TC03850

Appeal number: TC/2011/03740

Value Added Tax. Section 80 Value Added Tax Act 1994. Section 121(1) Finance Act 2008 (extended time limits for old VAT claims). Construction of agreement purporting to override the section 80 prima facie right to refund. Shift of evidential burden to HMRC; Wood v Holden [2006] EWCA Civ 26 applied. Held: agreement operated as assignment/waiver of appellant's right to repayment of VAT only to extent that repayment claims by persons other than appellant had actually been made. Burden on HMRC to prove claims actually made – burden not discharged. Unjust enrichment not considered as not in issue. Appeal allowed.

FIRST-TIER TRIBUNAL
TAX CHAMBER

ROYAL BOROUGH OF KENSINGTON & CHELSEA — **Appellant**

- and -

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS — **Respondents**

TRIBUNAL: JUDGE RACHEL PEREZ
MR JAMES MIDGLEY

Sitting in public at 45 Bedford Square, London on 8 April 2013

Mr Richard Vallat of counsel for the appellant

Mr Philip Shepherd of HMRC for the respondents

DECISION

Introduction

1. It was common ground that the appellant had overpaid £584,572 VAT to HMRC in reliance on HMRC's guidance (in fact, there may have been a few months' more VAT, but the appellant waived that). The question was whether the appellant was entitled to repayment of that £584,572 VAT (a) in light of the Method 2 agreement between the parties and (b) in the absence of evidence as to which, if any, repayment claims had been made by persons other than the appellant as envisaged by the agreement.

2. We allowed the appeal by summary decision. We decided that—

(1) on a proper construction of the Method 2 agreement, the appellant had by the agreement waived (or assigned) its right to repayment of VAT only to the extent that repayment claims by persons other than the appellant had actually been made;

(2) the burden was on HMRC to show that repayment claims by persons other than the appellant had actually been made;

(3) HMRC did not discharge that burden; and

(4) the appellant is therefore entitled to repayment of £584,572 VAT.

3. We now give our full decision at the appellant's request.

4. The summary decision was reached by Judge Perez and Mr Midgley together. Since then, Mr Midgley has retired from the tribunal. This full decision has been drafted by Judge Perez alone.

Citations

5. The parties cited the following—

- *Chartbrook Ltd v Persimmon Homes Ltd* [2009] 1 AC 1101
- *Customs and Excise Commissioners v National Westminster Bank plc* [2003] EWHC 1822 (Ch)
- *HMRC v Condé Nast Publications Ltd* [2008] STC 324, [2008] UKHL 2
- *HMRC v Fleming (trading as Bodycraft)* [2008] STC 324, [2008] UKHL 2
- *HMRC v Noor* [2013] UKUT 071 (TCC)
- *Investor's Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 912

- *Marks and Spencer plc v Customs and Excise Commissioners* [2002] STC 1036
- *Oxfam v RCC* [2009] EWHC 3078 (Ch)
- *Reed Employment Ltd v RCC (No 3)* [2013] UKUT 0109 (TCC)
- *Wood and another v Holden (Inspector of Taxes)* [2006] EWCA Civ 26
- *Halsbury's Laws of England 5th Edition, Volume 11*, paragraphs 769 to 775 (incidence of burden of proof)
- *Halsbury's Laws of England 5th Edition, Volume 22*, paragraphs 357 to 363 (principles of construction).

Background

6. The appellant ("RBKC") is a local authority. One of its functions is the regulation of building works, for which it charges building control fees.

7. On 11 November 1985, HM Customs and Exercise (a predecessor to HMRC) issued guidance that building control fees charged by local authorities in England and Wales were subject to VAT from 1 April 1985. This was said to be due to the Building (Approved Inspectors etc.) Regulations 1985 (S.I. 1985/1066) and to the approval of NHBC Building Control Services Ltd to carry out certain building control services.

8. It was common ground that, in accordance with that guidance (and in common with other local authorities), RBKC charged and accounted at the standard rate for VAT on non-domestic building control fees.

9. Late in 1995, HM Customs and Excise ("HMCE") changed its guidance to say that, from 1 April 1985 to 31 December 1995, VAT should not have been charged on building control fees for non-domestic properties. The fees should instead, said the revised guidance, have been treated as consideration for non-business supplies and therefore outside the scope of VAT. This was because there was no competition with the NHBC and the fees did not relate to business activities. This changed guidance was in HMCE Business Briefs 23/95 and 26/95.

10. Accordingly, RBKC sought to recover amounts mistakenly paid as VAT on non-domestic building control fees under section 80 of the Value Added Tax Act 1994. They were able to bring the claim despite the time limits in section 80 because of the extended time limit given by section 121 of the Finance Act 2008. This is commonly referred to as a "*Fleming* claim" because section 121 was enacted (with retroactive effect) following the case of *HMRC v Fleming (trading as Bodycraft)* [2008] STC 324.

11. The claim covers the period 6 April 1986 to 31 March 1997. Mr Vallat told us that, before January 1986, RBKC charged no VAT at all on these fees due to a special

regime for inner London. This meant, he said, that the repayment claim could date back only to 1 January 1986. Mr Vallat also told us that there would be a possible point about a transfer of functions order in relation to the period 1 January 1986 to 5 April 1986. But he dispensed with that point by waiving the part of RBKC's claim relating to that period, so that the period covered by the claim starts with 6 April 1986.

12. As a result, the amount of VAT repayment that RBKC claimed on the appeal came to £584,572. HMRC agreed that this would be the amount due to RBKC if the appeal were to succeed.

13. It was common ground that RBKC were prima facie entitled under the legislation to a VAT repayment of this amount, but that the agreement they had reached had changed that position. The issues between the parties related to the effect of that agreement.

14. In a guidance note published in 1996 ("the 1996 guidance note"), HMCE advised local authorities of two methods for refunding valid claims for VAT which had been charged incorrectly on building control fees. The 1996 guidance note said, so far as relevant—

> "4.1 There will be two methods of processing claims in respect of Building Regulation Fees. Each authority will be able to choose which method to adopt but the chosen method must be used for all claims.
>
> **Method 1**
>
> Local authorities accept claims for refunds of VAT and make repayments to the person by whom or on whose behalf the work was carried out. Tax should not be repaid to persons other than the person to whom the tax was originally charged. Evidence of tax payment will be the original invoice, receipt or other documentary evidence of tax payment. It will be necessary for the local authority to issue a credit note for the tax refunded.
>
> **Method 2**
>
> Applicants for refunds apply, or are referred by local authorities, to HM Customs and Excise who will be acting on behalf of the relevant local authorities to process and pay claims for refunds of tax and statutory interest. Local authorities will need to authorise HM Customs and Excise to make the payments direct to the claimants. A copy of this authorisation is at Annex 2.
>
> 4.2 Where Method 1 has been adopted claims should be made direct to the appropriate local authority in a format required by that authority. This however should follow the structure of the form at Annex 3. Customs will not make any repayments direct to claimants unless authorised. The authority should recover the tax from HM Customs and Excise on the normal VAT return. Any statutory interest will need to be the subject of a specific claim by the local authority to their local VAT Office with supporting calculations and documentation to enable payment to be made.

4.3 If Method 2 is to serve its purpose of substantially reducing the burden on local authorities of administering repayments it is essential that in normal circumstances communication is directly between the applicant and Customs and Excise. The cases in which applicants are to be referred back to local authorities for evidence of payment should be kept to the minimum.

4.4 Claims for refund of VAT and interest where the council has taken up Method 2 should be made to HM Customs and Excise on a refund form enclosing the original invoice, receipt or other documentary evidence of tax paid. The forms are available from local VAT offices and those building control authorities who have adopted the method. Applicants for refunds apply, or are referred by local authorities, to HM Customs and Excise at the address below:

> The Building Regulation Fees Refund Department
> HM Customs and Excise
> Chaucers Walk
> Further Gate Industrial Estate
> BLACKBURN, BB1 3AF. Telephone 01254 507523

4.5 Customs will make checks that the tax refunded was properly paid in the first instance to the appropriate building control authority. This will be carried out as part of the local VAT office assurance programme.

4.6 Any questions about the claims procedure should be directed to the office at Blackburn…

5.1 Authorities should…complete the authorisation form at Annex 2, signed by the appropriate officer, if they want to follow Method 2. This should be sent as soon as possible to the Blackburn VAT Office who will acknowledge its receipt…".

15. Neither party had retained any notification as to whether RBKC had chosen Method 1 or Method 2. However, on a list dated 16 September 1997, HMRC had recorded that RBKC had chosen Method 2. RBKC accepted that RBKC had chosen Method 2.

16. It was common ground too that the parties had signed an agreement for the purposes of implementing Method 2. Neither party had a copy of the signed agreement. But they accepted that the agreement that they had signed ("the Method 2 agreement") was in the standard form contained in Annex 2 to the 1996 guidance note.

17. The Method 2 agreement provided—

> AGREEMENT IN RESPECT OF BUILDING REGULATION FEES AND VAT
> This agreement is made between the Commissioners of Customs and Excise ("The Commissioners") and…….("The Council").
>
> Whereas the Commissioners will be inviting [have invited] "relevant applications" for the repayment of VAT paid in respect of building regulation fees and

Whereas, in the normal course of events, the Council [as a taxable person] would be involved itself in making a claim for repayment of VAT under section 80 of the Value Added Tax Act 1994 and of interest under section 78 of the Value Added Tax Act 1994 and remitting the said repayment of VAT to the Council's customer.

the Commissioners and the Council agree that the Commissioners will

(a) publish a press release inviting "relevant applications" to be made direct to Customs and Excise;

(b) deal with the administration and verification of the said applications direct with the applicant, and

(c) make repayments of the VAT, and where appropriate interest, direct to the applicant.

the Council agrees that it will not seek a repayment of VAT in its own right in respect of the tax attributable to the "relevant applications".

In this Agreement "relevant applications" means either

(a) an application made by persons not registered for VAT for the repayment of VAT paid by them to the Council in respect of fees charged by the Council under the Building Regulations issued under the Building Act 1984;

(b) an application made by a person registered for VAT for the repayment of VAT paid by them to the Council in respect of fees charged by the Council under the Building Regulations issued under the Building Act 1984 and in relation to which credit for input tax deduction has not been obtained; or

(c) an application made by a person registered for VAT for the repayment of VAT paid by them to the Council in respect of fees charged by the Council under the Building Act 1984 and in relation to which credit for input tax deduction has been obtained.

Signed on behalf of the Commissioners of Customs and Excise	Signed by the authorised signatory on behalf of the Council.
---	---
('The Commissioners')	('The Council')
Dated	Dated

Please forward to HM Customs & Excise

The Building Regulation Fees Refund Department

HM Customs & Excise

Chaucers Walk

Further Gate Industrial Estate

BLACKBURN BB1 3AF

Telephone 01254 507523".

Issues

18. The issues before us were—

(1) whether the Method 2 agreement operated as an assignment/waiver by RBKC of all possible VAT repayment claims (which HMRC contended) or as an assignment/waiver only in respect of VAT repayment claims actually made (which RBKC contended);

(2) if RBKC were right in that the Method 2 agreement operated as a assignment/waiver only in respect of claims actually made, then the second issue was whether the burden was on RBKC to prove what claims were not made (which HMRC contended) or on HMRC to prove what claims were made (as RBKC contended); and

(3) whether the burden of proof was discharged.

Preliminary point of jurisdiction

19. In order to be able to decide these three substantive issues, we had to be satisfied that we had jurisdiction to consider the effect of an agreement between the parties. More importantly, we also had to be satisfied that the agreement could be used in the tribunal to allow for an outcome different from what the legislation provides (that is, to override RBKC's statutory right to repayment under section 80 of the Value Added Tax Act 1994).

20. It was common ground that we did have jurisdiction on both counts, so the point was not contested before us. We nevertheless needed to be satisfied on both counts in order to proceed to hear the appeal. Mr Vallat took us to the case of *Oxfam v RCC* [2009] EWHC 3078 (Ch) and to *Noor* [2013] UKUT 071 (TCC) (which he said did not overrule *Oxfam* in this regard) in support of his submission that we had the necessary jurisdiction.

21. We were content, regardless of *Oxfam,* to accept that we did have jurisdiction to consider the effect of the agreement. And we were satisfied that it could be used to allow for an outcome different from what the legislation provides.

22. We turn therefore to the substantive issues in this appeal.

Consideration of substantive issues

(1) First issue: Construction of the Method 2 agreement

RBKC's submissions

23. RBKC's position was that "it has only agreed not to seek repayment of VAT in its own right in respect of "relevant applications" and "relevant applications" are tightly defined as "applications made" (i.e. actually made) in certain circumstances. On the plain words of the agreement, the definition of "relevant applications" is not apt to cover applications that might be made (but have not been) and RBKC's waiver does not relate to claims "in respect of fees charged under the Buildings Regulations / Act" more generally. Looking at obligations (b) and (c) [of the agreement] imposed on HMRC in particular, it is also clear that these relate to claims actually made.". Mr Vallat submitted that "relevant applications" is specifically defined in the agreement and does not mirror line 4 of the recital to the agreement. Instead, he said, it uses descriptions (a), (b) and (c) to be very precise and quite narrow and does not use the broad word "claim" used in the 1996 guidance note.

24. Mr Vallat further argued that the plain meaning of the agreement was clear and that there was no ambiguity or other reason to go behind that plain meaning. Even if there were ambiguity, it should, he said, be construed contra proferentem against HMRC whose predecessor had drawn up the agreement.

25. The first two lines of the operative part of the agreement say—

> "the Commissioners and the Council agree that the Commissioners will
>
> > (a) publish a press release inviting "relevant applications" to be made direct to Customs and Excise;".

We asked, if "relevant application" means an application already made, then could "relevant application" be used prospectively as it is in these first two lines of the agreement? Mr Vallat submitted that, if there is a problem, it is with that limb (a) and not with the part of the agreement which defines a "relevant application" as an application already made.

HMRC's submissions on construction issue

26. HMRC argued that "by opting for Method 2 the Local Authorities effectively assigned their rights to make a claim for repayment of VAT to the person who actually incurred the cost of the tax I.e. a private consumer or possibly a partially exempt trader.".

27. Mr Shepherd made five points in support of this argument.

(1) Reliance on extraneous letter dated 7 December 1995

28. Mr Shepherd submitted that, to construe the Method 2 agreement, it is helpful to look at a letter dated 7 December 1995. This letter was from the Association of Metropolitan Authorities to the Heads of Building Control at the Metropolitan Districts and London Boroughs. It is headed "BUILDING REGULATIONS AND VAT UPDATE Provides follow up information to that contained in Building Control Circuar [sic] 13/95 detailing on-going discussions with Customs and Excise regarding the VAT and building control fees". The last paragraph of the letter said—

> "Authorities are advised that discussions are still being urgently pursued in respect of the extent of retrospective application of the revised advice, and the detail and the cost of consequential repayment arrangements, both from Customs & Excise to local authorities and from local authorities to those who paid tax and seek repayment of it. In broad terms we are discussing an agreement whereby Customs & Excise would undertake – on the basis of a formal agreement with individual authorities – to make repayments on authorities' behalf, and we are seeking sufficient detail to enable authorities to make an informed choice as to the respective advantage of choosing that route or of opting to deal with repayment applications themselves. Customs have this week promised further draft advice in the very near future, and refer to this briefly at the end of the attached Business Brief. **The Associations will convey that further advice by Circular as soon as it is agreed. No further detail is currently available.**".

29. Mr Shepherd submitted that the second sentence (which we have underlined) helps us to understand the Method 2 agreement.

(2) Reliance on recital coupled with operative part of agreement

30. Mr Shepherd also relied on the word "Whereas" at the start of the third preambular paragraph of the Method 2 agreement: "Whereas, in the normal course of events, the Council [as a taxable person] would be involved itself in making a claim for repayment under section 80". He said that this, coupled with the part of the agreement which says "the Council agrees that it will not seek a repayment of VAT in its own right in respect of the tax attributable to the "relevant applications"", has the effect of a complete waiver of RBKC's right to make a claim under section 80.

(3) Argument that definition of "relevant application" is exhaustive

31. Mr Shepherd further submitted that the circumstances set out in limbs (a) to (c) of the definition of "relevant application" in the Method 2 agreement covered all situations of wrong VAT charging for building control by RBKC. Any application would have fallen into either (a), (b) or (c), he submitted. This meant, he submitted, that the agreement covered not just applications actually made, but any applications that could be made.

(4) Limb (c) of "relevant application" definition refers to any input tax deduction

32. Also, said Mr Shepherd, limb (c) in that definition refers to any input tax deduction and not necessarily to a full input tax deduction. This, he said, would cover

situations where an applicant did not have a full input tax deduction, that is, where the applicant is partly exempt.

(5) Asserted cut-off date for relevant applications

33. Mr Shepherd also took us to a template refund claim form headed "Claim for Refund of Value Added Tax in respect of Building Regulation Fees in England and Wales". It was labelled bottom left "VAT 72". He told us that this was a copy of the standard claim form issued by HMRC to anybody making a "relevant application".

34. He told us that "clearly there was a cut-off point for claims to be made to Customs, and it would appear from the bottom right of this form that it [the cut-off point] was clearly February 1996". He submitted that this conclusion arose from the fact that, at the bottom of the form, the telephone number of the Blackburn office (which he said dealt with <u>all</u> such claims) was listed as follows—

> "Up to 24/2/96: Contact No. is 01254 507515
>
> after 26/2/96: Contact No. is 01254 347515
>
> (for processing queries only).".

Mr Shepherd submitted that this suggested that there was a cut-off date of 24 February 1996 for making "relevant applications", and that this was "the best evidence we have of a cut-off date". He submitted that this showed that HMCE's practice was not to entertain claims from individuals as opposed to councils after 24 February 1996.

35. This appeared to us to assist the appellant's claim on a later point we had to consider, that is, whether or not any "relevant applications" were made. But Mr Shepherd submitted that it went to the issue we are presently considering; that is, it showed, he said, that the appellant had by the Method 2 agreement assigned <u>all</u> rights to claim a refund from HMRC, rather than assigning rights only to the extent that any "relevant applications" were actually made.

<u>Discussion: construction issue</u>

36. We saw no ambiguity in the words of the agreement such as to justify reliance on extraneous material to construe the agreement. But in any event, the letter of 7 December 1995 relied on by Mr Shepherd did not say that the agreement had an effect different from that contended by Mr Vallat. Mr Vallat accepted that any repayments by HMRC direct to applicants pursuant to the Method 2 agreement must be on RBKC's behalf, in view of section 80. But that did not help to construe whether the agreement operated as a complete waiver / assignment of all possible applications as opposed to a waiver / assignment only in respect of applications actually made.

37. Mr Shepherd's reliance on the third preambular paragraph coupled with the words after the first paragraph (c) in the agreement (paragraph 30 above), did not help his case. It took as its premise that "relevant applications" in the words after the first paragraph (c) meant any applications that could be made, rather than applications

actually made. But that premise was unproven and was the very question in issue, so the point took us no further.

38. As to Mr Shepherd's argument that the circumstances in the definition of "relevant applications" covered all possible applications (paragraph 31 above), that too took as its premise the very point in issue. That is, it relied on an assumption that the word "made" in each of (a), (b) and (c) of the definition of "relevant application" meant something other than actually made. The mere fact that the circumstances set out in limbs (a) to (c) in the definition of "relevant application" cover all potential applications is not inconsistent with the appellant's argument that "made" in those limbs means "actually made". If anything, the fact that the agreement comprehensively defines all possible applications that could be made (if it did) shows only that the drafter of the agreement was keen to be precise, which helps the appellant's argument that "made" means what it says.

39. Mr Shepherd's argument that limb (c) of the "relevant application" definition referred to any input tax deduction (paragraph 32 above) did not help his case either. It left unanswered the material question of whether the word "made" in the definition of "relevant application" meant "actually made" or meant "that could be made".

40. As to Mr Shepherd's point about the cut-off date on the application form (paragraphs 33 to 35 above), we could not see how this helped his case and he did not develop the point further.

41. We accept that the prospective use of "relevant application" in the first paragraph (a) in the agreement ("the Commissioners will publish a press release inviting "relevant applications" to be made") was not the best use of language. But it does not suffice in our judgment to detract from the very precise wording of the definition of "relevant application". We judge that first paragraph (a) to be short-hand for the otherwise lengthy description that might have to be used; for example, it might otherwise have to say "inviting applications to be made that fall within the definition of "relevant application" set out below".

42. Therefore, and for the reasons advanced by Mr Vallat, we find that the reference to "an application made by persons" in each of limbs (a) to (c) of the definition of "relevant application" in the Method 2 agreement, means an application actually made.

43. This means, in our judgment, that the Method 2 agreement operates as a waiver (or assignment) of RBKC's right to repayment only to the extent that any applications were actually made that fell within the definition of "relevant application" in the Method 2 agreement. So the questions then were whether any such applications had actually been made, and on which party the onus of proof lay on this point.

(2) Second issue: Burden of proof

RBKC's submissions

Legal burden

44. RBKC argued that it is HMRC who rely on the Method 2 agreement as a defence to RBKC's claim and that the legal burden of proof must therefore lie with HMRC to prove the amounts repaid pursuant to the agreement (in other words, to prove the monetary extent to which RBKC's claim must fail as a result of the agreement).

Evidential burden

45. RBKC argued, in the alternative, that even if the legal burden remained with RBKC on this point, the evidential burden had shifted to HMRC (it being common ground that RBKC had discharged its own initial burden to prove the amounts mistakenly paid as VAT).

46. In support of his argument that the evidential burden had shifted to HMRC, Mr Vallat relied on two facts which appeared to be common ground.

(1) RBKC had no involvement and so held no evidence of claims having been made

47. The first fact on which Mr Vallat relied was that, on HMRC's own case, RBKC would have had no involvement in any repayments made pursuant to "relevant applications" made direct to HMRC. That this should be the practical result of applying Method 2 is clear from paragraph 4.3 of the 1996 guidance note (paragraph 14 above) on which HMRC relied as part of their case and from paragraphs (b) and (c) (where they first occur) of the operative parts of the Method 2 agreement. HMRC did not suggest that RBKC did have any involvement in any repayments made to persons other than RBKC pursuant to the agreement. Nor were RBKC aware of having had any such involvement.

48. We find therefore that RBKC had no such involvement. It is very likely therefore, and we find, that they did not have any knowledge of or evidence of any "relevant applications" having been made (or paid, although the mere making of a relevant application would have sufficed to trigger the waiver/assignment, in our judgment).

(2) HMRC did have involvement and so would have held evidence of any claims made

49. The second fact on which Mr Vallat relied was that HMRC, on their own admission, were the ones who would have held evidence of any "relevant applications" having been made. He submitted that, in such a case, *Wood v Holden* [2006] EWCA Civ 26 CA requires a finding that the evidential burden has passed to HMRC.

50. In *Wood v Holden*, the taxpayers had entered into a scheme to mitigate the charge to capital gains tax under section 86 of the Taxation of Chargeable Gains Act 1992 on

the disposal by the taxpayers of their company. The case turned on the residence of a company, Eulalia, incorporated in the Netherlands. HMRC had charged capital gains tax, finding that Eulalia was resident in the UK for tax purposes. The Special Commissioners had dismissed the taxpayers' appeal, holding that the taxpayers had not established that Eulalia was not resident in the UK for tax purposes. They had held that Eulalia's central management and control were situated in the UK, and that Eulalia was therefore resident in the UK and not in the Netherlands. The taxpayers appealed to the High Court. The High Court reversed that finding, upholding the taxpayers' appeal. HMRC appealed to the Court of Appeal. The Court of Appeal found for the taxpayers—

> "**[30]**…The judge accepted that the Special Commissioners had been correct, in principle, to approach the matter on the basis that it was for Mr and Mrs Wood to show that the amendments made to their self assessments in October 2001 had been wrongly made [in view of section 50(6) of the Taxes Management Act 1970]…But he went on:
>
> > 'However, there plainly comes a point where the taxpayer has produced evidence which, as matters stand then, appears to show that the assessment is wrong. At that point the evidential basis must pass to the Revenue.'
>
> The judge's conclusions at para [63] must be read with those observations in mind.
>
> **[31]** At para [63] of his judgment the judge said this:
>
> > '[63] … in so far as the Commissioners decided this appeal against Mr and Mrs Wood on grounds relating to the burden of proof (and the opening part of para SC145 suggests that those were the critical grounds for the decision), I consider that they were in error.'
>
> He could not have been intending to suggest, in that paragraph, that the Special Commissioners had been wrong in principle to approach the matter on the basis that it was for Mr and Mrs Wood to show that the adjustments to their self-assessments had been wrongly made. Rather, I think, he was stating his conclusion that the Special Commissioners had been wrong in failing to appreciate that the evidential burden had passed to the Revenue in the present case. He had set out his view of the position at para [60]…
>
> **[32]** As the judge pointed out, the Revenue had produced no positive material to show where the central control and management of Eulalia was. It was not enough (as the judge thought) for the Revenue to criticise the lack of evidence from some of those at Price Waterhouse and ABN AMRO who had been involved in the transaction in 1996…
>
> **[33]** In *Rhesa Shipping Co SA v Edmunds, The Popi M* [1985] 1 WLR 948 at 955-956 Lord Brandon of Oakbrook pointed out that a judge is not bound, always, to make a finding one way or the other with regard to facts averred by the parties: 'He has open to him the third alternative of saying that the party on whom the burden of proof lies in relation to any averment made by him has failed to discharge that burden'. But that is not a course which should be adopted unless 'owing to the unsatisfactory state of the evidence or otherwise, deciding on the burden of proof is the only just course for him to take'. It is a feature of tax litigation—not least where the litigation arises from a tax avoidance scheme—that, in the first instance, the facts are likely to be known only to the

taxpayer and his advisers. The Revenue will not have been party to the transaction; and will know only those facts which have been disclosed by the taxpayer or others; following, perhaps, the exercise of the Revenue's investigatory powers. I have no doubt that there are cases in which the evidence before the Special Commissioners is so unsatisfactory that the only just course for them to take is to hold that the taxpayer has not discharged the burden of proof which s 50(6) TMA 1970 has placed upon him. But, equally, I have no doubt that the judge was correct, for the reasons which he gave, to hold that the present case was not one of those cases. There was no reason to think that the material facts had not been disclosed; and the commissioners did not hold that it was for that reason that they were unable to decide the question of residence. I agree with the judge that, in the present case, the 'third alternative' to which Lord Brandon referred in *Rhesa Shipping* was not one which was properly open to the Special Commissioners.".

51. Mr Vallat submitted that the effect of *Wood v Holden* was that where the taxpayer had done enough, it was not acceptable for HMRC to sit on their hands. He submitted that the present case is more extreme than *Wood v Holden* because the evidence in the present case was never available to the appellant. He submitted that paragraph 32 of *Wood v Holden* makes this point in reverse: unlike the present case, the taxpayer in *Wood v Holden* had the evidence, not the Revenue. But even there, the evidential burden shifted to the Revenue. In RBKC's case, he submitted, the appellant never had the evidence in the first place.

52. Mr Vallat also took us to paragraphs 769 to 775 of Volume 11 of *Halsbury's Laws of England, 5th edition (2009)*. Paragraph 769 says—

> "…The evidential burden...requires the party bearing the burden to produce evidence capable of supporting but not necessarily proving a fact in issue; the burden rests upon the party who would fail if no evidence at all, or no further evidence, as the case may be, was adduced by either side: see *Joseph Constantine Steamship Line Ltd v Imperial Smelting Corpn* Ltd [1942] AC 154, [1941] 2 All ER 165, HL; *Huyton-with-Roby UDC v Hunter* [1955] 2 All ER 398, [1955] 1 WLR 603, CA; *Brown v Rolls Royce Ltd* [1960] 1 All ER 577, [1960] 1 WLR 210, HL." [our emphasis].

Mr Vallat submitted that it is HMRC whose case would fail if no evidence at all, or no further evidence, was adduced by either side.

53. Mr Vallat also took us to paragraph 772 of the same volume of *Halsbury's Laws*—

> "Where the truth of a party's allegation lies peculiarly within the knowledge of his opponent, the burden of disproving it often lies upon the latter (*R v Edwards* [1975] QB 27, [1974] 2 All ER 1085, CA), but there is no general rule of law to this effect (*R v Edwards*). There is authority contrary to this exception [citing inter alia *Doe d Bridger v Whitehead* (1838) 8 Ad & El 571], but it certainly exists and has frequently been applied by the courts.".

In other words, said Mr Vallat, if you know, or have better access to, the position, you cannot sit on your hands.

54. Looking at the case issue by issue, he submitted, the legal burden for proving the case overall rests with RBKC. The legal burden for proving the agreement rests with

HMRC, he submitted, because the agreement (depending on how construed) would defeat an otherwise good claim. He accepted (and we agree) that that HMRC burden has been discharged because the appellant agrees that the agreement was entered into and that it can defeat an otherwise good claim. But, he submitted, the evidential burden as to whether "relevant applications" were made had to have shifted to HMRC because (by HMRC's own admission) they were the ones, and the only ones, in control of the evidence on that point. The fact that they say they are unable to produce any such evidence that may have existed, because they destroyed it, does not, submitted Mr Vallat, let HMRC off the hook. The facts remain that they were the only ones in control of the evidence, and they were the ones who destroyed it. How, he argued, could it possibly, in that situation, fall to the appellant to prove what claims were not made, as compared with requiring HMRC to prove what claims were made?

HMRC's submissions on burden of proof

55. HMRC's position was that the burden of proof remained with RBKC because it is for RBKC to prove their case on appeal, not for HMRC to disprove it.

56. In support of this argument, Mr Shepherd submitted that it is a common issue with *Fleming* claims that, given the passage of time, there is a high incidence of lack of evidence from any party to support the claim. This is where matters have, he submitted, to go to best judgment on a balance of probabilities as to whether a claim is valid or not.

57. He submitted also that HMRC had no need to keep evidence of claims past the six-year time limit imposed on HMRC to do so, so the burden should not be on HMRC to show which claims (that is, which "relevant applications") were made. He adduced at the hearing, with Mr Vallat's consent to its lateness, an email string from HMRC colleagues—

> "**From**: David Pemberton (ESS Customer & Support Services)
>
> **Sent**: 30 July 2010 13:43
>
> **To**: Mary Greenwood (BIAA Anti-Avoidance)
>
> **Subject**: Re: Building Control Fees – Claims under Fleming
>
> Mary
>
> I am almost certain documentation did exist on this project and if I am correct Jenni Hindle was involved, but looking at the dates it would definitely have been destroyed over the last month because we are freeing up space for 30 staff to join us from Accrington and Burnley.
>
> Sorry
>
> Dave Pemberton"

"**From**: Mary Greenwood

Sent: 30 July 2010 15:07

To: David Roberts (CT & VAT London)

Subject: Fw: Building Control Fees – Claims under Fleming

David

Please see the reply below [referring to the Dave Pemberton email above]. It appears that all old records have been destroyed very recently.

I do recall the policy issues, but as to details of individual claims, without the original records there will be no way to trace these.

The payments were issued from Queens Dock, so there may be something available from that end, as they would have required names and addresses. But payment details would not have included the relevant local authority.

Sorry this hasn't been more helpful.

Mary"

"**From**: David Roberts (CT & VAT London)

Sent: 30 July 2010 15:30

To: Lynda Barbato (CT & VAT, London); Marco Criscuolo (CenPol TaxAdminAdvice)

Cc: Timothy Maughan (LocalCOMP I&PB Public Bodies); Steven Gould (LocalCOMP I&PB Public Bodies)

Subject: RE: Building Control Fees – Claims under Fleming

I'm afraid Blackburn think the records gave [sic] been destroyed, although there is a suggestion that QD may hold sthg – I've no idea of where to even start making enquiries in QD !

D".

58. Mr Shepherd told us that David Pemberton was based at the Blackburn office and that it was to that office that "all claims on this" were sent.

59. We asked Mr Shepherd whether, to the best of his knowledge, anyone at HMRC had made efforts to identify and retain information relevant to pending claims (that is, claims such as the one under appeal). He told us—

> "No, it only came to light later. Yes, that evidence that might have been helpful was destroyed. And it could have been destroyed as early as 2004, from HMCE's time limit requirement to retain these records.".

Mr Vallat pointed out that, according to David Pemberton's email above, any evidence which existed of relevant applications having been made would definitely have been destroyed in the period 30 June to 30 July 2010. Mr Vallat reminded us that this was over a year after the claim by RBKC was submitted (on 27 March 2009) to HMRC.

Discussion: burden of proof

60. We find, for the reasons advanced by both parties, that RBKC never had evidence or knowledge of any relevant applications having been made to HMCE (or HMRC).

61. We accept that HMRC were the only ones (as between the parties) who would have held such evidence and had such knowledge. We accept too that HMRC no longer have evidence of any relevant applications having been made to them, because they destroyed any evidence they may have held. We do not read David Pemberton's email as saying that any such evidence was destroyed in 2010 and not before. We think he almost certainly meant that, if any had still existed by the time of the clear out in 2010, then it would have been destroyed in that clear out. We make no finding as to when any evidence was destroyed, except that we accept that it could have been destroyed as early as 2004, as Mr Shepherd submitted. However, that does not alter the fact that HMRC were the only ones who, as between the parties, would have held the evidence in the first place.

62. We do not accept Mr Shepherd's submission that the fact that HMCE (or HMRC) were not obliged to retain such evidence beyond six years means that they do not bear the evidential burden of proving what relevant applications were made. Of the two parties, HMRC were the only ones to have ever held such evidence, or to have had knowledge of relevant applications having been made. It would be unreasonable, and unjust, to expect RBKC to adduce evidence of relevant applications not having been made (quite apart from the obvious difficulty of requiring them to prove a negative).

63. The factors set out at paragraphs 60 to 62 above suffice, in our judgment, for the evidential burden to have shifted to HMRC in light of *Wood v Holden*.

64. But in addition, on their own evidence, HMRC knew as far back as 16 September 1997 that RBKC had chosen Method 2; HMRC had recorded this choice on a list dated 16 September 1997 (paragraph 15 above). So HMRC were, we find, on notice from that date that they needed to keep evidence about the operation of Method 2 in relation to RBKC. But they still destroyed it at least seven years later, in 2004, if not later.

65. In any event, when considering whether to enact section 121 of the Finance Act 2008, the Crown should have realised and taken into account that HMRC may need to retain evidence beyond the six-year mark. Even if all relevant evidence held by HMRC and their predecessors had been destroyed by then, section 121 must have

been enacted in the knowledge that it would allow claims that would post-date HMCE/HMRC's six-year time limit for retaining evidence. It is not clear whether the Method 2 agreement was entered into before or after the enactment of section 121. But either way, if the Crown did not want to accede to claims such as the present one, it should have been more careful before allowing a situation to arise whereby a claim could be made which depended, as it turned out, on HMRC adducing evidence which only HMRC would have and which HMRC no longer held.

66. For these reasons, as well as those advanced by Mr Vallat, we find that the evidential burden was on HMRC to prove what "relevant applications" were made, rather than on RBKC to prove what "relevant applications" were not made.

67. We should make clear that we do not view the *Halsbury's Laws* citations as binding. They are simply a helpful summary of the position established by caselaw.

(3) Third issue: Whether burden discharged

68. Mr Vallat reminded us that paragraph 32 of *Wood v Holden* holds that we can decide the appeal on the basis that the burden of proof has not been discharged, but only as a last resort. He submitted that the present case does require us to take the course of last resort, that is, to decide that HMRC's burden of proving that "relevant applications" have been made has not been discharged, rather than requiring a positive decision that there have been no such applications.

69. HMRC's position was that "having opted for Method 2, under the balance of probabilities, any 'Fleming' claims [that is, "relevant applications"] that have been submitted, are very likely to have been repaid already either in full or in part under the process agreed between the Local Authorities and Customs & Excise". That does not however address the material question of whether any claims were submitted in the first place.

70. We find, based on HMRC's own evidence (set out above), that they had by the time of the hearing no evidence of any "relevant applications" having been made. We accept that any destruction by HMRC was not done in bad faith and Mr Vallat retracted his initial suggestion (based on an earlier HMRC document) that HMRC had declined to produce the evidence. Nevertheless, the evidence was not there.

71. It is clear therefore, and we find, that HMRC have not discharged the burden of showing what "relevant applications" were made within the meaning of that phrase in the Method 2 agreement. We agree with Mr Vallat that this is a case where it is appropriate to find that the burden was not discharged.

Unjust enrichment

72. Mr Vallat told us that it is not suggested that, if this appeal were to succeed, RBKC will repay the refunded VAT to those persons who originally paid it. He said that those persons could not be identified and that the refund would just go into RBKC's coffers.

73. Mr Vallat submitted that unjust enrichment is a defence to a claim (under section 80(3) of the Value Added Tax Act 1994). He submitted that it is therefore for HMRC to plead and prove a case on unjust enrichment, rather than for the appellant to raise and disprove it. This is clear, he said, from the words of section 80(3). He directed us, in support of this proposition, to *CCE v National Westminster Bank plc* [2003] EWHC 1822 (Ch) at paragraphs 23 to 27 and to *Reed Employment Ltd v RCC (No 3)* [2013] UKUT 0109 (TCC) at paragraphs 60 to 62.

74. Mr Shepherd told us that unjust enrichment was not considered by HMRC at the time the decision under appeal was made and that HMRC have taken the view that they will not now raise it on the appeal.

75. Both parties were agreed that unjust enrichment cannot be addressed by the tribunal of its own volition; they agreed that, for it to be addressed, it has to be raised by a party.

76. This does appear to be the effect of the word "defence" in section 80(3). So, as neither party raised unjust enrichment before us, we do not address it.

77. The appeal is allowed.

78. Our thanks to both parties for very helpful and thorough statements of case and skeleton arguments.

Appealing against this decision

79. This document contains full findings of fact and reasons for the decision. 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. 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.

RACHEL PEREZ
TRIBUNAL JUDGE

RELEASE DATE: 30 July 2014