRC contend to be a repayment of excess APRT) results in a reduction of the relevant deductions for CT purposes. In other words, the PRT paid (in part by way of set-off of APRT) was fully deductible for CT purposes and now that deduction should be reversed as a result of the repayment of tax. However, if HMRC is right on its arguments in this case, the tax repaid is excess APRT credit, APRT is a separate tax from PRT, and so PRT was not repaid within the meaning of s.17(2) of the 1975 Act. The effect, if HMRC is right, is that no CT adjustment would be required. That difficulty does not arise if the repayment of tax is treated as a repayment of PRT."

46. In my view, however, the Judge was mistaken in seeing any problem for HMRC's case here. Section 17 of OTA 1975 provides for PRT to be deducted when computing a participator's income for corporation tax purposes and, by virtue of section 17(1A), APRT set against PRT is to be treated as payment of PRT for this purpose. If the carrying back of losses serves to reduce the PRT payable in respect of a period and, hence, to reduce the APRT set against PRT, the deduction under section 17 will be reversed pursuant to section 17(2) and section 301 of the Corporation Tax Act 2010 as to both any PRT that was paid in cash and PRT "treated … as having been paid" from APRT under section 17(1A).

47. As he explained in paragraph 47 of his judgment, the Judge also perceived HMRC's case to face this difficulty:

> "if the legislation is to be read as providing for a re-crediting of APRT upon carry back of losses, with the effect that the set-off and discharge of PRT is retrospectively reversed, there would retrospectively have been additional APRT in the chargeable period in question to carry forwards and set-off against PRT liability for the next chargeable period, resulting in an overpayment of PRT by cash in that chargeable period. If the legislation does indeed require the re-writing of history in the way that HMRC suggests, it is unclear why the re-writing is only partial so as to produce a notional excess of APRT in 1987 when,

> if history were fully re-written, that would not have been the case."

48. I do not think, however, that the Judge was right about this. The approach for which HMRC contend does not in fact involve "partial" "re-writing of history". The position is rather that, if the carrying back of losses has served to reduce or extinguish a PRT liability and, hence, the amount of APRT set against PRT, the extra APRT is carried forward to subsequent chargeable periods and, if still unused at the end of the ninth chargeable period, falls to be repaid pursuant to paragraph 14 of schedule 19 to FA 1982. Where, as in the present case, the relevant losses post-date the ninth chargeable period, it will in fact necessarily be the case that the additional APRT will not have been used by the end of that period since carried back losses are set against later periods before earlier ones.

49. In the circumstances, I respectfully take a different view from the Judge. It seems to me that the repayments on which HMRC have declined to pay interest were of APRT, not PRT.

Was it appropriate for MCX to bring a claim under CPR Part 8?

50. Where a matter can be raised by way of an appeal to the First-tier Tribunal (Tax Chamber) ("the FTT"), it is generally an abuse of process to seek to pursue it in ordinary civil proceedings. As the Court of Appeal explained in *Knibbs v Revenue and Customs Commissioners* [2019] EWCA Civ 1719, [2020] 1 WLR 731 at paragraph 17:

> "It is well established that if Parliament has laid down a statutory appeal process against a decision of HMRC, a person aggrieved by the decision and wishing to challenge it must use the statutory process. It is an abuse of the court's process to seek to do so through proceedings in the High Court or the County Court."

51. In *Autologic Holdings plc v Inland Revenue Commissioners* [2005] UKHL 54, [2006] 1 AC 118, which was decided when the FTT had not yet been established and tax appeals lay to commissioners, Lord Nicholls said this about the "exclusive nature of the appeal commissioners' jurisdiction to decide certain types of disputes arising in the administration of this country's tax system":

> "11. … The present disputes concern claims for group relief. The way a taxpayer claims group relief depends on whether the claim relates to an accounting period before or after 1 July 1999. Before that date the corporation tax (pay and file) system was in force. This has now been replaced by the corporation tax (self-assessment) system. For present purposes this difference is immaterial. What matters is that, whichever system is applicable, an assessment which disallows a group relief claim cannot be altered except in accordance with the express provisions of the tax legislation. Statute so provides: see, in respect of the pay and file system, section 30A of the Taxes Management Act 1970 (as inserted by the Finance Act 1994, section 196, Schedule 19, Part 1, paragraph 5) and, in respect of the self-assessment system, paragraphs 47(2) and 97 of Schedule 18 to the Finance Act 1998.

> Further, the statutory code makes its own provision for appeals. Under both the 'pay and file' system and the self-assessment system a taxpayer has a right of appeal to the appeal commissioners against assessments of tax, including amendments made by the revenue to a taxpayer's tax return. The appeal commissioners' findings of fact are final. In appropriate cases a further appeal lies to the High Court by way of case stated on a point of law. Where the appeal commissioners reduce the amount of an assessment, any overpaid tax must be repaid to the taxpayer, with a repayment supplement by way of interest as provided in section 825 of the ICTA.
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> 12. Clearly the purpose intended to be achieved by this elaborate, long established statutory scheme would be defeated if it were open to a taxpayer to leave undisturbed an assessment with which he is dissatisfied and adopt the expedient of applying to the High Court for a declaration of how much tax he owes and, if he has already paid the tax, an order for repayment of the amount he claims was wrongly assessed. In substance, although not in form, that would be an appeal against an assessment. In such a case the effect of the relief sought in the High Court, if granted, would be to negative an assessment otherwise than in accordance with the statutory code. Thus in such a case the High Court proceedings will be struck out as an abuse of the court's process. The proceedings would be an abuse because the dispute presented to the court for decision would be a dispute Parliament has assigned for resolution exclusively to a specialist tribunal. The dissatisfied taxpayer should have recourse to the appeal procedure provided by Parliament. He should follow the statutory route.
>
> 13. I question whether in this straightforward type of case the court has any real discretion to exercise. Rather, the conclusion that the proceedings are an abuse follows automatically once the court is satisfied the taxpayer's court claim is an indirect way of seeking to achieve the same result as it would be open to the taxpayer to achieve directly by appealing to the appeal commissioners. The taxpayer must use the remedies provided by the tax legislation. This approach accords with the views expressed in authorities such as *Argosam Finance Co Ltd v Oxby* [1965] Ch 390, *In re Vandervell's Trusts* [1971] AC 912 and, more widely, *Barraclough v Brown* [1897] AC 615."

52. In the present case, Mr Ewart submitted that the question whether the repayments made by HMRC were wholly of PRT or represented both PRT and APRT could have been the subject of appeal to the FTT and that it was an abuse of process for MCX to seek to have it determined in ordinary civil proceedings. It is nothing to the point, Mr Ewart said, that any such appeal might have had to have been brought by an old participator rather than MCX. It was for the old participators and MCX to make appropriate arrangements in that regard between themselves, for example by including in the

agreements under which the old participators transferred their interests in the Dunlin field provision for the old participators to issue appeals at MCX's request. The fact that, as a result of contractual arrangements with the old participators, it is MCX rather than the old participators which stands to gain from the present litigation cannot have entitled MCX to institute civil proceedings where it would not have been proper for the old participators to do so.

53. Mr Goldberg's answer, which the Judge accepted, was that this dispute could never have been the subject of an appeal to the FTT. The Judge said this in his judgment:

> "56. HMRC … pointed to the terms of the amended assessment dated 26 August 2015, which identified a 'discharge' (repayment) of £1,157,973. This was the principal amount of tax paid pursuant to a 1996 amended assessment for that chargeable period, net of APRT credit. The amended August 2015 assessment was therefore an assessment that only the PRT liability paid in cash should be discharged by oil allowance or exempt allowance leaving an obligation to repay tax. The tax chargeable was shown on that amended assessment as nil. It is difficult to understand how the old participators could have sought to appeal an assessment of nil, other than as regards the appropriateness of the use of allowances rather than allowable losses to set against assessable profits. Even if they could have done so, that amended assessment was not in fact the end of the process of revising their liability to PRT for the chargeable period in question, and HMRC did later repay all PRT paid by means of APRT credit as well as that paid in cash.
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> 57. A further amended assessment dated 18 December 2015 made a nil assessment on the basis that all except a small part of the assessable profits was reduced by allowable losses, with the final small part reduced by oil or exempt allowances. This amended assessment said nothing about the amount of tax to be repaid. In any event, I accept Mr Goldberg's submission that it is no part of an amended assessment of liability to calculate a repayment of tax (or interest) that is due, even if it might helpfully include such information. The old participators therefore could not have appealed the December 2015 amended assessment on the ground that HMRC did not pay full interest on the repaid tax.
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> 58. Accordingly, I reject the argument that the old participators could and should have appealed one or other of the amended assessments, if they wished to challenge a decision made by HMRC about what sums were to be repaid."

54. Supporting the Judge's conclusions, Mr Goldberg argued that there was nothing for the recipient to appeal against in the 26 August 2015 assessment. It put both the "Amount chargeable to tax" and the "Net amount payable" at zero. There was no reason for the old participators (or MCX) to disagree, and the thinking behind an assessment does not form part of it.

55. On balance, however, I agree with Mr Ewart that the old participators could have appealed. Paragraph 14 of schedule 2 to OTA 1975 allows a participator to appeal "against an assessment". An "assessment" will show what, if any, amount of tax is said to be due, but I cannot see why the right to appeal should be limited to that figure. In fact, the Judge himself evidently accepted that it would also be possible to appeal "the appropriateness of the use of allowances rather than allowable losses to set against assessable profits" and a participator could potentially have very good reason to contest such a point. To my mind, it would have been equally possible to appeal the fact that the 26 August 2015 assessment gave the "Discharge" figure as £1,157,973 when on MCX's case the correct figure would have been £422,061 higher to take account of the APRT which had previously been set against PRT. It was implicit in that part of the assessment that HMRC saw £422,061 of the tax that they were repaying as APRT rather than PRT. Whether they were right to do so was an issue eminently suitable for decision by the FTT, and in my view it could have been the subject of an appeal to the FTT.

56. In the circumstances, it seems to me that the present proceedings were an abuse of process. Parliament has laid down a statutory appeal process by which PRT assessments can be challenged. The question whether HMRC's refunds were due by way of discharge of PRT payments could have been determined using that procedure and, that being so, MCX should not have resorted to ordinary civil proceedings.

Conclusion

57. I would allow the appeal.

Lord Justice Baker:

58. I agree.

Lord Justice Underhill:

59. I also agree.