Neutral Citation Number: [2014] EWCA Civ 255

Case No: A3/2013/1532

**IN THE COURT OF APPEAL (CIVIL DIVISION)**
**ON APPEAL FROM THE UPPER TRIBUNAL (TAX AND CHANCERY CHAMBER)**
**FTC30332012**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11/03/2014

**Before :**

**LORD JUSTICE RIMER**
**LORD JUSTICE BRIGGS**
and
**SIR STANLEY BURNTON**

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**Between :**

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| **SHOP DIRECT GROUP** | **Appellant** |
| **- and -** | |
| **THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS** | **Respondent** |

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**DAVID GOLDBERG QC and MICHAEL JONES**
(instructed by **WEIL, GOTSHAL & MANGES**) for the **Appellant**
**MALCOLM GAMMIE QC and ELIZABETH WILSON**
(instructed by **SOLICITOR TO HER MAJESTY'S REVENUE AND CUSTOMS**)
for the **Respondent**

Hearing dates : 24th to 26th February 2014

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# Approved Judgment

**Lord Justice Briggs :**

1. This appeal represents the third stage of the (thus far unsuccessful) endeavour by Shop Direct Group ("SDG") to challenge the assessment to corporation tax of a very large repayment of VAT, together with an even larger amount of interest thereon, both of which were received by SDG on 19th September 2007. The repayment was £124,963,600 and the statutory interest thereon was £174,828,209. Both the repayment and the interest formed items in a series about which there were conjoined appeals by SDG and associated companies, within which they acquired the acronyms "VRP2" and "IP2". They are however the only payments in the series in respect of which SDG has pursued its challenge to this court. I shall continue to use those acronyms, not least because they provide a useful link between this judgment, the Decision of the First-tier Tribunal ("FTT") by Judge Berner and Miss O'Neill published on 14th February 2012 and the judgment of Asplin J. in the Upper Tribunal ("UT") released on 19th April 2013.

2. SDG was assessed to corporation tax in relation to VRP2 on the basis that it was a post-cessation receipt under section 103(1) of the Income and Corporation Taxes Act 1988 ("ICTA"), by which it is chargeable under Case VI of Schedule D. It was assessed to corporation tax on IP2 on the basis that the interest payment represented a profit arising from a loan relationship within the meaning of the corporation tax version of Case III under section 18(3A)(a), by reason of the extended meaning given to "loan relationship" in section 100(1) of the Finance Act 1996. In both cases I refer to the provisions of those Acts as they were in force in 2007.

3. HMRC repaid VRP2 because it represented the aggregate of a series of overpayments of VAT many years previously by SDG and various other trading companies within the same VAT Group when the overpayments were made, pursuant to a statutory obligation to do so under section 80 of the Value Added Tax Act 1994. It made IP2 pursuant to a statutory obligation to do so under section 78 of that Act. The overpayments had been made between 1978 and 1996 inclusive. Only £200,000-odd of the overpayment was made by SDG itself. As to the balance, £72.8 million was overpaid by GUS Plc ("GUS"), £50 million by two companies, Kay & Company and Abound Limited ("Kay and Abound"), and £1.9million by Reality Group Limited ("RGL"). In their very helpful written submissions, Mr. David Goldberg QC and Mr. Michael Jones for SDG labelled those overpayments as follows:

   Part A: The £2.1million aggregate of the overpayments by SDG and RGL

   Part B: The overpayments of £50million by Kay and Abound

   Part C: The £72.8million overpayment by GUS.

4. It is common ground that, by September 2007 when VRP2 was repaid, all the trades during the course of which the overpayments had been made had been permanently discontinued within the meaning of sections 103(1) and 106(2) of ICTA. SDG had indeed been dormant since it transferred its trade to Shop Direct Home Shopping Limited ("SDHSL") in October 2005.

5. The making of an overpayment of VAT gives rise to a statutory right to be repaid under section 80 of the VAT Act. In theory the right arises as soon as the overpayment is made. There was an intense debate, before the FTT, the UT and before this Court, as to the devolution of the repayment rights which arose upon the overpayments which I have summarised. The FTT held that all those repayment rights had become vested in SDG by the time that VRP2 was repaid, so that SDG was beneficially entitled to receive that repayment and IP2 which was the interest payable upon it. The FTT held that Section 103(1) applied to SDG's receipt of VRP2, since all the trades from the carrying on of which that aggregate sum arose had been permanently discontinued. It held that IP2 was chargeable under Case III of Schedule D because VRP2 represented a money debt as respects which SDG stood in the position of a creditor, and the statutory interest was payable to SDG. The UT dismissed SDG's appeal, broadly on the grounds that the FTT's conclusions disclosed no perversity in its finding of beneficial entitlement, and no error of law.

6. In this court SDG pursued its appeal on two main grounds, one in relation to VRP2, and the other in relation to IP2. In relation to VRP2, Mr. Goldberg submitted that Section 103(1) charges to tax receipts after a permanent discontinuance of a trade only if those sums are received by the trader who or which discontinued the trade from the carrying on of which those sums arose. I will refer to that person as "the original trader". Apart from Section 103(1), he submitted that there was no other qualifying source upon the basis of which SDG could be charged to corporation tax for the receipt of VRP2.

7. As to IP2, Mr. Goldberg submitted that the FTT had indeed been perverse, or erred in law, in finding that SDG had been beneficially entitled to any of VRP2. It therefore could not have stood in the position of a creditor in relation to VRP2 so as to give rise to a qualifying loan relationship, nor was IP2 "interest of money" within the meaning of Section 18(1)(b) of ICTA so as to be chargeable to corporation tax under Case VI.

8. Those were by no means all Mr. Goldberg's submissions on this appeal. For example, he submitted that no part of VRP2, as received by SDG was a "sum arising from the carrying on of the trade" within Section 103(2), because what he described as the "proximate cause" of its payment to SDG was a decision by SDG's parent company that a gift of it should be made to SDG. In relation to IP2, he submitted that HMRC's statutory liability to repay over-paid VAT was not, in any event, a "money debt" within the meaning of Section 100(1) of the 1996 Act so that, even if SDG had been entitled to receive it, the interest payable did not arise from a qualifying loan relationship.

9. This appeal, and the litigation which preceded it, has been greatly complicated by two factors. The first is that all the overpayments and repayments of VAT were, at every stage, made by and to representative members of VAT Groups within the meaning of sections 43 and following of the VAT Act, rather than by or to the trading companies concerned, and the identity of the relevant representative members, and the constitution of the relevant VAT Groups, has changed over time. The second factor is that the FTT was obliged to address the issue of entitlement by reference to sparse documents, in a context where no requirement for disclosure of anything other than documents to be relied upon had been imposed, and in circumstances where SDG decided, at a late stage, to call no oral evidence at the hearing.

10. I have come to the conclusion that SDG was assessable to corporation tax both on VRP2 and IP2 for reasons which do not require an in-depth analysis of the devolution of the repayment rights for the purpose of deciding whether and by what route SDG became entitled to them, and in relation to which the intervention between HMRC and SDG of VAT Group representative members is an irrelevance. It will clarify and I hope shorten this judgment if I describe first my reasons for that conclusion, and then address those submissions which I have, on the way, rejected to the extent necessary thereafter. I mean thereby no discourtesy to Mr. Goldberg, whose quite extraordinarily clear and persuasive submissions about this at first sight complicated case have been of the greatest assistance throughout.

VRP2 / Post-cessation receipts

11. Section 103 of ICTA provides, so far as is relevant, as follows:

> "(1) Where any trade, profession or vocation… the profits of which are chargeable to tax… has been permanently discontinued, corporation tax shall be charged under Case VI of Schedule D in respect of any sums to which this section applies which are received after the discontinuance.
>
> (2) Subject to Section (3) below, this section applies to the following sums arising from the carrying on of the trade, profession or vocation during any period before the discontinuance (not being sums otherwise chargeable to tax) –
>
> > (a) where the profits for that period were computed by reference to earnings, all such sums insofar as their value was not brought into account in computing the profits for any period before the discontinuance, and
> >
> > (b)…"

12. Section 110(1B) provides:

> "In the case of a trade carried on by a company, any reference to the permanent discontinuance of a trade includes a reference to the occurrence of an event treated under section 337(1) below as a discontinuance…"

Section 337(1) provides that:

> "Where a company begins or ceases –
>
> (a) to carry on a trade or
>
> (b) to be within the charge to corporation tax in respect of a trade,

> the company's income shall be computed for the purposes of corporation tax as if that were the commencement or, as the case may be, the discontinuance of the trade, whether or not the trade is in fact commenced or discontinued."

13. In the present case, the trades during the carrying on of which the relevant overpayments of VAT were made have not in fact been discontinued. They were, in 2007, still being carried on by SDHSL. It is however common ground that there had been a permanent discontinuance of them within the meaning of section 103(1) and section 110(1B) when each of the companies which made the relevant overpayments transferred the trade in the course of which those overpayments were made to a successor company. This occurred in relation to the £0.2 million of Part A overpaid by SDG itself when it transferred its trade to RGL in June 1991. It occurred in relation to the remainder of Part A when RGL transferred its trade back to SDG in November 2000. It occurred in relation to Part B when Kay and Abound transferred their trades to RGL in April 1997. It occurred in relation to Part C when GUS transferred its trade to RGL in April 1996. That much was common ground during this appeal.

14. Section 106 makes important inroads upon the charging provision in section 103(1). It provides as follows:

> "(1) Subject to subsection (2) below, in the case of a transfer for value of the right to receive any sum to which sections 103, 104(1) or 104(4) applies, any corporation tax chargeable by virtue of either of those sections shall be charged in respect of the amount or value of the consideration (or, in the case of a transfer otherwise than at arm's length, in respect of the value of the right transferred as between parties at arm's length), and references in this Chapter, except section 101(2), to sums received shall be construed accordingly.
>
> (2) Where a trade, profession or vocation is treated as permanently discontinued by reason of a change in the persons carrying it on, and the right to receive any sum to which section 103 or 104(1) applies is or was transferred at the time of the change to the company carrying on the trade, profession or vocation after the change, corporation tax shall not be charged by virtue of either of those sections, but any sum received by that company by virtue of the transfer shall be treated for corporation tax purposes as a receipt to be brought into the computation of the profits of the trade, profession or vocation in the period in which it is received."

15. The first, and main, question is whether the charge to tax imposed by section 103(1) applies to any recipient of a post-cessation receipt (as defined) or only to a post-cessation receipt by the original trader (i.e. the trader who (or which) was carrying on the trade from which the sum arose prior to its permanent discontinuance). In my judgment, section 103(1) imposes a charge to tax upon any recipient of a post-cessation receipt, regardless whether that recipient is the original trader, save only to the extent that section 103(1) is cut down by section 106, and subject to any other derogations from section 103(1), none of which are relevant for present purposes.

16. I have reached that conclusion for four reasons, which I shall first summarise and then develop separately. In summary:

i) Section 103(1) and (2) simply do not contain the restriction for which SDG contends.

ii) The language of section 106 assumes a much wider ambit, in terms of the person chargeable under section 103 than just the original trader.

iii) The history of section 103, which dates back to 1960, demonstrates that it cannot as originally enacted have been intended to be restricted in the way for which SDG contends.

iv) A restriction of the charge in section 103(1) to receipts by the original trader would leave untaxed substantial classes of post-cessation receipts which is most unlikely to have been intended.

17. Before setting out those reasons in more detail, it is necessary first to deal with a false trail that might be thought to flow from the fact that, by 2007, sections 103 and 106 are expressed to deal only with charges to corporation tax, thereby limiting chargeable recipients under section 103(1) to companies rather than individuals. From 1988, when originally enacted, until 2005, section 103 imposed a charge to tax generally, rather than just to corporation tax. Subsection (1) read:

> "Where any trade, profession or vocation the profits or gains of which are chargeable to tax under Case I or II of Schedule D has been permanently discontinued, tax shall be charged under Case VI of that Schedule in respect of any sums to which this Section applies which are received after the discontinuance."

Similarly, in section 106, the references as at 2007 to corporation tax were, before 2005, references to tax. Sections 103 and 106 were cut down in this way because fresh provision for charging income tax on individual (rather than corporate) recipients of post-cessation receipts was made in the Income Tax (Trading and Other Income) Act 2005, in Chapter 18 of Part 2, in Sections 241 and following. But the removal of a charge to income tax from section 103 cannot have been intended in addition to narrow the scope of the section 103(1) charge in relation to corporate recipients which would have been charged prior to 2005 on the true construction of section 103(1) in its original form. In fairness, Mr. Goldberg did not seek to make anything of the 2005 amendment, and the FTT were content to quote from sections 103 and 106 as if its confinement in 2005 to corporation tax did not appear at all.

18. My first reason for concluding that the section 103(1) charge to tax applies (save where cut down by section 106) to all recipients of qualifying post-cessation receipts needs little elaboration. Tax is chargeable in respect of qualifying sums which "are received" after the discontinuance. Qualifying sums are all those identified in section 103(2), namely all "sums arising from the carrying on of the trade… before the discontinuance (not being sums otherwise chargeable to tax)". In short, the charge is designed to bring into taxation all sums arising from a trade which are received after its discontinuance but which, apart from section 103(1), would not otherwise be

taxable. The charge is, as Mr. Malcolm Gammie QC for HMRC concisely put it, a charge on receipts, regardless of the identity of the recipient.

19. My second reason requires a closer analysis of the effect of section 106, and its relationship with section 103. At the heart of Mr. Goldberg's submissions on these two sections was the proposition that post-cessation recipients may exhaustively be divided into three categories: (I) the original trader (that is the person from whose pre-discontinuation trading the sum arises); (II) anyone to whom the right to receive the sum has been transferred, other than at the same time as, and with, the transfer of the trade; and (III) any person to whom both the trade and the right to receive the sum have been simultaneously transferred. He submitted that section 103(1) deals with class (I), section 106(1) deals with class (II) and section 106(2) deals with class (III). At first sight, that elegant submission had a simple and persuasive neatness about it, but in my judgment it conflicts with the language and the meaning of section 106.

20. Mr. Goldberg's submission takes as its starting point an assumption that, because section 103(1) only charges the recipient of a qualifying sum if it is the original trader, section 106 deals with other persons (transferees of the rights, or of the rights with the trade) who or which would not, unless charged by section 106 itself, be chargeable at all. But this is not how section 106 is framed. Subsection (1) assumes as its starting point that the transferee for value of the right to receive the relevant sum is chargeable under section 103, and then adjusts the incidence of that charge, by levying it by reference to the amount or value of the right transferred. Similarly, section 106(2) assumes, as its starting point, that the transferee both of the trade and of the right to receive qualifying sums is chargeable under section 103(1), but then disapplies section 103(1) and substitutes an alternative basis of taxation, wherever the requirements of the subsection are satisfied. In summary, the whole of section 106 is infused with the implicit assumption that, save where section 106 applies, section 103 has a broad ambit, which is not limited to charging the original trader. Section 106 is framed in a manner which is irreconcilable with an assumption that, where it applies, it imposes a charge to tax upon sums which would otherwise not be taxable at all.

21. It is at this stage necessary to deal with two issues about the interpretation of section 106. Consistent with his starting position, Mr. Goldberg submitted, as he had to, that section 106(1) applied to all cases where the right to receive a post-cessation receipt was transferred other than with, and at the same time as, the relevant trade. He said that it applied to all transfers for value, but also to all gifts, on the basis that gifts should all be regarded as transfers otherwise than at arm's length. I disagree. In my judgment, Section 106(1) is about sale rather than gift of the rights to receive relevant sums. The governing words are "in the case of a transfer for value of the right to receive any sum to which Section 103… applies". I consider that the words in parentheses "or, in the case of a transfer otherwise than at arm's length…" refer also to transfers for value rather than gifts.

22. The other issue relates to the question under section 106(2) whether the dis-application of section 103 in circumstances where there has been a simultaneous transfer of the trade and the right to receive post-cessation receipts, applies to sums received only during the period when the transferee continues to carry on that trade, or at least some trade. It is obvious that the alternative basis of charge imposed by section 106(2) can only apply to a recipient which is trading at the time of the receipt

of the relevant sum. The more difficult question is whether, if the transferee of the trade receives the relevant sum after it has ceased to trade, it is taxable under section 103, or not taxable at all, on that receipt.

23. On this point, the FTT and the UT disagreed. The FTT took the latter view, but Asplin J concluded that the dis-application of section 103 only applied for as long as the alternative basis of charge could be imposed: see paragraph 166 of her Judgment.

24. On this issue, I prefer the analysis and conclusion of Asplin J to that of the FTT. I accept that, as a matter of cold syntactical analysis, it may be argued that the dis-application of section 103 is permanently achieved by section 106(2) wherever the original permanent discontinuance arises from a simultaneous transfer of the trade and of the right to receive post-cessation receipts. But it seems to me that, on a purposive analysis, it cannot have been the intention of Parliament thereby to create a potentially large class of non-taxable post-cessation receipts. Rather, section 106(2) was designed as a matter of convenience, to enable a successor trader simply to account to the Revenue in respect of receipts attributable to trading prior to the transfer date as an ordinary part of its trading activity rather than to have to separate out post-cessation receipts as a separate item. It was not designed altogether to remove sums received, potentially long after the original transfer, from taxation as post-cessation receipts merely because the transferee trader had by then discontinued that trade, either by closing it down, or by transferring it again.

25. The result of my conclusions about those two discrete issues of interpretation under section 106 is that Mr. Goldberg's apparently neat and exclusive threefold categorisation of post-cessation recipients becomes unsustainable. There is a large undistributed middle, if he is right about his narrow interpretation of section 103(1) which includes all donees of the right to receive relevant sums, and all transferees of the rights with the trade who or which have, by the time of receipt, either transferred the trade again or shut it down. In my judgment, rather than being an undistributed middle of persons who or which incur no charge to tax on such sums, they are all chargeable under section 103, as recipients of chargeable sums to whom or to which section 106 is inapplicable.

26. My third reason for preferring a broad rather than narrow interpretation of the scope of section 103(1) derives from an appreciation of the history of taxation on post-cessation receipts. Before 1960, it had become established that the post-cessation receipts arising from the trade of an individual were not taxable in his hands after his retirement, in the hands of his personal representative after his death, or in the hands of a person to whom he had bequeathed or assigned them: see *Purchase v Stainer's Executors* (1951) 32 TC 367, *Carson v Cheyney's Executor* [1959] AC 412 and *Hume v Asquith* [1969] 2 Ch 58 (a case about post-cessation receipts prior to 1960). There was, quite simply, no Case under which the former trader, his personal representatives, heirs or assigns could be taxed.

27. The provisions now to be found in sections 103 and 106 were introduced in sections 32, 33(1) and 34(2) of the Finance Act 1960, in terms not materially different from those now found in ICTA. It is a fair assumption, and one expressly made by the FTT (at paragraph 136 of its Decision) that those provisions were introduced to remedy that deficiency in the scope of income tax. The provisions were, in 1960, applicable as

much to companies as to individuals since before 1965 companies paid income tax rather than corporation tax.

28. If Mr. Goldberg's submissions about the narrow ambit of section 106(2) were correct, then the deficiency would only have been remedied in relation to the post-cessation receipts of retired traders, but not personal representatives, heirs or assigns. Mr. Goldberg did not suggest that section 106(1) could sensibly be applied to the transmission of the right to receive post-cessation receipts to personal representatives. In my judgment section 106(1) is equally inapplicable to a vesting assent in relation to the right to receive, between a deceased trader's personal representatives and a beneficiary named in the will, or entitled on his or her intestacy.

29. My fourth reason for preferring a broad rather than restricted interpretation of section 103(1), namely that it avoids the apparent anomaly of the creation of substantial classes of tax-free recipients of post-cessation receipts, will have become sufficiently apparent from my analysis thus far. There are circumstances (and the resolution of the discrete issue under section 106(2) may be one of them) where a purposive interpretation calls for the recognition of some implied limitation upon the use of general words. But a purposive interpretation of section 103(1) points positively away from, rather than toward, the recognition of any such limitation. All the relevant restrictions upon the general ambit of section 103(1) are to be found in section 106, and nothing further need or should be identified by way of restriction in section 103(1) itself. There is therefore no implied restriction of the section 103(1) charge to the original trader.

30. Nor is there any implied restriction in section 103 that requires it to be shown that the recipient of a qualifying receipt is beneficially entitled to the right to receive it. I accept that a mere agent or nominee might not be chargeable to tax, but any recipient entitled to keep it is chargeable. This will include personal representatives, heirs and assigns and, as in this case, companies entitled to keep the receipt, even if it is given to the recipient rather than paid to it upon the basis of prior beneficial entitlement.

31. On the interpretation of sections 103 and 106 which I consider to be correct, as set out above, all that needed to be shown to enable corporation tax to be charged to SDG upon VRP2 is that it was a sum (or, in reality, the aggregation of sums) arising from a carrying on of a trade prior to the permanent discontinuance of that trade. It is common ground that the whole of VRP2 consisted of repayments of VAT which had been overpaid in the course of the carrying on of trades which had, by November 2000 at the latest, been permanently discontinued (as defined). VRP2 was received by (in the sense of being credited to) SDG at a time when it had ceased trading. Provided only the repayment can properly be described as a sum or sums "arising from the carrying on of the trade" which included the making of the original overpayments, then in my judgment section 103(1) charges VRP2 to corporation tax as against SDG regardless of the contentious issues about the route via which, if at all, SDG became entitled to a right to receive it. It is not suggested that SDG received VRP2 as a mere agent or nominee for some other person. Mr. Goldberg sensibly acknowledged throughout that SDG was entitled to keep VRP2 upon receipt.

32. That short analysis is, in my judgment, conclusive against SDG on this appeal, so far as concerns corporation tax on VRP2. Nonetheless I must briefly address some further submissions made by Mr. Goldberg in relation to it, before moving to IP2.

33. Mr. Goldberg did not accept that VRP2 was a sum (or the aggregate of sums) arising from the carrying on of any trade. He submitted that a sum could properly be described as "arising from the carrying on of the trade" within section 103(2) only if the carrying on of the trade was the proximate cause of its receipt, relying on *Hochstrasser v Mayes* [1960] AC 376 and *Abbott v Philbin* [1961] AC 352. He then submitted that the proximate cause of SDG's receipt of VRP2 was the decision of its then parent company March UK Limited ("March") that it should receive the payment, rather than the other group companies entitled to it. Before the FTT and the UT, Mr. Goldberg made the more fundamental submission that the proximate cause of the payment of VRP2 was simply HMRC's obligation under Section 80 of the VAT Act. Both those tribunals rejected that submission, and it has not been pursued in this court.

34. In my judgment VRP2 was, when received by SDG, plainly a sum which arose from the carrying on of the discontinued trades of those companies which had made the VAT overpayments. The receipt of the sum by SDG did not lose that character merely because of a process of intra-group decision-making about the specific company to which it should be paid. Nor is it relevant that, under the statutory machinery for VAT Groups, and in particular Section 43(1) of the VAT Act, the businesses and taxable supplies by and to members of the VAT Group are deemed to be treated as the businesses and supplies of the representative member.

35. By the time of the payment of VRP2 in September 2007, the representative member of the VAT Group which had included the various companies making the overpayments had, by succession, become Argos Ltd ("Argos"). Elaborate arrangements were made before HMRC paid VRP2 to ensure both that the payment would in fact be made (or in the event credited) to SDG and that HMRC obtained a good receipt for the payment, sufficient to ensure that it was thereby exposed to no claims from any other company as the party entitled. The cash was in fact paid to a firm of solicitors, Weil Gotshal & Manges ("WGM") which had by then been appointed as agent to receive it, both by Argos and by SDG. The cash was then paid to a parent company of SDG called LW Corporation Limited ("LWC"), but credited to SDG as an inter-company loan to LWC, recorded as such in SDG's accounts for that year as an exceptional item, with the amount of the loan carried to its profit and loss account.

36. In my judgment nothing about that mechanical and administrative process whereby VRP2 started with HMRC and ended with SDG has any relevance to the identification of its source. Even if that is to be ascertained by asking what was the proximate cause of the payment, it was the overpayments of VAT which had been made by the various companies to which I have referred during the carrying on by each of them of trades which had, long before 2007, been permanently discontinued in the relevant sense. I shall have more to say about that machinery when addressing the appeal in relation to IP2. It is sufficient for present purposes for me to say that the documents now available (not all of which were made available to the FTT) demonstrate that both SDG and HMRC regarded the substance of the matter as being

a repayment of overpaid VAT by HMRC to SDG, notwithstanding the role of Argos as representative member or the detailed arrangements by which SDG was identified and put forward to HMRC as the company entitled to be paid.

37. The remaining question in relation to VRP2 is whether the apparent applicability to it of section 103(1) is displaced by section 106, properly construed. Having been charged to corporation tax under section 103(1), it was for SDG to show, if it wished to, on its appeal to the FTT that section 106 applied. The burden was on SDG because it was the appellant before the FTT, because it rather than HMRC must be supposed to have had, or have had access to, knowledge about the relevant facts about the transmission of the right to receive back the overpayments and because, for reasons which I have already set out, it appeared prima facie on facts which were not in dispute that section 103(1) applied.

38. SDG made no attempt to show that Section 106(1) applied. Indeed, the FTT recorded at paragraph 139 of its Decision that:

> "It was common ground that S.106(1) had no application to these appeals."

In the Upper Tribunal it appears that some attempt was made to introduce, for the first time, an argument based on section 106(1). Asplin J concluded, at paragraph 163 of her Judgment, that since no attempt had been made to demonstrate a transfer of value to which section 106(1) applied, it was, as had been agreed before the FTT, irrelevant.

39. The whole of SDG's effort before the FTT on the factual issue about the devolution of the rights to repayment was directed at seeking to establish that SDG had no such rights at all at the time of the payment of VRP2. The FTT found that SDG had become entitled to be paid VRP2 by September 2007 but, as will appear, by a process of elimination which involved no finding that there had been a relevant transfer for value.

40. On this appeal, Mr. Goldberg submitted that the inapplicability of Section 106(1) had never been conceded. But in my judgment its applicability or otherwise was not a matter for concession by SDG but a matter for it, in effect, to plead and to prove. This it did not do before the FTT as the tribunal of fact, even as an alternative or fallback case, and it was too late for SDG to raise it either before the UT or, *a fortiori*, before this court on an appeal limited to matters of law.

41. As for section 106(2), the short answer to any attempt by SDG to rely upon it is that given by Asplin J, namely that Section 106(2) has no application in relation to the receipt of a sum by a company which is not itself trading at the time of the receipt. Since it is common ground that SDG ceased trading in October 2005, that is an end of the matter. As I have said the FTT did not share Asplin J's views about that limit upon the applicability of section 106(2). Its conclusion was that in relation to none of the rights to receive what became, collectively, VRP2, had there been a simultaneous transfer both of the trade and of the rights: see paragraph 146(2) of its Decision. Since I have preferred the analysis of section 106(2) identified as correct by Asplin J, it is unnecessary for me to delve into the intricacies of the analysis whether the FTT was

right in its conclusion in respect of the rights to receive repayment of every part of the overpayments originally made.

42. For those reasons, I would dismiss the appeal in relation to VRP2.

IP2

43. There are two routes by which a receipt of interest by a company may be charged to corporation tax under Schedule D pursuant to Section 18 of ICTA. The first is, by subsection (3A) under the special Case III as profits and gains arising from loan relationships. The alternative basis is that it is "interest of money" within the meaning of section 18(1)(b) and chargeable, in default of any other applicable Case, under Case VI under subsection (3).

44. The primary basis for the identification of a qualifying loan relationship is to be found in sections 80 and 81 of the Finance Act 1996. Section 81 provides (so far as is relevant) as follows:

> "(1) Subject to the following provisions of this section, a company has a loan relationship for the purposes of Corporation Tax Acts wherever-
>
> (a) the company stands (whether by reference to a security or otherwise) in the position of a creditor or debtor as respects any money debt; and
>
> (b) that debt is one arising from a transaction for the lending of money;
>
> and references to a loan relationship and to a company's being a party to a loan relationship shall be construed accordingly.
>
> (2) For the purposes of this Chapter a money debt is a debt which is, or has at any time been, one that falls, or that may at the option of the debtor or of the creditor fall, to be settled –
>
> (a) by the payment of money;
>
> (b) …"

By Section 103(1) the word "debt" is defined as including:

> "a debt the amount of which falls to be ascertained by reference to matters which vary from time to time;"

45. Section 100 provides, so far as is relevant:

> "(1) For the purposes of the Corporation Tax Acts, a company has a relationship to which this section applies in any case where –

(a) the company stands, or has stood, in the position of a creditor or debtor as respects a money debt;

(b) the money debt is not one which arose from a transaction for the lending of money (so that, in consequence of Section 81(1)(b) above, there is no loan relationship); and

(c) the money debt is one-

(i) on which interest is payable to or by the company; or

(ii) …

(2) Where a company has a relationship to which this section applies -

(a) this Chapter has effect in relation to the matters mentioned in subsection 1(c)(i) to (iii) above… as it has effect in relation to such matters arising under or in relation to a loan relationship,…"

46. Section 80 provides that:

"(1) For the purposes of corporation tax all profits and gains arising to a company from its loan relationships shall be chargable to tax as income in accordance with this Chapter."

The Chapter in question is Chapter 2 of Part IV of the Finance Act 1996, of which Sections 80 to 103 all form part.

47. The result of this rather convoluted series of provisions is that, where section 100(1) applies, the company is deemed to have a loan relationship, even though it does not in fact, for the purposes of liability to corporation tax for interest received. Thus the only questions of interpretation or application relevant to IP2 may be stated as follows:

(i) Was VRP2 a money debt?

(ii) If so, was IP2 interest payable on that money debt?

(iii) At the time of payment of IP2, did SDG stand or had it stood, in the position of a creditor as respects that money debt?

An affirmative answer to all three questions would lead to the conclusion that SDG was liable to corporation tax in respect of IP2.

48. Mr. Goldberg submitted that questions (i) and (iii) should be answered in the negative. He did not challenge an affirmative answer to question (ii), if, contrary to his submission, question (i) was to be answered in the affirmative. I will therefore take questions (i) and (iii) in turn.

49. Mr. Goldberg submitted that an amount payable by HMRC pursuant to an obligation under section 80 of the VAT Act to repay an earlier overpayment of VAT was not a money debt. This was because, he said, it was a statutory right to compensation, akin to a right to damages for breach of contract, relying upon the analysis of Millett LJ in *Jarvis v Harris* [1996] Ch 195, at 202.

50. I disagree. As is apparent from Millett LJ's analysis, the essential distinction in the contractual context, between a debt and damages is that a debt is a primary monetary obligation, whereas damages consist of the court's compensation for the breach of that or some other primary obligation. In the present case, HMRC's obligation under section 80 of the VAT Act is its primary statutory obligation. It is an obligation to repay a sum or sums of money. The right to receive it is a right to a sum or sums of money. The fact that the amount may fall to be ascertained by reference to matters which vary from time to time is irrelevant: see the definition of "debt" in section 103(1) of the 1996 Act to which I have already referred. The fact that the quantification of the sum payable may require painstaking historical research into overpayments made many years previously, and even extensive litigation to establish HMRC's obligation, is neither here nor there. It remains, from start to finish, a primary obligation to pay a sum or sums of money, and is from the perspective of the recipient a money debt. I would therefore answer question (i) in the affirmative.

51. Mr. Goldberg's more substantial point relates to question (iii). He said that SDG did not stand in the position of a creditor as respects VRP2, because it was not at the time of payment, nor ever had been, entitled to receive it. On the contrary, he submitted that SDG was merely given it without any entitlement, and that the contrary decision of the FTT was, on the evidence presented to it, perverse, or vitiated by error of law.

52. I agree that, to stand as a creditor in relation to a money debt, a person must have some form of entitlement to it. That entitlement may be proprietary, i.e. an entitlement *in rem*, restitutionary, or statutory (such as the right to repayment of VAT under section 80). But it may also be contractual, in the sense that it is a sum which the debtor (in this case HMRC) has agreed to pay to the recipient.

53. Before the FTT this debate was focussed upon the question whether SDG had acquired the statutory right to the aggregate repayments in VRP2 from the companies which had made the original overpayments. The decision was that it had: see paragraph 159. The FTT was shown only part of the documentation prepared in connection with the arrangements put in place to ensure that SDG was credited with both VRP2 and IP2. We were told that the documents shown to the FTT included (albeit possibly only in an unsigned form) the copy of a written agreement between HMRC and SDG headed "Undertaking to repay VAT and statutory interest" which contained, in return for certain warranties and promises by SDG to repay in certain stated events (which have not occurred) the following promise by HMRC:

> "The Commissioners for HM Revenue and Customs ("the Commissioners") agree to pay Shop Direct Group (company number 39708) ("the Recipient Company") the sum of £124,963,600 VAT together with statutory interest (together referred to as "the Payment") as detailed in Schedule 1 to this Undertaking in discharge of the claim dated 24/06/03 ("the

> Claim") made by GUS plc (company number 146575) ("the Claimant")."

It is common ground that the sums referred to in that provision as "the Payment" are the aggregate of VRP2 and IP2. Documents provided to the UT show, and this is not in dispute, that this written agreement was made on or about 12th September 2007. A signed but undated copy of it was handed to Asplin J during the course of the appeal to the UT.

54. In my judgment this written agreement, made between HMRC and SDG only days before the simultaneous payment of VRP2 and IP2, discloses the clearest possible express contractual obligation by HMRC to pay VRP2 to SDG. It was an obligation clearly supported by consideration, in the form of SDG's contractual warranties and conditional promise to repay. It is an amply sufficient obligation to fulfil the requirement under Section 100(1)(a) of the 1996 Act that, viewed at the time of its receipt of VRP2, SDG stood or had stood in a position of a creditor as respects a money debt.

55. It is true that, as at the date of that agreement, the contractual warranty which followed the passage quoted above suggested that the statutory entitlement to receive VRP2 then resided not only in SDG, but also in Kay, Abound and RGL. But neither that agreement nor any other evidence showed that SDG was to receive VRP2 and IP2 as a trustee, nominee or agent for those other companies. On the contrary, the whole of VRP2 and IP2 were credited in SDG's accounts as its money once received. Furthermore, although Argos had appointed WGM as its agent for receipt of those payments, it is clear from the minutes of a board meeting of SDG held on 10th December 2007 that it also appointed WGM as its agent to receive what the written agreement with HMRC refers to as "the Payment". This board resolution was also shown to the FTT: see paragraph 49 of its Decision.

56. Mr. Goldberg protested that it was an agreed fact that VRP2 and IP2 were paid, through the agency of WGM, to Argos. That may be so, but this was just a matter of machinery arising from the provisions as to VAT Groups which I have briefly described. The written agreement between HMRC and SDG demonstrates that both the parties to it (which are the only parties to this appeal) recognised that in substance the payment was to be made, and therefore was made, by HMRC to SDG. Accordingly, the conditions for SDG's liability to corporation tax in respect of IP2 are satisfied.

57. I would therefore dismiss this appeal in relation both to VRP2 and IP2.

Postscript – Other matters in dispute

58. I indicated at the beginning of this judgment that, on the interpretation of the relevant statutory provisions which I consider to be correct, it was unnecessary for me to resolve the large and complicated dispute about the transmission of the right to receive the overpayments from the original overpaying companies to SDG, if indeed there was any such transmission at all. That dispute may be summarised as breaking down into two main issues. The first was whether SDG was beneficially entitled to

the right to receive VRP2 (and therefore IP2) by September 2007. The second was whether SDG had itself transferred to SDHSL such of those rights to which it had by then become entitled when it transferred its trade to SDHSL in October 2005. The FTT answered the first question in the affirmative and the second question in the negative.

59. It should not be thought that the route by which I have concluded that this appeal should be dismissed involves any rejection of either of those two conclusions. On the contrary, the first, which was a conclusion of mixed fact and law, seems to me to have been vitiated neither by error of law nor by perversity. The second, which was a question of construction of the SDG/SDHSL business sale agreement, was in my view correct in law. I shall very briefly give my reasons for those conclusions.

60. The FTT's decision that SDG had become beneficially entitled to the right to receive VRP2 and IP2 was, in substance, reached by a process of elimination. There could have been only three reasons why those payments were directed to be made to SDG, rather than to the original overpaying companies or any other companies within the group. Either SDG was entitled to them, or the payments were made to SDG by mistake (that is, those responsible believed that SDG was entitled to them when in truth it was not), or the payments were made by way of gift. It may be over-simplistic to say that one of those three explanations must be applicable to every part of VRP2 (and the corresponding parts of IP2) since they represented repayments of original over-payments by different companies. It is, at least in theory, possible that Part A was repaid to SDG because it was beneficially entitled, Part B by mistake and Part C by way of gift.

61. At first blush, it appeared that the payments were made to SDG because it was entitled to all of them. This is the natural inference which would flow from the crediting of the payments to SDG's account, and the inclusion of the benefit of the associated loan of the cash in its profit and loss account for that year. It was therefore for SDG to seek to displace that natural inference by putting forward and proving one or the other of the only two alternative explanations, either globally or in relation to particular parts of the aggregate amount of VRP2. A corresponding case in relation to the same part of IP2 would naturally follow.

62. SDG made no suggestion, still less attempt to prove, that any part of those payments had been made to it by mistake. On the contrary, its entire case, from start to finish, was that the payment had been directed to be made to it by its parent, by way of gift. The word "gift" was not used in SDG's Statement of Case. Rather, it was said that, at paragraphs 8.6-8.7, VRP2 was directed by March to be paid by WGM to LWC, but credited to SDG:

> "because March UK Limited wanted the receipt recorded in the accounts of an unlimited company to help manage the disclosure that needed to be made to the workforce."

That was the allegation of a deliberate crediting of VRP2 to SDG for a group purpose rather than because of a mistaken belief that SDG was entitled to it.

63. The FTT squarely faced SDG's case of gift, and rejected it, on the scanty available evidence: see mainly paragraphs 30 to35, in relation to VRP1 and IP1, and paragraphs 58 to 62, in relation to VRP2 and IP2, in which, after an exhaustive analysis of alleged differentiating factors between the two pairs of payments, the FTT adopted a very similar basis for its conclusion on both.

64. In my view, the FTT's analysis, in which it concluded that VRP2 and IP2 were paid on the basis of SDG's beneficial entitlement, having eliminated the only pleaded alternative of gift, was a perfectly rational, legitimate and common sense analysis of the limited materials which the parties chose to put forward, and it was not vitiated by any error of law.

65. Mr. Goldberg submitted that, having found that none of GUS, Kay or Abound transmitted their repayment rights at the time when they transferred the trades out of which they had arisen, either to SDG or any predecessor in title of SDG, then the evidential burden shifted to HMRC to demonstrate that those rights were indeed transferred to SDG at some later stage. I disagree. As I have already said, the evidential starting point consisted of evidence showing SDG being credited with VRP2 and IP2, and no accounting entries for any other company were produced of the type which might suggest that an entitlement to those payments previously vested in some other company had been given up by way of gift to SDG, either by its parent March, or by any other group company over which March exercised *de facto* control. In my judgment the burden was, from start to finish, on SDG to prove that the payments were made to it by way of gift, so as to displace the natural inference that they were made in recognition of a beneficial entitlement, there being no suggested case of mistake.

66. That is not to say that there was no available evidence to suggest that, even very shortly before the payments were made in September 2007, beneficial ownership of the statutory right to receive them lay, at least in part, in other group companies, in particular Kay, Abound and RGL. But it is not for this court, nor was it for the Upper Tribunal, to weigh such evidence in the balance. The tribunal of fact was the FTT. There was ample evidence to support its conclusion that the payments were not made by way of gift, and that conclusion was, as I have said, neither irrational nor vitiated by any error of law.

67. The final matter to which I should briefly refer is the question of interpretation of the SDG/SDHSL business transfer agreement. The question is whether such rights as SDG may by then have had to repayments of VAT previously overpaid by it, and by other companies, were or were not transferred by that agreement to SDHSL. The question turned upon the meaning to be given to the repetitious, confusing and partly circular definitions and descriptions of the subject matter of the sale, in clauses 2.1, 2.2 (in particular 2.2.8), 2.3, and in the definition of "Assets" in clause 1.1. That definition referred to management accounts of SDG prepared for the period ending immediately prior to the sale, which were not made available to the FTT, and which had probably been lost.

68. The consideration for the transfer of the business and assets was the assumption by SDHSL of the liabilities of the business: see clauses 4 and 5 of the agreement. It appears that, at the time of the transfer, the value of the liabilities exceeded the value

of the assets (or at least their book value), since clause 4.2 provided that SDG would continue to owe to SDHSL the amount by which the liabilities exceeded the book value of the assets, following completion, as an interest-free, on-demand, inter-company loan.

69. At the time of this agreement, in 2005, SDG had made a note as to the existence of a claim to VRP1 in its statutory accounts. The FTT concluded that, as a matter of fact, the management accounts would not have included any reference to rights to recover overpaid VAT. Since no book value had by then (or could have been at that stage) placed on them, to include them in the management accounts would have, in effect, given away to SDHSL a potentially valuable asset without any corresponding reduction in SDG's ongoing liability to SDHSL under clause 4.2. As a matter of construction, the FTT concluded that rights to recover overpaid VAT then vested in SDG were not included within the sale, unless identified in the management accounts.

70. The FTT's conclusion about the absence of reference to a right to receive what became known as VRP2 in the management accounts seems to me unchallengeable. It was neither perverse, nor involved any error of law. Notwithstanding Mr. Goldberg's detailed attempt to persuade this court that those rights were, regardless of the management accounts, nonetheless transferred by the 2005 business sale agreement, I remain persuaded that the FTT's construction was correct, substantially for the reasons which the tribunal gave, at paragraphs 45 to 48 of its Decision. It was a commercially sensible approach to provisions which yielded no clear answer in purely linguistic terms and, although this is strictly irrelevant, it fully accorded with the way in which the fruits of those repayment claims were later distributed within the group, SDHSL having never, at any time, made any claim to be entitled to VRP2, whether by virtue of the business sale agreement in 2005, or otherwise.

**Sir Stanley Burnton**

71. I agree.

**Lord Justice Rimer**

72. I also agree.