Trinity Term
[2018] UKSC 35
On appeal from: [2016] CSIH 54

JUDGMENT

Commissioners for Her Majesty's Revenue and Customs (Appellant) *v* Taylor Clark Leisure Plc (Respondent) (Scotland)

before

Lord Mance
Lord Reed
Lord Carnwath
Lord Hodge
Lord Briggs

JUDGMENT GIVEN ON

11 July 2018

Heard on 11 April 2018

Appellant	*Respondent*
Andrew RW Young QC David M Thomson QC (Instructed by Office of Advocate General)	Philip Simpson QC David Scorey QC (Instructed by KPMG LLP)

LORD HODGE: (with whom Lord Mance, Lord Reed, Lord Carnwath and Lord Briggs agree)

1. This is an appeal concerning a claim for repayment of unduly levied Value Added Tax ("VAT") in the context of a VAT group of companies. The question is whether Taylor Clark Leisure PLC ("TCL") is to be treated as having made claims for repayment within the time limit set by section 121 of the Finance Act 2008 ("FA 2008"), namely by 31 March 2009, when another company, which was formerly a member of the VAT group, and not TCL made the relevant claims.

2. As I discuss below, the idea of a VAT group of companies was introduced to simplify the collection of VAT (a) by ignoring intra-group transactions and (b) by treating supplies by or to any member of the group in their dealings with entities outside the group as transactions by a single taxable person.

3. Several companies have sought to intervene in this appeal because of concerns that the determination of this appeal would affect their outstanding claims which are due to be heard by the Court of Appeal in January 2019. This court has declined to allow such intervention because this appeal is not directly concerned with questions raised in those appeals as to which company has a right to claim repayment of unduly levied VAT either when a company which has had the economic burden of paying VAT has left a VAT group or where a VAT group has been dissolved. I recognise that, nonetheless, my discussion of the nature of the statutory regime in the United Kingdom ("UK") in relation to an extant VAT group will indirectly have a bearing on those issues.

Factual background

4. TCL is now a dormant company. It was initially incorporated as Caledonian Associated Cinemas Ltd in 1935 and was reincorporated on change of name on two occasions before it acquired its current name in 1995. Between 1973 and 2009 TCL was the representative member of the Taylor Clark VAT Group ("the VAT Group"), in accordance with legislation which I discuss under the heading "VAT legislation" below. From 1973 until 28 February 2009, when the VAT Group was disbanded, the VAT registration number ("VRN") of the VAT Group was 265 7918 16.

5. On 16 November 2007, Carlton Clubs Ltd ("Carlton") submitted four claims to the Commissioners of HM Revenue and Customs ("HMRC") under section 80 of the Value Added Tax Act 1994 ("VATA") for repayment of VAT output tax, which

TCL as representative member of the VAT Group had accounted for in the years between 1973 and 1998 using its VRN as representative member of the VAT Group. TCL submits that it, as the representative member of the VAT Group, is entitled to rely on Carlton's claims because it asserts that those claims are to be regarded as having been submitted on behalf of the VAT Group which EU law treats as a single taxable person entitled to repayment of the unduly levied tax.

6. The dispute has arisen in the following way. In about 1990 TCL undertook a group reorganisation. Part of that reorganisation involved the transfer of its bingo business to Carlton, a member of the VAT Group which had been incorporated for that purpose under the name Leisurebrite Ltd, with effect from 1 April 1990. The transfer was effected by a letter dated 30 March 1990 ("the 1990 Asset Transfer Agreement"). In 1998 Carlton was sold out of the Taylor Clark group of companies and thus ceased to be part of the VAT Group. Thereafter Carlton accounted under its own VRN for VAT in relation to its bingo hall and other leisure business activities.

7. Until 2005 it had been wrongly assumed that income generated from bingo and gaming machines was to be treated as subject to VAT at the standard rate. But on 17 February 2005 the Court of Justice of the European Union ("CJEU") ruled that income from gaming machines was exempt from VAT, whether the machines were operated privately or at licensed public casinos: *Finanzamt Gladbeck v Linneweber* (Joined Cases C-453/02 and C-462/02) [2005] ECR I-1131; [2008] STC 1069. HMRC initially thought that the *Linneweber* decision did not apply in the UK as it believed that the UK treatment of gaming machine income did not breach the principle of fiscal neutrality. Nonetheless, HMRC invited claims for the repayment of VAT on income from gaming machines and analogous activities.

8. In 2011 the CJEU decided that, as a result of the application of the principle of fiscal neutrality, bingo was not subject to VAT in the UK: *Rank Group PLC v Revenue and Customs Comrs* (Joined Cases C-259/10 and C-260/10) [2011] ECR I-10947; [2012] STC 23. In response, HMRC issued a Revenue and Customs Brief 39/11 in which they accepted that claims for repayments relating to bingo would be paid subject to verification. But HMRC, on their interpretation of the *Rank Group* judgment, continued to contest claims relating to gaming machines.

9. On 23 January 2008 the House of Lords held that UK legislation which imposed a shortened three-year time limit on claims for the refund of overpaid VAT in the period from 1973 to 4 December 1996 without providing for an adequate transitional period, which was fixed in advance, was contrary to European law: *Fleming (t/a Bodycraft) v Revenue and Customs Comrs* [2008] 1 WLR 195. In response to that judgment Parliament enacted section 121 of FA 2008, which disapplied the three-year time limit for claims to be made for over-declared or

overpaid VAT in respect of periods up to 4 December 1996, if a claim was made before 1 April 2009.

10. In anticipation of the judgment of the House of Lords in *Fleming*, Carlton on 16 November 2007 submitted four protective claims for repayment of output VAT which TCL as representative member of the VAT Group had overpaid in accounting periods between 1973 and the first quarter of 1998. Carlton made the claims, which related to overpaid VAT on (i) mechanised cash bingo takings, (ii) gaming machine takings, (iii) participation fees, and (iv) added prize money and participation fees, on its own letterhead but using the VAT Group's VRN. In claims (i), (ii) and (iv) Carlton headed the claim using TCL's name but in claim (iii) it used its own name in the heading. Carlton submitted the claims without informing TCL. On 8 January 2009 Carlton submitted a revised claim (iv) in which it quoted its own name and VRN as well as TCL's name and the VAT group VRN. In the revised claim, as discussed below, it asserted a right to claim overpaid VAT back to 1973 (ie before its incorporation in 1990) by relying on the 1990 Asset Transfer Agreement, which it claimed had assigned to it the right to make such historic claims.

11. HMRC refused all of Carlton's claims and Carlton appealed against the refusal. HMRC then betrayed no little uncertainty as to how to proceed with the claims. Initially, on 27 April 2009 HMRC wrote to TCL as representative member of the VAT Group to confirm that they had processed a repayment of £667,069 together with interest. This was the sum claimed by Carlton in its revised claim (iv), which HMRC paid to TCL on 12 May 2009. HMRC then changed their minds and on 7 July 2009 notified TCL of an assessment for repayment of that sum and interest. HMRC then changed their minds again and withdrew the assessment on 27 October 2009. Thereafter, on 4 May 2010 TCL's advisers wrote to HMRC to assert its right to receive repayment under the other claims. In a lengthy exchange of correspondence, TCL accepted that it had not made the claims but asserted a right to repayment because the claims had been made in respect of VAT for which it, as representative member of the VAT Group, had incorrectly accounted.

12. In a decision letter dated 23 September 2010 HMRC (a) reversed their earlier decision concerning claim (iv) by confirming the assessments which sought repayment of the £667,069 and interest and (b) refused TCL's claim for repayment of the other claims. HMRC gave three reasons for their decision. First, they contended that TCL had not submitted claims before the expiry of the time limit imposed by section 121 of FA 2008. Secondly, HMRC stated that they had taken legal advice and expressed the view that the claims predating 31 March 1990 had been assigned to Carlton by the 1990 Asset Transfer Agreement. Thirdly, they asserted that because the VAT Group had since been disbanded, the claim for over-declared output tax must be made by the company whose activities gave rise to the over-declaration and Carlton had made that claim. This third reason reflected HMRC's policy at that time; now HMRC assert that the right to repayment remains

with the last representative member of a disbanded VAT group. TCL requested a review of the decision and on review HMRC confirmed their decision and maintained their assessments.

13. TCL and Carlton pursued rival appeals against HMRC's refusal to repay the outstanding claims. TCL's appeals, which had been lodged in London, were transferred to Edinburgh so that they could be heard together with Carlton's appeals. On 26 January 2012 Carlton withdrew two of its appeals and intimated to the First-tier Tribunal ("FTT") that HMRC had satisfied those claims. Carlton's representative also informed the FTT that Carlton had withdrawn another appeal because HMRC had repaid the claim to Carlton. The remaining appeal remains sisted (stayed). It thus appears that HMRC have paid to Carlton the sums claimed in three of the four appeals.

The decisions of the Tribunals and the Inner House

14. The FTT (Judge Gordon Reid QC and Dr Heidi Poon) issued its determination on 19 December 2012, in which it decided three main issues. First, it held that the right to claim repayment of sums due from 1973 to 1990 had been assigned to Carlton by the 1990 Asset Transfer Agreement ("the Assignation Issue"). Secondly, it held (contrary to the submissions of both parties) that the right to repayment for the claims relating to the period from 1990 to 1996 had been re-invested in Carlton when it left the VAT Group in 1998 ("the Entitlement Issue"). Thirdly, it held that TCL had not made a claim under section 80 of VATA and could not rely on the claims submitted by Carlton, which had not made the claims on TCL's behalf ("the Claimant Issue").

15. TCL appealed to the Upper Tribunal ("UT") on all three issues. The UT (Lord Doherty) in a determination dated 8 September 2014 dismissed the appeal. On the Claimant Issue he interpreted section 80 of VATA as requiring that the claim be made by or on behalf of the taxpayer seeking repayment. TCL had not made a claim and no claim had been made on its behalf before the end of the limitation period; accordingly TCL's claim was time-barred. On the Assignation Issue Lord Doherty reversed the FTT's decision, holding that TCL had not assigned the pre-1990 claims to Carlton in the 1990 Asset Transfer Agreement. On the Entitlement Issue, he recorded that it was common ground between HMRC and TCL that TCL was the appropriate party to seek repayment of tax accounted for between 1990 and 1996, even after the VAT Group had been disbanded on 28 February 2009.

16. TCL sought to appeal only in relation to the Claimant Issue. Lord Doherty refused permission to appeal but on a renewed application to a single judge of the

Inner House, Lady Clark of Calton gave permission to appeal on the Claimant Issue by reference to the following question:

> "Can the VAT Group, represented by [TCL], rely on the claims for repayment of VAT overpaid by the VAT Group, when the claims were made in time but were made by another member of the same VAT group?"

HMRC did not cross-appeal on the Assignation or Entitlement Issues. Accordingly the only issue which was before the Inner House and is now before this court is the Claimant Issue.

17. The Extra Division of the Inner House in an opinion dated 14 July 2016 allowed TCL's appeal. The court held that the representative member embodied the VAT group which was a single taxable person, or "a quasi-persona", so that the acts, rights, powers and liabilities of the individual members of the group were ascribed to the representative member as far as they related to VAT. The Inner House held that, in the context of section 43 of VATA, a claim by an individual member of a VAT group must normally be construed as a claim made on behalf of the representative member embodying the group as otherwise the claims would have no meaning. As a result, by adopting a purposive construction of the letters which Carlton sent to HMRC, the claims made by Carlton fell to be regarded as claims made by TCL as representative member of the VAT Group.

The parties' contentions

18. HMRC's principal argument is that the Inner House erred in holding that a claim for repayment of VAT by an individual member of a VAT group must normally be construed as a claim made on behalf of the representative member of that group. Carlton's claim was made on its own behalf and TCL cannot rely on it to avoid the statutory time bar. TCL's response, in summary, is that Carlton's claims sought to vindicate the rights of the single taxable person, which was the VAT Group. Carlton in EU law had no individual fiscal personality in relation to those rights. The claims must be treated as having been submitted on behalf of the VAT Group, which was the only taxable person recognised by EU law, and TCL, as the representative member of the VAT Group, was entitled to rely on those claims. In any event, TCL submits that it validly ratified the claims which Carlton made on its behalf.

The VAT legislation

19. The starting point for consideration of the parties' submissions is article 11 of the Principal VAT Directive, Council Directive 2006/112/EEC of 28 November 2006 ("the Principal Directive") which provides:

> "After consulting the advisory committee on value added tax (hereafter, the "VAT committee"), each member state may regard as a single taxable person any persons established in the territory of that member state who, while legally independent, are closely bound to one another by financial, economic and organisational links.
>
> A member state exercising the option provided for in the first paragraph, may adopt any measures needed to prevent tax evasion or avoidance through the use of this provision."

Two points may be made about this provision. First, it is permissive. There is no obligation on a member state to institute such a regime. Secondly, it is not prescriptive. It does not lay down a template as to how a member state will treat a group of persons as a single taxable person. It shares these characteristics with its predecessor, article 4.4 of the Sixth Council Directive of 17 May 1977 (77/388/EEC) ("the Sixth Directive").

20. The UK took up the opportunity to establish VAT groups of companies, initially in section 21 of the Finance Act 1972 and later in section 29 of the Value Added Tax Act 1983 ("the 1983 Act"). The current provision is section 43 of VATA, as amended, which provides, so far as relevant:

> "(1) Where under sections 43A to 43D any bodies corporate are treated as members of a group, any business carried on by a member of the group shall be treated as carried on by the representative member, and -
>
> (a) any supply of goods or services by a member of the group to another member of the group shall be disregarded; and
>
> (b) any supply which is a supply to which paragraph (a) above does not apply and is a supply of goods or

> services by or to a member of the group shall be treated as a supply by or to the representative member; …
>
> and all members of the group shall be liable jointly and severally for any VAT due from the representative member."

21. It is clear from the statutory words in section 43(1) of VATA that the UK chose to achieve the end which the Directive authorised not by deeming the group to be a quasi-person but by treating the representative member as the person which supplied or received the supply of goods or services.

22. This point was clearly made by the House of Lords in *Customs and Excise Comrs v Thorn Materials Supply Ltd* [1998] 1 WLR 1106 in their discussion of the predecessor provisions, namely article 4.4 of the Sixth Directive and section 29 of the 1983 Act. Lord Nolan, with whom Lord Browne-Wilkinson and Lord Lloyd of Berwick agreed, stated (1113C-D) that those provisions were "designed to simplify and facilitate the collection of tax by treating the representative member as if it were carrying on all of the businesses of the other members as well as its own, and dealing on behalf of them all with non-members". I do not construe Lord Nolan's reference to "dealing on behalf of" the other members of the VAT group as a reference to an agency relationship. Section 43 is not concerned with the intra-group legal arrangements of group members. It is concerned with dealings in relation to VAT with entities outside of the VAT group and with HMRC, including the disregard of intra-group supplies in relation to liability for VAT. In its dealings with HMRC in relation to VAT the representative member is treated as carrying on the businesses of the other members of the group. Lord Clyde made the same point (1121H) stating that in the UK the single taxable person for which provision was made in article 4.4 of the Directive was the representative member. Lord Hoffmann, while dissenting, agreed on the effect of the provisions. He stated (1118A-B):

> "Section 29 does produce a single taxable person, namely, the representative member. But it does so, not by the crude method of deeming all members to be a single person … but by the much more limited and specific assumptions which the subsection [now section 43(1)(a) and (b) of VATA] makes."

Thus, the single taxable person is the representative member. The joint and several liability of the other members of the group for VAT due by the representative member is the means by which the UK has sought to counter tax evasion and avoidance in accordance with the authority conferred by the second paragraph of article 11 of the Principal Directive.

23. In *Ampliscientifica Srl v Ministero dell' Economia e delle Finanze* (Case C-162/07) [2008] ECR I-4019; [2011] STC 566, the CJEU (paras 19 and 20) explained that article 4.4 of the Sixth Directive, if implemented by a member state, had the effect that companies in a VAT group were no longer treated as separate taxable persons for the purpose of VAT but were to be treated as a single taxable person. This precluded such companies from submitting VAT declarations separately "since the single taxable person alone is authorised to submit such declarations". It followed that the national implementing legislation had to provide that "the taxable person is a single taxable person and that a single VAT number be allocated to the group".

24. In the UK the model which achieves that result is that of the representative member. The words in section 43(1) are clear beyond question: "any business carried on by a member of the group shall be treated as carried on by the representative member". It has not been suggested that the UK failed to consult the VAT committee before adopting this model (as required by Annex A of the Second Council Directive of 11 April 1967 (67/228/EEC) and later by article 4.4 of the Sixth Directive and now by article 11 of the Principal Directive) and no challenge has been made to the effect that the model does not faithfully implement the option which article 11 of the Principal Directive or its predecessor made available to member states. There is no reason to doubt that the model which the UK has adopted is consistent with the EU legislation.

25. Other models have been used to take up the option. Thus, in the Kingdom of Sweden, national legislation, which exercised the option which article 4.4 of the Sixth Directive gave, provided that a VAT group might be regarded as a single operator and the activity in which companies within the group were engaged might be regarded as a single activity. The result was that services supplied to a company within such a VAT group in Sweden were regarded as services supplied to the VAT group: *Skandia America Corpn (USA), filial Sverige v Skatteverket* (Case C-7/13) [2015] STC 1163, paras 16 and 28-32.

26. Whatever may be the position in the legislation of other member states, there is, in my view, no need to complicate matters by introducing a concept of the VAT group as a quasi-persona in an analysis of the UK legislation. While one can, and HMRC does, speak of the registration of a group giving rise to a "single taxable person", it is the appointment of a company as representative member of the group which provides the legal person which is the taxable person.

27. The administration of VAT involves giving the representative member of a VAT group a VRN and the establishment of a bank account in its name from which VAT payments may be made to HMRC and into which repayments may be made. A VAT group may change its representative member by applying to HMRC under

section 43B(2)(c) of VATA (as inserted by section 16 of, and paragraph 2 of Schedule 2 to, the Finance Act 1999) but the new representative member retains the same VRN and bank account. In *Revenue and Customs Comrs v MG Rover Group Ltd* [2016] UKUT 434 (TCC); [2017] STC 41, the Upper Tribunal (Warren J and Hellier J) described the position of the representative member in these terms (para 171):

> "[T]he representative member of section 43 must, in our view, be understood as a continuing entity (perhaps akin to a corporation sole whose role is fulfilled by whoever holds the relevant office at any time). Thus actions, liabilities and rights of an old representative member must be ascribed to the new representative member on a change of representative member."

In my view that analogy is apt. Section 43 of VATA does not make the group a taxable person but treats the group's supplies and liabilities as those of the representative member for the time being.

28. Section 80 of VATA (as amended by section 3 of the Finance (No 2) Act 2005) provides (so far as relevant):

> "(1) Where a person -
>
> (a) has accounted to the Commissioners for VAT for a prescribed accounting period (whenever ended), and
>
> (b) in doing so, has brought into account as output tax an amount that was not output tax due,
>
> the Commissioners shall be liable to credit the person with that amount. …
>
> (2) The Commissioners shall only be liable to credit or repay an amount under this section on a claim being made for the purpose."

29. It is clear from the words of section 80(1) that HMRC's liability to credit or repay the overpaid output tax is owed to the person who accounted to them for VAT in the relevant accounting period or periods. It is also clear from the concluding

words in subsection (2) ("for the purpose") that a claim must be made for the credit or repayment to that person before HMRC come under any liability to credit or repay. Other subsections support this view. Section 80(3), which provides HMRC with the defence of unjust enrichment against a claim under subsection (1) or (1A), refers to the enrichment of the claimant and appears to assume that the claimant is the person who has accounted for the VAT. Subsection (4), which imposes a time limit on claims, also is drafted on the basis that the claim will result in the giving of a credit or repayment to the person who accounted for or paid the VAT in the first place. It therefore follows from the operation of section 43 of VATA that where there have been overpayments of VAT by the representative member of a VAT group, the person entitled to submit a claim during the currency of a VAT group, unless the claim has been assigned, is either the current representative member of the VAT group or a person acting as agent of that representative member.

30. I therefore agree with the Extra Division in para 24 of their opinion that it is only the representative member who has any interest in making the claim. My disagreement is simply that one does not need the complication of viewing the group as a quasi-persona to reach that conclusion.

31. In this regard I agree with the impressive analysis of the single taxable person in the context of a subsisting VAT group by the FTT (Judge Roger Berner and Mr Nigel Collard) in paras 73 -75 of the decision in *Standard Chartered plc v Revenue and Customs Comrs* [2014] UKFTT 316 (TC); [2014] SFTD 1270. In particular, as Judge Berner stated (para 73): "Under UK law, as set out in section 43 VATA, the concept of the single taxable person is properly implemented through the representative member. … The representative member is not the agent or trustee of the constituent members of the group. It is … the domestic law embodiment of the single taxable person".

32. Mr Scorey on behalf of TCL submits that the only taxable person is the VAT group, which alone has fiscal personality, and that any company within the VAT group can claim repayment of unduly levied VAT on behalf of the group. For the reasons set out above, I do not accept that submission. Nor do I see any basis for the assertion by the Extra Division (para 27) that a claim by an individual member of a VAT group must normally be construed as a claim made on behalf of the representative member, as otherwise the claim would have no meaning. An assignee of the representative member may make a valid claim in its own right (as Carlton purported to do in this case). Alternatively, a party may make a claim to which it is not entitled.

33. I therefore approach the construction of Carlton's claims without any such preconception. I also have regard to the limitation of an appeal from the UT to errors of law.

Applying the law to the facts: Carlton's claims

34. The FTT concluded (para 78) that it was clear from the text of each of Carlton's letters that it was claiming, in its own right, repayment of sums alleged to have been overpaid by way of VAT, and (para 86) that Carlton did not make the claims in 2007 and the revised claim in 2009 on behalf of TCL.

35. In my view, for the following four reasons, the FTT did not err in law in so holding.

36. First, when Carlton sent the letters to HMRC under its own letterhead, it had long ceased to be a member of the VAT group. This would have been known to HMRC. Even if Carlton had remained a member of the VAT Group, I would not have construed its letter as one on behalf of TCL, in the absence of an assertion that it was acting as TCL's agent, because the statutory scheme, which it was invoking, envisaged that HMRC would deal only with the representative member. Secondly, it appears from the four letters dated 16 November 2007 that Carlton had already presented claims in respect of each of claims (i) - (iv) in relation to its own business activities in the period after it had left the VAT Group and it presented the new claims as serving "to extend the scope of the previous disclosure". Thirdly, the use of the VAT Group's VRN was necessary in order to identify the original source of the allegedly overpaid VAT. The use of the VRN did not disclose who was entitled to the repayment as it was possible (and later clarified) that Carlton was claiming as assignee. Fourthly, in each of the claims submitted on 16 November 2007, Carlton was claiming repayment of sums paid from 1973, long before its incorporation in 1990, as well as in the period after 1990 when it was a member of the VAT Group. It clarified the basis on which it made those claims in its letter of 8 January 2009 in which it revised its claim (iv) in respect of cash bingo participation fees. In that letter it founded on the 1990 Asset Transfer Agreement and on a decision of the London VAT Tribunal in *Triad Timber Components Ltd v Customs and Excise Comrs* [1993] VATTR 384 in support of its right to be paid the overpaid VAT. In relation to the former Carlton claimed that it had obtained legal opinion that TCL had transferred to it the right under section 80 of VATA to claim output tax previously over-declared. The *Triad* decision, on which Carlton relied for its post-1990 claim, was that a trading company had the right, after it left a VAT group and that group's registration had ceased, to reclaim VAT which had been overpaid on its supplies whilst it was a member of that group. Carlton claimed that that decision entitled it to claim overpaid output tax for the period that it had been a member of the VAT Group. HMRC at that time also accepted the *Triad* decision, as their policy then, in relation to claims after a group registration had ceased, was to repay the trading entity which had suffered the economic burden of the overpaid VAT. Both parties would have readily understood Carlton to be claiming repayment in its own interest.

37. TCL sought to neutralise the effect of the letter of 8 January 2009 by arguing that one could not use a subsequent writing to assist in the construction of the earlier letters. I do not accept that submission in the context of these letters. The four letters of 16 November 2007 were in substantially similar terms. The letter of 8 January 2009 expressly revised the earlier claim for overpaid output tax on cash bingo participation fees, thereby superseding the earlier claim to that extent, and expanded on the reasoning behind that claim. That explanation, contained under the heading "The right to deduct", applied equally to the other claims made on 16 November 2007, most obviously in relation to the periods in each claim which pre-dated Carlton's incorporation. In so far as there was any doubt as to the basis on which Carlton was making the claims in the four letters of 16 November 2007, the clarification provided by the latter letter is admissible and relevant evidence of the nature of Carlton's claims. To hold otherwise, and have regard to the letter of 9 January 2009 only to the extent that it revised the earlier claim, would in my view be wholly artificial.

38. I am also satisfied that TCL's case of agency cannot get off the ground. Carlton had no actual authority to send the letters on TCL's behalf. The FTT's findings of fact, which were not challenged, destroyed any such assertion. The FTT held (para 55) that TCL "neither instructed nor authorised" Carlton to submit any of the claims and (para 57) that TCL was unaware that it had a potential claim under section 80 of VATA and that HMRC's payment of £667,069 to it on 27 April 2009 "came out of the blue". Similarly, there is no basis for an argument that TCL ratified Carlton's claims which had been made on its behalf, thereby conferring retrospective authority. First, Carlton's letters to HMRC did not purport to be written as agent of TCL. On the contrary, they were claims which Carlton pursued for its own benefit. That is fatal to the claim of ratification: *Keighley, Maxsted & Co v Durant* [1901] AC 240, especially Earl of Halsbury LC 243-244 and Lord Macnaghten 246-247. Secondly, there are no findings of fact that TCL ratified Carlton's actions as its agent. This is unsurprising as TCL's case before the FTT and UT had not been based on Carlton having acted as its agent.

39. Further, TCL's counsel in addressing the UT acknowledged that Carlton had submitted the letters on its own behalf and not on behalf of TCL. Instead she based her case on an interpretation of section 80 of VATA which allowed TCL to take over Carlton's claims. The UT decided the appeal on that basis. As an appeal from the UT to the Inner House or to this court is available only on a point of law arising from the decision of the UT (Tribunals, Courts and Enforcement Act 2007 sections 13-14C (as inserted by section 64 of the Criminal Justice and Courts Act 2015)), it is not open to the appellate courts to find that there was an agency relationship between Carlton and TCL.

Further submissions

40. After the court had released this judgment in draft to counsel to enable them to point out any typographical errors and minor inaccuracies in accordance with Practice Directions 6.8.3 and 6.8.4, TCL's counsel applied to the court to make a reference to the CJEU under article 267 of the Treaty on the Functioning of the European Union. The suggested reference would raise the question whether the interpretation of section 43 of the VATA which I favour is compatible with the concept of the single taxable person in article 11 of the Principal Directive.

41. I am satisfied that it is neither necessary nor appropriate to make such a reference because a ruling by the CJEU on the nature of the single taxable person is not necessary for the determination of this appeal: *Srl CILFIT v Ministry of Health* (Case C-283/81) [1982] ECR 3415. Whether in United Kingdom law the representative member is seen as the single taxable person or as the representative of a quasi-person which is the aggregate of the companies in the VAT group and which itself is to be recognised in domestic law, the outcome of this appeal would be the same. This is because Carlton made its claims in its own interest and not on behalf of either the representative member or the extant VAT group of which it had ceased to be a member. A ruling by the CJEU that a member of a VAT group is a member of a single taxable person would not alter that conclusion.

42. TCL also suggested that Schedule 1 to the VATA, which implements the second paragraph of article 11 of the Principal Directive by creating a single taxable person to counter tax avoidance, was inconsistent with the interpretation of section 43 which I favour. I disagree. Paragraphs 1A and 2 of Schedule 1 implement this part of article 11 by empowering HMRC to make a direction that the persons named in that direction are to be treated as a single taxable person, which is registered in respect of taxable supplies. Paragraph 2 provides that on the making of the direction (i) the persons affected by the direction are to give a name in which the taxable person is to be registered, (ii) provisions which are equivalent to section 43(1)(b) and (c), and the tailpiece of section 43(1) imposing joint and several liability on the constituent members, are applied, (iii) a failure by the taxable person to comply with a requirement imposed by or under the VATA is treated as a failure by each of the members severally and (iv) subject to the foregoing, the constituent members are treated as a partnership carrying on the business of the taxable person. Thus paragraph 2 of Schedule 1 implements the second paragraph of article 11 by treating the persons who are named in the direction as members of a partnership carrying on the business of the taxable person. In other words, in domestic law the partnership is the mechanism by which the persons subjected to the direction are treated as a single taxable person and no separate quasi person is required. I see no inconsistency between these provisions in Schedule 1 and the interpretation of section 43 which I favour.

Conclusion

43. I would therefore allow the appeal.