

# Restitution & VAT

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Etienne Wong  
Tax Chambers  
15 Old Square

Corrections in red

# Overview I: General

- Where a Member State collects tax in breach of EU law, the taxpayer has the right to a refund
  - *San Giorgio*, C-199/82
- Absent detailed EU rules, how the taxpayer obtains the refund is left to the Member State

# Overview II: EU Principles

- Equivalence: the applicable rules must not be less favourable than those for domestic claims
  - *Marks & Spencer*, C-62/00
- Effectiveness: the rules cannot make it virtually impossible or excessively difficult to obtain the refund
  - *Marks & Spencer*, C-62/00
- Legal certainty: time limits are compatible with EU law
  - *Aprile*, C-228/96

# Overview III: UK Rules

- Section 80 VATA
  - Section 80(2A) & sections 81(3) & 81(3A)
    - Set-off for over-deducted input tax
  - Section 80(3)
    - Unjust enrichment defence
  - Section 80(4)
    - Time limits (the so-called three-year (now four-year) cap)
      - The last three / four years
      - Before 4 December 1996
      - In between: the “dead period”
  - Section 80(7)
    - “Except as provided by this section ... the Commissioners shall not be liable to credit or repay any amount accounted for or paid to them by way of VAT that was not VAT due to them”

# Example: Facts

- X buys in services and pays VAT of 25
- X supplies services to its client and charges VAT of 100
- X accounts for and pays HMRC VAT of 75
  
- If VAT was not in fact due:
  - X would not be able to recover the 25
  - X would not be liable to account for the 100
  - Section 80(4) VATA: X is entitled to recover 75
  - Section 80(3) VATA: in most cases, the 75 is passed back to the client

# Example: Comparison I

- What should have happened?
  - X – VAT cost of 25
  - Client – no VAT cost
- What did happen?
  - X – no VAT cost
  - Client – VAT cost of 100
- What happens under section 80 VATA?
  - X – no VAT cost
  - Client – VAT cost of 25

# Claim against X?

- Contractual claim
  - Rare
- Mistake of law claim
  - Change of position
    - “... [X]’s position is so changed that he will suffer an injustice if called upon to repay or to repay in full, the injustice of requiring him so to repay outweighs the injustice of denying the [client] restitution”
      - Lord Goff of Chieveley, *Lipkin Gorman v Karpnale* [1991] 2 AC 548

# Claim against HMRC?

- *Investment Trust Companies*
  - HMRC's mistake: charging VAT on the management of special investment funds
    - *Claverhouse*, C-363/05
- Unjust enrichment
  - Has HMRC been enriched?
  - Was it **at** the claimants' expense?
  - Was the enrichment unjust?
  - Are there any defences?
    - Lord Steyn, *Banque Financiere* [1999] AC 221

# *Investment Trust Companies: High Court*

- [2012] EWHC 458
- HMRC was enriched
  - 100, not 75
- Was it at the claimants' expense?
  - Considerations:
    - Close causal connection between payment and enrichment?
    - Risk of double recovery?
    - Conflict with contracts?
    - Disgorgement, not compensation or damages
  - Economic and commercial reality
- Section 80(7) VATA
  - "... exhaustive and exclusive machinery for the recovery of undue VAT, subject to a relatively strict time limit for the making of claims"
  - Claims for the "dead period" time-barred

# *Investment Trust Companies: Europe*

- *Danfoss*, C-94/10
  - A Member State may oppose a claim for refund from the tax-bearer
  - Provided that:
    - The tax-bearer is able to bring a civil action against the taxpayer
    - Recovery from the taxpayer is not virtually impossible or excessively difficult
      - Principle of effectiveness

# *Investment Trust Companies: Court of Appeal*

- [2015] EWCA Civ 82
- HMRC was enriched
  - 75, not 100
- Managers were enriched
  - 25
- Was the enrichment at the claimants' expense?
  - Indirect benefit can be sufficient (against HMRC)
  - Change of position?
- Section 80(7) does not extend to the tax-bearer
  - Section 32(1)(c) Limitation Act 1980 applies

# Example: Comparison II

- What should have happened?
  - X – VAT cost of 25
  - Client – no VAT cost
- What did happen?
  - X – no VAT cost
  - Client – VAT cost of 100
- What happens under section 80 VATA?
  - X – no VAT cost
  - Client – VAT cost of 25
- What happens now?
  - X – VAT cost of 25
  - Client – no VAT cost

# *Investment Trust Companies: Aftermath*

- Who benefits?
- Claim against X
  - Change of position?
- Claim against HMRC?