VAT – whether overclaims of 'COS' VAT can be recovered by HMRC under s 73 VATA - yes

FIRST-TIER TRIBUNAL
TAX CHAMBER

TC07158

Appeal number: TC/2018/04296

BETWEEN

MILTON KEYNES HOSPITALS NHS FOUNDATION TRUST **Appellant**

-and-

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

TRIBUNAL: JUDGE BARBARA MOSEDALE

Sitting in public at Taylor House, Rosebery Avenue, London on 1 April 2019

Mr D Southern QC, for the Appellant

Ms V Sloane QC, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION on PRELIMINARY ISSUE

INTRODUCTION

1. The appeal concerns VAT which the appellant paid when acting as a public authority. In particular, it incurred expenditure on new IT equipment. It recovered this VAT from HMRC, but HMRC have now assessed it under s 73 Value Added Tax Act to recover some £114,998 of the VAT recovered on the basis that (says HMRC) the appellant had no right to reclaim it.

THE PRELIMINARY ISSUE

2. The appellant's right to recover VAT which it pays when acting as a public authority derives from the Value Added Tax Act 1994 ('VATA'). S 41 VATA provides:

> (3) Where VAT is chargeable on the supply of goods or services to a Government department…and the supply…is not for the purpose –
>
> (a) of any business carried on by the department, or
>
> (b) of a supply by the department which, by virtue of s 41A is treated as a supply in the course or furtherance of a business,
>
> then, if and to the extent that the Treasury so direct and subject to subjection (4) below, the Commissioners shall, on a claim made by the department at such time and in such form ad manner as the Commissioners may determine, refund to it the amount of the VAT so chargeable.

3. An NHS Trust, such as the appellant is deemed to be a 'Government department' for the purpose of s 41 by s 41(7).

4. The parties were agreed that the VAT the subject of the appeal was VAT which was incurred by the appellant other than in the course of any business or deemed business; they did not agree whether it was VAT which fell within the directions made by the Treasury under s 41(3).

5. It was agreed that the VAT in dispute had been recovered by the appellant in various VAT returns in the financial years 2013/14, 2014/15 and 2015/16. HMRC had assessed the appellant to recover it on 11 July 2017. The appellant appealed the assessment to this Tribunal ('the FTT').

6. The parties were (obviously) in dispute over whether or not the appellant had been entitled to recover the VAT on the IT services concerned; but they were also not agreed on whether, assuming that the appellant was not entitled to recover the VAT under s 41 VATA, HMRC were able to raise a s 73 VATA assessment in order to recover VAT over-claimed under s 41. It was this latter question which was set down as a preliminary issue as it had the potential to resolve the dispute because, if the assessment was invalid, the appeal must be allowed.

STATUS OF THE APPELLANT

7. One point to state at the outset is that it was implicitly accepted by all parties that the appellant, as any other NHS Health Trust, although deemed by s 41(7) VATA to be a Government department for the purposes of VAT, is not in law a department of the Government and therefore it is possible for it to be assessed by, and for it to sue, the Government, in the form of HMRC.

SUMMARY OF THE PARTIES' RESPECTIVE POSITIONS

8. The appellant's position was that the assessment the subject of the appeal was invalid because s 73 could not be used to assess amounts recovered under the s 41 procedure. It

supported its position by reference to the EU and UK VAT systems and case law, and Parliament's presumed intentions.

9. HMRC's position was that s 73 was clearly applicable to any amounts of VAT wrongly recovered by the appellant and there was nothing in the EU or UK VAT systems, the case law, or Parliament's presumed intentions, that suggested otherwise.

10. In order to decide the preliminary issue, I will therefore consider in turn:

(1) The EU VAT system (including its relevant case law);

(2) The UK VAT system (including its relevant case law); and

(3) Parliament's presumed intentions.

THE EU VAT SYSTEM

11. Mr Southern went through the EU VAT provisions in some detail but I only give an overview here as there was no difference between the parties on the issue.

12. The parties were agreed that VATA was intended to implement the EU's Principle VAT Directive ('PVD'). They were agreed that the PVD did not give the appellant any right to recover the VAT at issue in this appeal. This was because, in general, the PVD did not treat a public body acting as such as a taxable person: see *Comune di Carpaneto Piacentino* (C-231/87) where the CJEU explained the fundamental difference between public bodies acting as such and taxable persons. Under the PVD, only taxable persons have a right to recover VAT which they incur: see *Elida Gibbs* (C-371/94) at [22-24] where the CJEU said only taxable persons could deduct input VAT. And while there were two situations in Art 13 PVD where the PVD would treat a public body acting as such as a taxable person, those exceptions only applied when (a) there were significant distortions of competition or (b) the activity was non-negligible and listed in Annex I to the PVD. I will not refer to these exceptions again: they were not relevant in this case where it was accepted that the VAT on the IT services in issue was incurred by the appellant acting as a health service provider and neither exception (a) nor (b) applied.

13. While HMRC accepted Mr Southern's summary of the EU law position and in particular that the PVD gave the appellant no right to recover VAT incurred by it in carrying out its function as an NHS trust, they did not accept that that had any relevance to the question of whether s 73 VATA allowed HMRC to assess when an NHS trust wrongly recovered VAT incurred by it in carrying out its function as an NHS trust.

14. In particular, there was no suggestion by the appellant that the UK acted unlawfully under EU law in giving a VAT refund to public bodies. Indeed, the UK is not the only Member State to do so and the EU Commission considered it (with approval) in a paper entitled 'VAT in the Public Sector and exemption in the public interest' in 2011 where they said:

> 5.2 Refund system
>
> The main problem with the current VAT treatment of the public sectors outsourcing is connected with the non-deductibility of input VAT. Under a system where the supplies of public sector entities are either non-taxable or taxable but tax exempt the deduction of input VAT is not possible. This leads to a self-supply bias, disincentives to invest and a cascade effect. A refund system would solve the problem with the input VAT. The idea of compensation is not new. Several Member States are already operating refund systems outside of the VAT system.

15. In other words, the purpose of refunding public sector VAT is to avoid a bias by public bodies towards undertaking activities in-house which might have been outsourced but for the

fact that external contractors must charge VAT. And it is lawful for a member State to do this. The EU Commission approves it. There is nothing in the PVD which would make it unlawful albeit there is nothing which authorises it either.

THE UK VAT SYSTEM

16. S 41 VATA is therefore not authorised by the PVD but it is not unlawful under the PVD either. I have set it out at §2 above. It permitted designated bodies, including NHS trusts, to recover VAT paid on supplies which were not for a business purpose nor deemed to be for a business purpose 'if and to the extent that the Treasury so direct'.

17. It was agreed that the Treasury had made directions under s 41(3). The Directions were published in *The Gazette*. Over the years the directions have been replaced with a new version: the current version was dated 21 October 2008. They are colloquially referred to as the *Contracted Out Services Directions*, or *COS Directions* for short.

18. HMRC's guidance notes for Government Departments requires a Government Department, including a deemed Government Department, such as an NHS Trust, to complete a VAT 21 as well as a VAT Return (a VAT 100) online. The VAT 21 return lists all the VAT the NHS Trust is reclaiming, including 'COS VAT' being VAT recoverable under the COS Directions. The total of reclaimed VAT is then entered into Box 4 of the VAT return.

19. Mr Southern made the submission that COS VAT was outside the UK VAT system. HMRC did not accept that. While exactly which VAT comprised COS VAT was determined by the Treasury Directions, those Directions were made under, and the reclaim authorised by, VATA s 41(3). The recovery of COS VAT was therefore, said HMRC, a part of the *UK* VAT system, albeit not part of the EU VAT system.

20. This dispute was, to my mind, just semantics. Whether or not COS VAT should be seen as part of the UK VAT system does not matter. The question is whether HMRC can assess for over-claimed COS VAT using their powers of assessment in s 73 VATA.

21. Mr Southern was quite right, as HMRC accepted, to say that, conceptually, COS VAT was quite distinct from input VAT and formed no part of the EU VAT system. He referred to it as 'non-input VAT' and HMRC did not quarrel with that term. But recognising that it is not input VAT does not address the question of whether HMRC could assess for over-claimed COS VAT using their powers of assessment under s 73 VATA.

22. I was referred to the case of *Greater Manchester Police Authority* [2001] EWCA Civ 213 where the Police Authority sought to appeal a decision of HMRC that it was not entitled to recover the VAT it incurred on cars it purchased for use in execution of its public duty. The Police Authority was entitled to recover (certain) non-input VAT incurred in carrying out its duties under s 33 VATA The Court of Appeal held that s 33 properly construed did not extend to VAT blocked under a statutory instrument. That finding is not relevant here where the refund scheme is under s 41 VATA. The significance of the case to the appellant was that the Police Authority had to pursue its challenge by way of judicial review; Mr Southern's position was that this supported his view that s 73 could not be used to assess VAT refunded under a refund scheme, whether the refund scheme was s 33 or s 41 VATA.

23. I was also referred to *R (oao Cardiff CC) v HMRC* [2003] EWCA Civ 1456. In that case, Cardiff CC had overpaid VAT for many years, because it had erroneously inflated its output VAT liability. HMRC refused to repay the VAT overpaid more than 3 years before the claim on the grounds that claims for overpaid output tax had a three year time limit. The Council took judicial review proceedings against HMRC on the basis that what had really happened was that it had not been fully refunded its non-input VAT (Councils having a right to recover non-business VAT incurred by them under s 33 VATA). The Court of Appeal held that the

Council had been fully refunded the s 33 VAT which it had claimed; its later adjustment of its output VAT liability was caught by the 3 year time limit. Again, as the dispute was resolved by way of judicial review, Mr Southern's position was that this supported his view that s 73 could not be used to assess VAT refunded under a refund scheme, whether the refund scheme was in s 33 or s 41 VATA. He also relied on what Schliemann LJ said in the case about the refund scheme in the UK VAT system:

> [13] The result of [local] authorities being subject to both to the ordinary taxpayer regime and the special local authorities regime is that the VAT paid by local authorities to their suppliers falls into two notionally separate categories depending upon whether the supply was for business purposes or not. The former is properly described as input tax and can be dealt with under the ordinary taxpayer regime. The latter I shall describe as 'non-business VAT' and (for present purposes) is of relevance only in the special local authorities regime……
>
> [38] A claim under s 33 has nothing to do with rights given under Community Law…..

24. HMRC did not suggest that anything said in that case was wrong; I understood Ms Sloane's position was that it simply did not answer the question which arose in this appeal. HMRC accepted that the COS VAT (which was equivalent to Schliemann LJ's 'non-business VAT') was not input VAT and there was no right to recover it under EU law. HMRC's position was that, nevertheless, COS VAT/non-input VAT was recoverable (if at all) under s 41 and, if recovered when there was no right to do so, it could be assessed under s 73. While both the Police Authority and Cardiff CC cases were judicial reviews, neither of them concerned assessments under s 73 and were not authority on the scope of s 73.

25. I agree with HMRC that the answer to the preliminary issue must be decided by reference to the scope of s 73, and turn to that.

HMRC's power of assessment

26. HMRC relied on s 73(2) in making the assessment in this case. I do not, therefore, need to consider whether they could in the alternative have relied on s 73(1). Section 73(2) provided as follows:

> In any case where, for any prescribed accounting period, there has been paid or credited to any person –
>
> (a) as being a repayment or refund of VAT, or
>
> (b) as being due to him as a VAT credit,
>
> an amount which ought not to have been so paid or credited, or which would not have been so paid or credited had the facts been known or been as they later turn out to be, the Commissioners may assess that amount as being VAT due from him for that period and notify it to him accordingly.

27. 'VAT' is defined as 'value added tax' in s 1(1) of VATA; the same subsection defines 'value added tax' as what is 'charged, in accordance with the provisions of this Act – (a) on the supply of goods and services in the UK…..'

28. It is quite clear that s 41(3) relates to refunds of VAT because that is what it says:

> Where VAT is chargeable on the supply of goods or services to a Government Department….the Commissioners shall….refund to [the Department] the amount of the VAT so chargeable.

29. Based on a consideration of s 73 by itself, I therefore find it difficult to understand the appellant's case that HMRC cannot use s 73 to assess COS VAT which they consider the

appellant to have over-claimed. There has been paid or credited to the appellant, which is a 'person' for the purposes of the VATA, a refund of VAT. The appellant can therefore be assessed under s 73 if HMRC are right that they claimed too much VAT, being VAT charged on the supply of goods or services to them. It does not matter why they claimed the VAT if they were not entitled to do so. It does not matter that they overclaimed the VAT because they thought it was COS VAT, or because they thought it was input VAT. As long as it was VAT charged to them which they were not entitled to recover from HMRC under *any* provision, HMRC could assess them under s 73(2) to recover it.

30. Indeed, the status of COS VAT versus input tax is not relevant to s 73. The purpose of s 73 is to enable HMRC to recover sums of money which the claimant was not entitled to: so whether the claimant was not entitled to the sum claimed because the sum claimed was not VAT at all, or not input VAT, or not COS VAT, does not matter: if the claimant was not entitled to claim it, the money was wrongly claimed and can be recovered under s 73. This case is not about the meaning of s 41 but that of s 73(2).

31. The appellant suggested that because s 73(2) used the phrase 'amount of VAT due' from the NHS trust, it could not apply to NHS trusts acting as NHS trusts because as such they did not make supplies of any kind. However, that is a mis-reading of s 73 which simply said HMRC 'may assess that amount as being VAT due from him'. In other words, there was no suggestion that the amount of the assessment *was* an amount of VAT due on supplies: it was simply *deemed* to be VAT due from the taxable person. The point about the use of the word 'VAT' in s 73 where it refers to VAT 'paid or credited' was that it was referring to true VAT, but it was true VAT charged on supplies *to* (and not by) the taxable person, which the taxable person had wrongly reclaimed, for whatever reason or no reason. It did not matter that the recipient of the VATable supply could not itself make taxable supplies.

32. Nor does it matter that there is no right to recover any COS VAT under the PVD. Quite simply, if a VAT registered person reclaimed VAT which it had paid on supplies to it when it was not entitled to reclaim it, s 73 permitted HMRC to assess that VAT. And s 83 gave the taxable person the right to appeal that assessment to this Tribunal. That would seem to be the simple and correct answer to the preliminary issue, but I go on to consider all the points raised by the appellant.

The VAT returns

33. The appellant said there was no legal basis for Government Departments including COS VAT in Box 4 of the VAT return. Even if this was correct, it would not alter HMRC's right under s 73 to recover an amount that was wrongly reclaimed as VAT. S 73(2) does not in fact depend on the claim being on a VAT return, but it makes no difference because if the claim for (what was thought to be) COS VAT was made on a VAT return but should not have been, it is recoverable under s 73. It does not matter whether the claim should not have been made on the VAT return because it wasn't COS VAT or because (if true) no COS VAT should be claimed on a return. Either way, s 73 is the route for HMRC to reclaim it.

34. HMRC did not specifically address me on the question of whether it was right for Box 4 of the VAT return to include COS VAT. There certainly appear to be grounds for saying that under VAT regulations only input VAT should be in Box 4. But this does not matter for the purpose of this preliminary issue. And in any event, it seems to me, that as HMRC has issued guidance to Government Departments that they should claim such VAT in Box 4, Government Departments could rely on that assurance.

Conclusion on literal interpretation of s 73 VATA

35. The appellant's argument seemed fundamentally flawed in that they were bound to lose this preliminary issue whether they were right in their submissions or wrong. And that is

because if they were right to say that COS VAT was not 'VAT' as referred to in s 73, it would follow that HMRC could use s 73 to reclaim all COS VAT ever credited to them on the basis it was not VAT which should have been credited to them under the VAT Act.

36. However, I think that the appellant's case was flawed and HMRC could not use s 73 to assess COS VAT which the appellant was entitled to reclaim under the Treasury Directions: HMRC could only use s 73(2) (as they had purported to do so in this case) to reclaim VAT which was reclaimed on the basis it was COS VAT but which was not in fact and law COS VAT.

37. I do not agree with the appellant that there is anything in the case law which prevents this conclusion. *Cardiff CC* was, as Mr Southern points out, a judicial review. There was no right of action under s 83 VATA for Cardiff to reclaim s 33 VAT and as that was what the Council sought (unsuccessfully) to do, it was constrained to use judicial review. That does not have any relevance here where the appellant has a clear right to appeal a s 73 assessment under s 83(1)(p) VATA.

38. Moreover, it was a holding in that case that the VATA's set off provision in s 81(3) applied as much to non-business VAT claimed under s 33 as to input tax: see Scott Baker LJ at [79]. That is consistent with s 73 applying to any VAT purportedly reclaimed under any provision of VATA.

39. Similarly, in *ex parte Greater Manchester Police Authority* [2001] EWCA civ 213 the local authority wanted to challenge HMRC's decision that it could not recover VAT on police cars under s 33 VATA; there was no provision under s 83 VATA allowing it to appeal such a decision to the FTT and it was therefore bound to proceed by way of judicial review. The case did not consider jurisdiction (it was assumed) and so is not authority on it; in any event, it is certainly not authority for the proposition that disputes over *assessments* which relate to s 33 or s 41 VAT cannot be resolved in the FTT.

40. HMRC referred me to *Ashfield DC* (2001) VTD 17097 and [2001] STC 1706 in which the question was whether the local authority was entitled to recover VAT under s 33 in a tripartite situation. The appeal was brought in the VAT Tribunal and neither the Tribunal nor High Court on appeal considered the question of jurisdiction; indeed the decisions do not make it clear whether the Council was appealing an assessment to recover the VAT or a decision of HMRC's refusing to refund the VAT. As the point of jurisdiction was simply not considered, it cannot really be seen as authority on it. But it was certainly assumed by all parties that the Tribunal had jurisdiction to determine whether or not the VAT was properly recoverable under s 33.

41. In conclusion, there is nothing in the case-law which suggests that my conclusion at §§29-32 was wrong. There is nothing which suggests that HMRC cannot assess public and local authorities which are VAT registered in so far as they have claimed and recovered VAT incurred by them but which they were not entitled to reclaim. But I go on to consider the appellant's case that giving s 73 a literal interpretation was against Parliament's intention.

Parliament's intention?

42. I was told, and both parties appeared agreed on this, that prior to April 2011, HMRC had recovered what it considered to be overclaims of COS VAT by offsetting it against claims for refunds made by NHS trusts in later periods. It was agreed that they had done so in reliance on the common law doctrine in *Auckland Harbour Board v the King* [1924] JC 318. That case involved a payment by a government department to the appellant, which payment turned out to be unauthorised and therefore unlawful. The payment was held to be recoverable by deduction from a larger sum which the government owed to the appellant. The principle

extracted from the case was that HMRC (a Government Department) was therefore able to withhold later VAT repayments to NHS Trusts (and other deemed Government Departments) to the extent it had overpaid the trust in an earlier period.

43. However, by April 2011, HMRC had come to the view that it was arguable that VATA provided an exclusive mechanism for recovery of overpaid VAT, including overpaid COS VAT and arguable therefore that HMRC had to assess overpayments under s 73 VATA and could not rely on set-off under *Auckland Harbour Board.* And for that reason, from April 2011, HMRC assessed COS overpayments under s 73.

44. The appellant's position was that s 73 did not apply to COS VAT and therefore HMRC could only reclaim overpaid tax by way of set-off. In this case, however, they considered HMRC were out of time to exercise a set-off: whether they were right or wrong over this was something the FTT had no jurisdiction to decide as it had no jurisdiction over enforcement actions.

45. The appellant supported its position that I should not interpret s 73 literally by referring me to alleged anomalies it said would result if HMRC were entitled to issue a s 73 assessment to recover overclaimed COS VAT. I understand that this submission was made on the basis that Parliament could not have intended s 73 to cover overclaimed COS VAT because otherwise these anomalies would arise. This argument (save with respect to the 4th point below) was not foreshadowed in its skeleton argument which put Ms Sloane at a disadvantage in dealing with it. Nevertheless, I consider the alleged anomalies which were said to be:

(1) Inconsistent time limits would result;

(2) There would be liability to interest where none was intended; moreover

(3) There would be liability to penalties where none was intended; and, lastly,

(4) The Tribunal's jurisdiction would be more extensive than intended.

Inconsistent time limits

46. Mr Southern pointed out that COS VAT must be claimed no later than the return for June following the financial year (April to March) in which it was incurred. I was told this was known colloquially as the 16-month rule. The explanation for this short time limit which I was given, was that, as it was the Government paying the Government, the Treasury needed to know the VAT refund position promptly in order to make informed funding decisions for the next financial year.

47. Mr Southern then pointed out that the 16-month rule was considerably less generous to claimants that the 4 year rule that applied to assessments made by HMRC under s 73. He considered it patently unfair and unintended that an NHS Trust would have a maximum of 16 months to reclaim its COS VAT (and in some cases only four months) while HMRC in all cases would have 4 years to make an assessment. Moreover, if the justification for the short 16 month time limit for COS reclaims was the need for the Government to make funding decisions, then this was quite inconsistent with HMRC having 4 years to assess.

48. Ms Sloane considered this a bad point in that there would be inconsistent time-limits even if the appellant was right to say that wrongly claimed COS VAT could not be assessed under s 73. This was because (she said) the time limit to exercise the set off of the sort that was exercised in *Auckland Harbour* was even longer than 4 years, although she was unable to refer me to authority on this as she had had no warning about the argument. Moreover, she said, a disparity in time limits was reasonable and in any event permitted by EU law (citing *Birmingham Hippodrome* [2014] EWCA 684 Civ at [42] and *Ecotrade* C-95/07 at [51-52]).

49. Mr Southern's reply was that those authorities justified a disparity in time limits between the state and a private trader: whereas here the disparity was between the State in the form of HMRC and an NHS Trust. His view was that HMRC was unable to exercise set off under *Auckland* for any longer than 16 months after the reclaim. However, he did not point me to any authority on that either.

50. My view is that there was a disparity between the time limit for a COS claim and s 73 assessments but, in circumstances where (1) I was not satisfied that the time-limit for an *Auckland*-style set off was the same as for a s 41 claim and (2) disparity in time-limits between taxpayer and taxing authority was lawful under EU law, it could not be assumed that Parliament would not have intended there to be such a disparity. Therefore, this disparity did not suggest that s 73 should be given an interpretation which prevented it applying to purported COS VAT reclaims..

Liability to interest

51. Mr Southern also claimed that seeing overclaimed COS VAT as reclaimable by HMRC under s 73 opened up the claimant Government Department to the imposition of interest on the overclaim. This is correct as liability to interest under s 74 VATA depends upon an assessment being made under s 73: it is only the amount of the assessment which is subject to interest under s 74.

52. Ms Sloane considered it a bad point nonetheless: HMRC's position was that, even if HMRC could only recover an overclaim of COS VAT by an *Auckland*-style set-off, they were still entitled to claim interest on the overpayment. Again, she was taken by surprise with this argument and unable to refer me to authorities for her view.

53. I was not given the authorities to decide whether or not interest would have been due on sums such as in the *Auckland Harbour* case; in that case it appears that the Government made no claim for interest. But I do not think it matters whatever the answer is. There is no obvious reason why Parliament would have intended deemed Government departments to be exempt from paying interest on over-reclaims of COS VAT.

Liability to penalties

54. Mr Southern also claimed that regarding overclaimed COS VAT as reclaimable by HMRC under s 73 opened up the claimant Government Department to the imposition of penalties on the overclaim.

55. As Ms Sloane pointed out, this was not correct. Liability to a penalty did not depend on whether there was an assessment under s 73. Penalties for VAT overclaims are payable under Schedule 24 of Finance Act 2007. That provides that:

> **Error in taxpayer's documents**
>
> **1.** (1) a penalty is payable by a person (P) where –
>
> (a) P gives HMRC a document of a kind listed in the Table below, and
>
> (b) Conditions 1 and 2 are satisfied.

56. The Table listed for VAT a 'return, statement or declaration in connection with a claim' and Condition 1 was that:

> The document contains an inaccuracy which amounts to, or leads to –
>
> ….
>
> (c) a false or inflated claim to repayment of tax.

57. While there might be a legal argument over whether HMRC could penalise another (deemed) Government department and over whether a VAT 21 was within the Table, it is clear that liability under Sch 24 did not depend on whether the VAT overclaim was assessed or assessable under s 73 VATA. S 73 VATA is not mentioned as a precondition.

58. I agree with Ms Sloane that this was a bad point and did nothing to suggest that s 73 should be given anything other than a literal interpretation.

Tribunal's jurisdiction

59. One of Mr Southern's main planks of argument, and which was in his skeleton, was that Parliament could not have intended over-claimed COS VAT to be recoverable under s 73 because that would necessitate the Tribunal interpreting the COS Directions. He considered it obvious this could not have been intended because the COS Directions were not legislation but a matter of public law.

60. Mr Southern seemed to be of the view that statutory Tribunals could only interpret legislation. That is not the case. Statutory Tribunals only have jurisdiction over matters conferred on them by Parliament; but that jurisdiction, once conferred, requires the Tribunal to interpret whatever it has to interpret in order to discharge its function. It is normal for the Tribunal to interpret contracts and other non-legislative matters (such as accounting standards). In some cases, the Tribunal is called upon to decide matters of public law (for instance, whether certain decisions of HMRC were reasonable). The Tribunal certainly has the ability to interpret Treasury Directions. Exactly how it should go about doing is a matter to be determined in a hearing concerned with such interpretation.

61. Moreover, I tend to agree with HMRC that, despite their non-legislative status, the FTT Tax, with its tax specialist judicial panels, is probably best placed to interpret the COS Treasury Directions. There is certainly no reason to suppose that Parliament would not have intended it to do so.

62. In any event, Mr Southern's suggestion that non-input tax/COS VAT could not be assessed or adjudicated upon in the FTT gave rise to its own anomalies. For instance, returning to the *Ashfield DC* case, as Mr Southern recognised, the issue in that appeal would have arisen whether the VAT the subject of the claim was input tax or s 33 VAT: the issue was whether the supply was made to the DC at all. The FTT Tax was the most appropriate forum to determine that question based on its experience of such questions; but if Mr Southern was right it should only have determined that question if the DC had claimed it as input VAT rather than as non-input VAT under s 33.

63. I do not consider that the need for the FTT to interpret the Treasury Directions if it is to consider appeals against assessments for overclaimed COS VAT suggests that Parliament cannot have intended HMRC to use s 73 to assess such overclaims. On the contrary, it seems likely that Parliament intended the Tribunal to be the forum to resolve virtually all VAT matters, including the meaning of the Treasury Directions.

Conclusion on Parliament's intention

64. In conclusion, none of the reasons put forward by the appellant for suggesting that I should not interpret s 73 literally support its case. I consider that I should interpret s 73 literally as that is likely to be Parliament's intent.

OUTCOME OF PRELIMINARY ISSUE

65. It follows from what I have said that I consider that HMRC are entitled to assess over-claims of COS VAT under s 73(2). S 73 was intended to permit HMRC to recover from taxpayers amounts of VAT on supplies made to them but which they were not under the provisions of VATA entitled to be refunded. It makes no difference whether the VAT on

supplies to the claimant was wrongly treated as input VAT or wrongly treated as COS VAT or wrongly treated as VAT recoverable under s 33. If there was no right to recover it, it could be assessed under s 73 (subject to applicable time limits).

66. Whether the particular s 73(2) assessment at issue in this appeal was valid depends on whether the claim for the VAT charged on the IT services at issue properly fell under the COS Directions or not, and on whether the s 73(2) assessment was in time. Both of these issues are matters which the Tribunal will have to resolve on another day.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

67. This document contains full findings of fact and reasons for the decision on the preliminary issue set out at §6 above. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. However, either party may apply for the 56 days to run instead from the date of the decision that disposes of all issues in the proceedings, but such an application should be made not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

BARBARA MOSEDALE
TRIBUNAL JUDGE

RELEASE DATE: 29 APRIL 2019