Neutral Citation Number: [2015] EWHC 1483 (Admin)

Case No: CO/17339/2013

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21 May 2015

Before :

THE HONOURABLE MR JUSTICE SUPPERSTONE

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Between :

THE QUEEN ON THE APPLICATION OF PREMIER FOODS (HOLDINGS) LTD	**Claimant**
- and -	
THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS	**Defendant**
- and -	
Q COLD LTD (In Administration)	**Interested Party**

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Ms Valentina Sloane (instructed by **Reynolds Porter Chamberlain**) for the **Claimant**
Mr George Peretz QC (instructed by **Solicitor for HMRC**) for the **Defendant**
The Interested Party was not represented

Hearing date: 29 April 2015

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Approved Judgment

Mr Justice Supperstone :

Introduction

1. This application for judicial review by Premier Foods (Holdings) Ltd, the Claimant, relates to a decision of the Commissioners for Her Majesty's Revenue and Customs, the Defendant, dated 9 September 2013 in relation to VAT paid by the Claimant to a supplier, Q Cold Ltd (now in administration) ("QCL") who between 1 October 2008 and 31 December 2012 invoiced it in error and who accounted for it to the Defendant. The Defendant does not dispute that the VAT was invoiced to the Claimant in error and that the relevant supplies should have been zero-rated under Group 1 of Schedule 8 to the Value Added Tax Act 1994 ("VATA"). The total sum in issue is just under £4m.

2. QCL collected the tax on behalf of the Defendant and accounted for it to them (see *Elida Gibbs* [1996] ECR 1-5339 at paras 19-22). The Claimant has no statutory right to claim the VAT back from the Defendant, since the Claimant was incorrectly invoiced the VAT by QCL, which in turn accounted for the VAT to the Defendant. Under the current domestic statutory scheme, only QCL has a right to claim back the VAT from the Defendant (VATA, s.80). In the ordinary course, a supplier who has mistakenly invoiced VAT to its customer can make a statutory claim to the Defendant for repayment of that undue VAT and then pass the repayment on to the customer who actually bore the burden of the VAT. However, since making a statutory claim for repayment of the unduly invoiced VAT, QCL has gone into administration. Accordingly a civil claim by the Claimant against QCL to recover the sum paid by way of VAT will not provide an effective remedy.

3. The Claimant contends that in order to rectify the situation the Defendant can refuse to make repayment to QCL unless QCL undertakes to reimburse the full amount of the repayment to the Claimant. If QCL refuses to agree to that course of action the Defendant is obliged under EU law to reimburse the Claimant directly. That course would restore fiscal neutrality and render the position VAT-neutral, for all parties.

4. However the Defendant has taken a decision refusing to take that course. Instead the Defendant is proposing to repay the VAT to QCL in administration (which never bore the burden of that VAT and from whom the Claimant will be unable to recover the full amount of VAT unduly invoiced) while at the same time proposing to enforce assessments against the Claimant for the input VAT which it deducted. It is the Claimant's case that the effect will be to inflict serious financial hardship on the Claimant while giving QCL in administration (or, more precisely, its creditors) a windfall. That is contrary to the principle of fiscal neutrality.

5. The Claimant challenges the Defendant's decision and the proposed conduct as irrational, disproportionate and in breach of EU law principles, in particular the principles of fiscal neutrality and effectiveness.

The Legal Framework

(1) UK Law Mechanisms for Correcting Tax Improperly Paid

6. Section 80(1) of VATA provides that:

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

7. The Defendant has a statutory defence of unjust enrichment to a claim for repayment under section 80(1) of VATA. Section 80(3) provides:

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

8. In *Baines & Ernst v Customs and Excise Commissioners* [2006] STC 1632, Lloyd LJ explained the unjust enrichment defence at paragraphs 6-7:

> "6. Most VAT law is derived from one or more European Directives, but that is not true of the unjust enrichment defence. Nor, on the other hand, is it a purely domestic law concept. It is sanctioned by decisions of the Court of Justice of the European Communities (the Court of Justice) albeit that these decisions have not, for the most part, involved VAT itself. Thus in one of the earliest cases, *Amministrazione delle Finanze dello Stato v SpA San Giorgio* (Case 199/82) [1983] ECR 3595 (*San Giorgio*), the plaintiff was required to pay health inspection charges which were levied, contrary to Community law on the import of dairy products from other Member States. The Court of Justice reviewed earlier decisions, and said this:
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> > '13. However, as the Court has also recognised in previous decisions… Community law does not prevent a national legal system from disallowing the repayment of charges which have been unduly levied where to do so would entail unjust enrichment of the recipients. There is nothing in Community law therefore to prevent courts from taking account, under their national law, of the fact that the unduly levied charges have been incorporated in the price of the goods and thus passed on to the purchasers. Thus national legislative provisions which prevent the reimbursement of taxes, charges and duties levied in breach of Community law cannot be regarded as contrary to Community law where it is established that the person required to pay such charges has actually passed them on to other persons.'
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> …

> 7. If the charges wrongly levied 'have been incorporated in the price of the goods and thus passed on to the purchasers', then it could unjustly enrich the undertaking which paid the charges to be reimbursed for their amount, on the assumption that the benefit of the repayment would not be passed on to the customers who bore their burden in the price paid. That is the basis for the defence. VAT is a tax whose burden is designed to be passed on, so as to be borne by the end user of the goods or services. It can readily be regarded as passed on to users who are registered for VAT and entitled to recover input tax on purchases, usually by way of set-off against the output tax for which they are accountable on their sales. The application of the concept of passing on in other cases requires careful consideration in relation to such a tax."

9. In *Lady and Kid A/S and others v Skatteministeriet* [2012] STC 854 the ECJ provides a succinct statement of the unjust enrichment statutory defence. The Court of Justice stated:

> "18. … by way of exception to the principle of reimbursement of taxes incompatible with European Union law, repayment of a tax wrongly paid can be refused where it would entail unjust enrichment of the persons concerned. The protection of the rights so guaranteed by the legal order of the European Union does not require repayment of taxes, charges and duties levied in breach of European Union law where it is established that the person required to pay such charges has actually passed them on to other persons…
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> 19. In such circumstances, the burden of the charge levied but not due has been borne not by the trader, but by the purchaser to whom the cost has been passed on. Therefore, to repay the trader the amount of the charge already received from the purchaser would be tantamount to paying him twice over, which may be described as unjust enrichment, whilst in no way remedying the consequences for the purchaser of the illegality of the charge…"

10. VATA section 73 gives the Defendant a limited discretion in relation to the assessment of the amount of VAT due from a person. It provides:

> "**73**. **Failure to make returns etc**.
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> (1) Where a person has failed to make any returns required under this Act (or under any provision repealed by this Act) or to keep any documents and afford the facilities necessary to verify such returns or where it appears to the Commissioners that such returns are incomplete or incorrect, they may assess the amount of VAT due from him to the best of their judgment and notify it to him.

> (2) In any case where, for any prescribed accounting period, there has been paid or credited to any person—
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> (a) as being a repayment or refund of VAT, or
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> (b) as being due to him as a VAT credit,
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> 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."

(2) EU Law

11. The Court of Justice in *Reemtsma Cigarettenfabriken GmbH v Ministero delle Finanze* [2008] STC 3448 was concerned with a customer who was a taxable person who had mistakenly paid his supplier a sum by way of VAT. The supplier had paid the VAT to the Italian authorities. The question was whether the customer could claim reimbursement directly from the Italian authorities. The Court held (at paragraph 39) that:

> "… in principle, a system such as the one at issue in the main proceedings in which, first, the supplier who has paid the VAT to the tax authorities in error may seek to be reimbursed and, second, the recipient of the services may bring a civil law action against that supplier for recovery of the sums paid but not due observes the principles of neutrality and effectiveness. Such a system enables the recipient who bore the tax invoiced in error to obtain reimbursement of the sums unduly paid."

12. However the Court continued:

> "**41**. … If reimbursement of the VAT becomes impossible or excessively difficult, in particular in the case of the insolvency of the supplier, those principles may require that the recipient of the services to be able to address his application for reimbursement to the tax authorities directly. Thus, the member states must provide for the instruments and the detailed procedural rules necessary to enable the recipient of the services to recover the unduly invoiced tax in order to respect the principle of effectiveness.
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> **42**. The answer to the second part of the second question must therefore be that the principles of neutrality, effectiveness and non-discrimination do not preclude national legislation, such as that at issue in the main proceedings, according to which only the supplier may seek reimbursement of the sums unduly paid as VAT to the tax authorities and the recipient of the services may bring a civil law action against that supplier for recovery of the sums paid but not due. However, where reimbursement

> of the VAT would become impossible or excessively difficult, the member states must provide for the instruments necessary to enable that recipient to recover the unduly invoiced tax in order to respect the principle of effectiveness."

13. The Court of Appeal in the recent decision of *Investment Trust Companies (In Liquidation) v The Commissioners for Her Majesty's Revenue and Customs* [2015] EWCA Civ 82 endorsed the *Reemtsma* decision. Patten LJ (delivering the judgment of the Court) stated at paragraph 93:

> "The decision in *Reemtsma* is sufficient in itself to dispose of one of HMRC's original arguments (pressed more before the judge than before us) that not being the taxable party the investment trusts have no *San Giorgio* rights sufficient to give them a direct claim against HMRC for the recovery of the over-paid tax. The decision recognises that the end consumer, although not the taxpayer, has a sufficient economic connection with the payment of the tax to qualify for reimbursement under the *San Giorgio* principle."

The *ITC* decision is recognition by the Court of Appeal of the *Reemtsma* direct claim.

The Parties' Submissions and Discussion

14. Ms Valentina Sloane, for the Claimant, submits that VATA section 80 provides the Defendant with the domestic machinery to comply with EU law and in particular the principle of fiscal neutrality. Section 80(3) provides the Defendant with the statutory defence of unjust enrichment to any claim by QCL under section 80(1). Accordingly the Defendant's failure to rely on the defence, in the circumstances of this case, is both irrational and incompatible with EU law. The decision of the Defendant under challenge is, she contends, plainly unlawful.

15. The Defendant's position, summarised by Mr George Peretz QC on their behalf, is that the Claimant's case is well arguable, but they consider that there are good arguments the other way. They are therefore not confident that were they to reverse their decision in relation to paying QCL that QCL could not successfully appeal such a refusal before the First Tier Tribunal under VATA, section 83. The Defendant therefore seeks a declaration from the court as to the correct position that will bind QCL as well as the Claimant and the Defendant.

16. Mr Peretz submits that there are three relevant principles at issue. The first principle is the principle of EU law that an error of the kind that has occurred should not lead to any tax loss on the part of the Member State concerned. In the present case that means that the Defendant should not be "unjustly impoverished" by being required to pay both the Claimant and QCL. The second principle is that the taxpayer that has incorrectly accounted for VAT (in this case QCL) has a right to claim reimbursement of that VAT. The third principle is that a customer in the position of the Claimant has, as a matter of EU law, a *Reemtsma* claim against the Defendant in the circumstances set out in that case. It is common ground between the Claimant and QCL, and the Defendant does not dispute it, that, in the present case, the Claimant will bear (when the assessments are enforced) the full burden of the VAT incorrectly

accounted for. The Defendant also accepts that (in so far as the Claimant could not recover the full amount of that VAT against QCL in its insolvency), recovery of the balance would be "impossible or excessively difficult" for the purposes of *Reemtsma*. The Claimant has only an unsecured non-preferential claim against QCL.

17. Mr Peretz suggests that the difficulty in the present case is how to reconcile those three principles. The Claimant's case is that, in the circumstances of this case, it is the second principle that must yield. However Mr Peretz contends that the obstacle to the Claimant's argument that the defence of unjust enrichment offers the mechanism by which QCL's section 80(1) claim can be resisted is the judgment of the Inner House of the Court of Session in *Customs and Excise Commissioners v McMaster Stores (Scotland) Ltd (in receivership)* [1995] STC 846. In that case the Inner House held that the tribunal was entitled to find that payment by HMRC to an insolvent supplier (McMaster) under a provision not materially different in wording to section 80 would not give rise to "unjust enrichment", even though the effect of such payment was that customers who had borne the burden of VAT, the tenants, who were unsecured creditors, had to share the amount with other unsecured creditors.

18. Lord Hope (the Lord President) stated at page 854:

> "… In my opinion the test of enrichment will be satisfied where the amount claimed as overpaid VAT is repaid to the claimant, irrespective of the capacity in which he received that sum or of the obligations, if any, to which he has subjected himself in the event of its receipt.
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> In my opinion the critical issue where a claim is made under s.24 of the 1989 Act is whether the enrichment which will arise in these circumstances can be described as unjust. I consider however that this is a question of fact and degree which ought to be left to the decision of the tribunal, subject to review only where it can be shown that that decision was erroneous in point of law or on the facts was wholly unreasonable. In the present case the tribunal were of the opinion that there would be no unjust enrichment because there would not, due to the company's insolvency, be any benefit as a result of the repayment for the company and its shareholders.
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> …
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> It is clear on the agreed facts that the tenants will get something as a result of the repayment, which is better than nothing. It is also clear that there will be no benefit to the company or its shareholders, as the remainder must be shared equally with the other unsecured creditors. Those other unsecured creditors will receive a benefit which might be regarded, in their case, as a windfall. But that is inevitable if the tenants, who are entitled to claim repayment from the company, are to get anything at all."

19. In *Clarke and Frank Staddon Ltd v Marshalls Clay Products Ltd* [2004] 2 CMLR 45 the Court of Appeal stated that the EAT was not obliged by law to follow the Court of Session (per Laws LJ at paras 30-33). It follows that this court is not bound by the decision in *McMaster*. However in any event Ms Sloane submits, and I agree, that *McMaster* should not now be regarded as good law. The legal landscape has changed. The decision of the Court of Justice in *Reemtsma* has now established that the customer who ultimately bore the burden of the VAT has a right under EU law to recover the full amount of the mistakenly paid VAT directly from HMRC.

20. The state of the law, as understood, at the time of the *McMaster* decision was that the only two possible outcomes were either that HMRC retained the money by relying on the defence of unjust enrichment, or HMRC pay the money to the insolvent supplier. The Court of Session considered it preferable that the customer (who had ultimately borne the burden of the VAT) should be able to recover some of the VAT in its position as an unsecured creditor, rather than receiving nothing at all. The court recognised that the other unsecured creditors of the insolvent supplier would receive a benefit which might be acknowledged as a windfall but observed "that it is inevitable if the tenants who are entitled to claim repayment from the company are to get anything at all". In the circumstances of that case, and based on the understanding of the law at the time, the Court of Session upheld the tribunal's decision that enrichment of the insolvent company would not be unjust because it was understood to be the only means of enabling the customer to obtain some repayment. Ms Sloane observes, in my view correctly, that critical factual consideration in *McMaster* is of no application in the present case.

21. In their detailed grounds of opposition QCL suggest that the *Reemtsma* conditions for recovery do not apply in the present case because they are still in existence as an entity albeit in administration and therefore the Claimant can bring a civil action against them to recover the debt. I agree with Mr Peretz that there is no force in the factual distinctions that QCL draw between the present case and *Reemtsma* where the supplier of goods was in insolvency. What is critical is that if the Claimant tried to sue QCL it could only recover a proportion of what was owed.

22. Next QCL contend that that the Claimant's complaint must be that the UK has failed to introduce the necessary instruments and detailed procedural rules necessary to enable the recipient of the services to recover the unduly invoiced tax in order to respect the principle of effectiveness. I do not accept this submission. There is, in my view, a *Reemtsma* claim that can be made and the Court of Appeal in the *ITC* case has accepted that *Reemtsma* can be relied on in our domestic courts. By that decision and the defence under s.80(3) the UK has provided the machinery to ensure fiscal neutrality and the mechanism to enable the monies to be paid direct to the Claimant.

23. Finally, QCL submits that a judicial review of the Defendant's decision is inappropriate. I reject this submission for the reasons put forward by Mr Peretz. Most VAT decisions are appealable under section 83 to the First Tier Tribunal. However in my view the present challenge by judicial review was the correct course to adopt in this case because the Claimant is in part challenging the Defendant's decision to pay QCL which does not give rise to an appeal under VATA. Following the issue of the assessments it is appropriate that this court consider the Claimant's *Reemtsma* claim which depends critically on whether the Defendant has an unjust enrichment defence.

24. In my view QCL are bound by the decision in this case. They are a party to this litigation and they have expressly stated that they are not withdrawing their s.80 claim (see letter dated 17 April 2015 from Ashteds, their solicitors, to the Claimant's solicitors). If the Defendant rejects their s.80 claim, then QCL have a right to bring an appeal under s.83 to the First Tier Tribunal. It is therefore of importance to the Defendant as to whether they can defend the QCL claim.

Conclusion

25. In my judgment for the reasons I have given this claim succeeds.

26. The Claimant is entitled to an order that the following input tax assessments raised by HMRC pursuant to section 73 of VATA and notified to Premier be quashed:

    i) An input tax assessment in respect of period 07/09 for £77273.00 issued on 15/08/13;

    ii) An input tax assessment in respect of period 08/09 for £91881.00 issued on 15/08/13;

    iii) An input tax assessment in respect of period 09/09 for £96791.00 issued on 07/11/13;

    iv) An input tax assessment in respect of period 10/09 for £92249.00 issued on 07/11/13;

    v) An input tax assessment in respect of period 11/09 for £110081.00 issued on 05/12/13;

    vi) An input tax assessment in respect of period 12/09 for £70090.00 issued on 07/01/14;

    vii) An input tax assessment in respect of period 01/10 to 12/12 for £3,127,817 issued on 18/02/14.

27. Further I make a declaration that in the circumstances of this case payment to QCL by the Defendant of any part of its claim received by the Defendant on 24 April 2013 under VATA section 80(1) would amount to the unjust enrichment of QCL for the purposes of VATA, section 80(3).