VALUE ADDED TAX – flat-rate scheme for farmers – application for permission to make late appeal against cancellation of certificate – whether refusal of permission to make a late appeal breached principle of effectiveness under EU law – no – appeal dismissed

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

Appeal number: UT/2019/000001

BETWEEN

HAMPTON GEORGE HEWITT **Appellant**

-and-

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

TRIBUNAL: JUDGE THOMAS SCOTT
JUDGE ASHLEY GREENBANK

Sitting in public by way of remote video hearing treated as taking place in Belfast on 9 June 2021

Robert Maas, of Carter Backer Winter LLP, for the Appellant

Barbara Belgrano, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

INTRODUCTION

1. This appeal concerns an application by the appellant, Mr Hampton George Hewitt, for permission to make a late appeal against a decision of the respondents, the Commissioners for Her Majesty's Revenue and Customs ("HMRC"), to cancel Mr Hewitt's certificate as a flat-rate farmer for VAT purposes.

2. The application was refused by the First-tier Tribunal (Judge Alastair Rankin) (the "FTT"). The FTT's decision was first released in summary form on 7 February 2019 and then with full written findings and reasons on 28 February 2019. The full decision is reported as [2019] UKFTT 152 (TC). In this decision, our references to paragraphs in the FTT's decision are to the paragraphs in the full decision.

3. As will be seen below, the FTT refused the application, applying the principles set out by the Upper Tribunal in *Martland v HMRC* [2018] UKUT 178 (TCC) ("*Martland*") referring to the approach of the Court of Appeal in *Denton and others v TH White Limited and others* [2014] EWCA Civ 906 ("*Denton*"). There is no challenge on this appeal to the adoption of those principles by the FTT. The only issue raised on this appeal is whether the EU law principle of effectiveness requires that Mr Hewitt be granted permission to appeal against the cancellation of his certificate notwithstanding that his appeal is over five years out of time.

LEGISLATIVE BACKGROUND

4. We will first set out some of the legislative background to this appeal.

5. The agricultural flat-rate scheme ("AFRS") is a simplification measure. The scheme is an alternative to VAT registration for farmers and other people involved in agricultural production activities. A person who is operating under the AFRS (a "flat-rate farmer") is not registered for VAT, does not submit VAT returns and is not able to reclaim input tax on their business purchases, but instead is allowed to charge and retain a flat rate addition to the price of qualifying goods and services sold to VAT registered customers. The flat rate addition is currently set at 4%.

6. The AFRS is an EU-wide scheme. It is provided for in Articles 295 to 305 of Council Directive 2006/112/EC (the "Principal VAT Directive"). The AFRS is implemented in UK domestic law by section 54 of the Value Added Tax Act 1994 ("VATA"). Regulations have been made under section 54 VATA and are contained in regulations 202 to 211 of the Value Added Tax Regulations 1995 (SI 1995/2518) (the "VAT Regulations").

7. Regulation 203 of the VAT Regulations provides for HMRC to certify that a person is entitled to operate the AFRS where certain conditions are met. Those conditions are set out in regulation 204. Regulation 206 then contains provisions which permit HMRC to cancel a person's certificate in certain circumstances. These include, in regulation 206(1)(i), where they "consider it necessary for the protection of the revenue".

8. A person whose certificate as a flat-rate farmer has been cancelled by HMRC has a right to appeal to the FTT against the cancellation. That right is contained in section 83 VATA. It provides, so far as relevant:

> (1) Subject to sections 83G and 84, an appeal shall lie to the tribunal with respect to any of the following matters—
>
> …
>
> (m) any refusal or cancellation of certification under section 54 or any refusal to cancel such certification;

…

9. The time limits for making an appeal are set out in section 83G VATA. This provides, so far as relevant:

> (1) An appeal under section 83 is to be made to the tribunal before—
>
> (a) the end of the period of 30 days beginning with—
>
> (i) in a case where P is the appellant, the date of the document notifying the decision to which the appeal relates, or
>
> (ii) in a case where a person other than P is the appellant, the date that person becomes aware of the decision, or
>
> ...
>
> (2) But that is subject to subsections (3) to (5).
>
> …
>
> (4) In a case where HMRC are requested to undertake a review in accordance with section 83E—
>
> (a) an appeal may not be made—
>
> (i) unless HMRC have notified P, or the other person, as to whether or not a review will be undertaken, and
>
> (ii)if HMRC have notified P, or the other person, that a review will be undertaken, until the conclusion date;
>
> (b) any appeal where paragraph (a)(ii) applies is to be made within the period of 30 days beginning with the conclusion date;
>
> (c) if HMRC have notified P, or the other person, that a review will not be undertaken, an appeal may be made only if the tribunal gives permission to do so.
>
> …
>
> (6) An appeal may be made after the end of the period specified in subsection (1), (3)(b), (4)(b) or (5) if the tribunal gives permission to do so.
>
> (7) In this section "conclusion date" means the date of the document notifying the conclusions of the review.

So, in summary, section 83G provides that an appeal must be made to the FTT within 30 days of the decision to which the appeal relates or, where a decision has been subject to a statutory review, within 30 days of the conclusion of that review. However, an appeal may be made after the end of the relevant 30-day period, if the Tribunal gives permission to do so.

FACTS

10. We have set out a summary of the facts below. It is derived principally from [2] to [11] of the FTT's decision.

(1) Mr Hewitt is a farmer. He applied for certification under the AFRS on 18 June 2004. He was granted certification with effect from 1 July 2004.

(2) Following earlier correspondence, HMRC wrote to Mr Hewitt on 26 October 2012 to advise him that they were cancelling his certification under the AFRS with effect from 31 October 2012 on the ground that they considered it necessary for the protection of the revenue (i.e. within regulation 206(1)(i) VAT Regulations). HMRC took this view because the compensation Mr Hewitt derived from the receipt of the flat-rate addition substantially exceeded the input tax which Mr Hewitt would have been able to recover if

he had been registered for VAT. This approach was consistent with the provisions of VAT Notice 744/46 (paragraph 7.2) in the form in which it was published at the time. It is against this decision which Mr Hewitt now seeks permission to make a late appeal.

(3) HMRC's decision letter included paragraphs informing Mr Hewitt of his right to appeal the decision by asking either for a statutory review or by appealing directly to the FTT and setting out the relevant time limits for doing so.

(4) Mr Hewitt replied by letter dated 2 November 2012 stating that:

> "I hereby confirm that I will comply with your decision to take me off the scheme. I am however disappointed with your decision as I have endeavoured to comply."

(5) The time period for Mr Hewitt to appeal against the decision under section 83G VATA expired on 25 November 2012.

(6) By letter dated 15 October 2012, HMRC wrote to another farmer, Shields & Sons Partnership ("Shields"), advising them that their certificate was being revoked on the same grounds as Mr Hewitt. Shields appealed to the FTT. The FTT dismissed the appeal in a decision dated 8 October 2014.

(7) Shields appealed to the Upper Tribunal. In a decision dated 16 March 2016 (with neutral citation [2016] UKUT 142 (TCC)), the Upper Tribunal (Nugee J, as he then was) referred two questions to the Court of Justice of the European Union ("CJEU")[1]. Those two questions were:

(a) whether Article 296(2) of the Principal VAT Directive laid down exhaustively all the cases in which a member state may exclude a farmer from the common flat-rate scheme for farmers; and

(b) if so, whether farmers who are found to be recovering substantially more as members of the common flat-rate scheme for farmers than they would if they were subject to the normal VAT arrangements could constitute a category of farmers which could legitimately be excluded within the meaning of Article 296(2) of the Principal VAT Directive.

(8) The CJEU issued its decision on 12 October 2017 (Case C-262/16 *Shields & Sons Partnership v HMRC*, [2017] STC 2205 ("*Shields CJEU*")). The CJEU's answers to the two questions were:

(a) Article 296(2) of the Principal VAT Directive must be interpreted as laying down exhaustively all the cases in which a member state may exclude a farmer from the common flat-rate scheme for farmers; and

(b) Article 296(2) of the Principal VAT Directive must be interpreted as meaning that farmers who are found to be recovering substantially more as members of the common flat-rate scheme for farmers than they would if they were subject to the normal VAT arrangements or the simplified value added tax arrangements cannot constitute a category of farmers within the meaning of that provision.

(9) The effect of the CJEU decision was that HMRC's decision to exclude Shields from the AFRS on the grounds that they were recovering substantially more under the AFRS than they would if they were subject to the normal VAT arrangements was not valid. As a result of the CJEU's decision, the Upper Tribunal allowed Shields' appeal in

[1] In this decision, we have referred to both the Court of Justice of the European Union and its predecessor the European Court of Justice as the "CJEU".

a decision dated 21 December 2017 and reported as *Shields & Sons Partnership v HMRC* [2017] UKUT 504 (TCC).

(10) On 7 March 2018 Mr Hewitt's accountants, McCleary & Company Ltd ("McCleary"), wrote to HMRC claiming that HMRC were wrong to have removed Mr Hewitt from the AFRS. Based on the decision in *Shields CJEU*, they asked HMRC to reinstate Mr Hewitt in the AFRS and to pay him a refund of £65,687.87.

(11) HMRC replied by letter dated 20 March 2018 refusing to reinstate Mr Hewitt in the following terms:

> "Thank you for your letter received in this office on 12 February 2018 asking for [Mr Hewitt] to have his Agricultural Flat Scheme certificate reinstated.
>
> This request is based on the decision made by the European Court of Justice in the case of *Shields & Sons Partnership v Revenue & Customs Commissioners*.
>
> Unfortunately I cannot reinstate the Agricultural Flat Rate certificate on the basis of the *Shields* case.
>
> I have reviewed the application that was submitted in the name of [Mr Hewitt]. Assuming the application, if approved, would be from a current date, on the information provided the application would be refused. This is because the gain would be more that £3,000 in the year of trading following your application[2].

HMRC's letter offered Mr Hewitt a review of the decision to refuse the application to join the AFRS from "a current date" or the opportunity to appeal to the FTT against that decision.

(12) McCleary replied to HMRC by letter dated 4 April 2018 stating that HMRC's decision not to reinstate Mr Hewitt in the AFRS was without foundation, and that the decision in *Shields CJEU* meant that Mr Hewitt could not be excluded from the AFRS.

(13) HMRC wrote to McCleary again on 14 June 2018 dealing with the request to reinstate Mr Hewitt to the AFRS with effect from 31 October 2012 and to refund a total of £65,687.87. HMRC stated that the offer of a review contained in their letter of 20 March 2018 applied only to the decision to refuse the application to join the AFRS from "a current date". HMRC's letter also addressed the time limits which applied to Mr Hewitt's rights to appeal against HMRC's original decision to cancel Mr Hewitt's certificate (contained in their letter of 26 October 2012). HMRC explained that they would only consider a request for a review of that decision if Mr Hewitt had a reasonable excuse for failing to ask for a review within 30 days of the original decision. In HMRC's view, no reasonable excuse had been put forward and there was no reason for the statutory time limits to be extended in Mr Hewitt's case.

(14) Mr Hewitt appealed to the FTT by a notice of appeal dated 3 July 2018.

The FTT Decision

11. As his appeal was outside the time limit for an appeal set out in section 83G(1) VATA, Mr Hewitt required the permission of the Tribunal to bring a late appeal under section 83G(6). Mr Hewitt's application for permission to bring a late appeal was heard by the FTT on 4 February 2019.

[2] The £3,000 limit is a reference to regulation 204(d) of the VAT Regulations.

12. The FTT records in its decision (FTT [14]-[27]) the arguments put to the FTT by Mr Maas on behalf of Mr Hewitt as follows:

(1) Mr Maas referred to the decisions of the CJEU in Case C-240/87 *C Deville v Administration des Impots* ("*Deville*") and Case C-397/98 *Metallgesellschaft Ltd and others v Commissioners of Inland Revenue* ("*Metallgesellschaft*") and the decision of the House of Lords in *Fleming (trading as Bodycraft) v HMRC* [2008] UKHL 2 ("*Fleming*") concerning the ability (or otherwise) of EU member states to impose restrictions on the enforcement of EU law rights through provisions of national law or procedural rules.

(2) By reference to the decisions in *Martland* and *Denton*, Mr Maas argued that Mr Hewitt should be entitled to bring his appeal:

(a) although the delay in bringing his appeal was clearly substantial, Mr Hewitt could not have been aware that the UK law provisions did not properly transpose the relevant provisions of the Principal VAT Directive into UK law until the CJEU decision in *Shields CJEU*;

(b) it was not unreasonable for Mr Hewitt to wait for a reasonable period for HMRC to issue some guidance on the application of the CJEU decision in *Shields CJEU* before asking for his certificate to be reinstated;

(c) the implications for Mr Hewitt were significant and HMRC would not be prejudiced by granting permission to appeal.

13. Having recorded the arguments on behalf of HMRC, the FTT set out its reasons for refusing to grant permission:

(1) The FTT distinguished the various authorities on which Mr Hewitt relied as follows (FTT [38]-[40]).

(a) *Deville* concerned legislation introduced by an EU member state (France) to comply with a previous judgment of the CJEU. The UK had not introduced new legislation following the CJEU decision in *Shields CJEU*.

(b) *Metallgesellschaft* did not concern the application of time limits.

(c) *Fleming* concerned the introduction of retrospective legislation. There was no retrospective legislation involved in this appeal.

(2) The FTT noted that no reason had been given by Mr Hewitt as to why he chose not to appeal or request a review of HMRC's decision in 2012 as Shields had done (FTT [42]).

(3) Applying the approach of the Court of Appeal in *Denton* (as referred to by the Upper Tribunal in *Martland* at [44]), the FTT:

(a) found that the delay was both serious and significant;

(b) found that Mr Hewitt had put forward no reason for the delay other than the decision in *Shields CJEU*;

(c) accepted HMRC's arguments that permission should not be granted given the potential prejudice to HMRC and the public interest in the finality of proceedings (FTT [43]).

14. The FTT accordingly refused to grant permission for Mr Hewitt to make a late appeal.

GROUNDS OF APPEAL

15. Mr Hewitt applied for permission to appeal to this Tribunal. The FTT granted permission.

16. There is, in effect, only one ground of appeal. This is that, in refusing to grant Mr Hewitt permission to make a late appeal, the FTT erred in law by failing to give full effect to the EU law principle of effectiveness, which required that Mr Hewitt be given an effective remedy to enforce his EU law rights.

THE PARTIES' SUBMISSIONS IN OUTLINE

17. We will address the submissions made by the parties in more detail in the context of our discussion of the issues below. However, we will briefly outline the parties' submissions at this point as it will provide a framework for that discussion.

18. Mr Hewitt's case is founded entirely on EU law rights. In summary, Mr Maas, on behalf of Mr Hewitt, says that once the UK had decided to implement the AFRS, Mr Hewitt had a right under the Principal VAT Directive to be treated as a flat-rate farmer under the scheme. The imposition of a time limit of 30 days to appeal against HMRC's decision to cancel Mr Hewitt's certificate, expiring at a time when Mr Hewitt could not be aware that he had an enforceable right, made it impossible or excessively difficult for Mr Hewitt to enforce his EU law right. That was a breach of the principle of effectiveness.

19. At its highest, Mr Maas's submission is that the EU law principle of effectiveness requires that there is no time limit on the enforcement of EU law rights when a directly effective EU law right is not properly transposed into national law. In the alternative, he says that the principle of effectiveness requires that the effectiveness of Mr Hewitt's remedy should be judged at the time at which he was as a practical matter able to enforce his rights. That was not until the availability of the right was confirmed by the CJEU's decision in *Shields CJEU*. Mr Maas accepts that the argument was not put in these terms before the FTT.

20. Ms Belgrano, for HMRC, submits that Mr Hewitt had an effective right of appeal before the decision of the CJEU in *Shields CJEU*. The case law demonstrates that time limits are compatible with the principle of effectiveness; there is no requirement that a time limit cannot be relied upon until an EU law right is established as a result of a decision of the CJEU; and the principle of effectiveness does not require that time cannot run for the purposes of a time limit until a taxpayer is aware of their rights. The principle of effectiveness was not breached by the FTT's decision.

THE EFFECT OF THE UK'S WITHDRAWAL FROM THE EU

21. As a preliminary point, we asked the parties in advance of the hearing for submissions on the effect of the UK's withdrawal from the EU on the application of the principle of effectiveness in this case.

22. It was common ground between the parties that the principle of effectiveness was a "retained general principle of EU law" within the meaning of section 6(7) European Union (Withdrawal) Act 2018 ("EUWA 2018") and that it should be given full effect in relation to the matters under consideration in these proceedings. The restriction in paragraph 3 Schedule 1 EUWA 2018[3] did not apply as a result of the application of the transitional provision in paragraph 39(3) Schedule 8 EUWA 2018 for proceedings begun before "IP completion day" (11pm on 31 December 2020).

[3] Paragraph 3 provides that there is no right of action in domestic law on or after IP completion day based on a failure to comply with any general principle of EU law and that after that date no court or tribunal may disapply or quash any enactment or other rule of law, or quash any conduct or otherwise decide that it is unlawful, because it is incompatible with any general principle of EU law.

RELEVANT CASE LAW ON THE EU LAW PRINCIPLE OF EFFECTIVENESS

23. We were referred by the parties to a number of authorities on the application of the EU law principle of effectiveness. Without embarking on a comprehensive review of those cases, we have set out in this section the main principles that we derive from them.

The principle of effectiveness: general principles

24. It is for the domestic legal systems of EU member states to determine the detailed procedural rules that govern actions involving rights which individuals derive under EU law (see, for example, *Deville* [12], Case C-62/00 *Marks & Spencer plc v Commissioners of Customs & Excise* ("*M&S*") at [34], *Metallgesellschaft* [85]). However, it is a fundamental principle of EU law that, in doing so, EU member states may not make it impossible or excessively difficult for individuals to exercise those rights in practice (Case C-199/82 *Amministrazione delle Finanze dello Stato v SpA San Giorgio* at [12]). These principles are summarized by Sir Geoffrey Vos C in *Claimants listed in Class 8 of the Group Register of the CFC and Dividend GLO v HMRC* [2019] EWHC 338 (Ch) ("*Class 8*") at [34]-[35] in the following terms:

> 34. The most appropriate starting point is the case of *Amministrazione delle Finanze dello Stato v. SpA San Giorgio* (Case C-199/82) [1983] ECR 3595 ("*San Giorgio*"). It held that, where a Member State has received taxes and duties in breach of EU law, it must repay them. Paragraph 12 of the CJEU's judgment described the EU law principles of equivalence and effectiveness as follows:
>
> > "In that connection it must be pointed out in the first place that entitlement to the repayment of charges levied by a Member State contrary to the rules of Community law is a consequence of, and an adjunct to, the rights conferred on individuals by the Community provisions prohibiting charges having an effect equivalent to customs duties or, as the case may be, the discriminatory application of internal taxes. Whilst it is true that repayment may be sought only within the framework of the conditions as to both substance and form, laid down by the various national laws applicable thereto, the fact nevertheless remains, as the Court has consistently held, that those conditions may not be less favourable than those relating to similar claims regarding national charges [the principle of equivalence] and they may not be so framed as to render virtually impossible the exercise of rights conferred by Community law [the principle of effectiveness]".
>
> 35. A more recent statement of the principle of effectiveness is contained in the CJEU's decision in *Test Claimants in the FII Group Litigation v. IRC* [2014] AC 1161 (Case C-362/12) ("*FII CJEU 3*"), at paragraph 32, as follows:
>
> > "The detailed procedural rules governing actions for safeguarding a taxpayer's rights under EU law … must not be framed in such a way as to render impossible in practice or excessively difficult the exercise of rights conferred by EU law (principle of effectiveness) …".

The principle of effectiveness: time limits on claims

25. There is also a wealth of case law dealing with the application of the principle of effectiveness in the context of time limits imposed by domestic law.

26. As a starting point, it is accepted that the imposition under domestic law of a reasonable time limit on the exercise of EU law rights is not incompatible with the principle of effectiveness. The fundamental requirement is simply that the time limit or limitation period should not make the enforcement of those rights impossible or excessively difficult. By way of

example, in Case C-500/16 *Caterpillar Financial Services sp.z.o.o. v. Dyrektor Izby Skarbowej w Warszawie* ("*Caterpillar*") the CJEU says this (at [42] and [45]):

> 42. The Court has recognized the compatibility with EU law of the fixing of reasonable time-limits for bringing proceedings on pain of foreclosure in the interests of legal certainty which protects both the person concerned and the administration concerned, even if, by definition, the end of those periods entails the dismissal, in whole or in part, of the action brought (see, to that effect, judgment of 8 September 2011, *Q-Beef and Bosschaert,* C-89/10 and C-96/10, EU:C:2011:555, paragraph 36) …
>
> …
>
> 45. Thirdly, it must be borne in mind that, according to the Court, EU law precludes a national authority from pleading the expiry of a reasonable limitation period only if the conduct of the national authorities, combined with the existence of a limitation period, results in depriving a person of the possibility of asserting his rights before the national courts (see, to that effect, judgment of 8 September 2011, *Q-Beef and Bosschaert*, C-89/10 and C-96/10, EU:C:2011:555, paragraph 51 and the case-law cited).

27. More recently, in Case C-677/19 *SC Valoris SL*, the CJEU stated as follows in relation to the principle of effectiveness (at [24]-[25]):

> 24. It is settled case-law that, in the absence of harmonised rules governing the reimbursement of taxes imposed in breach of EU law, the Member States retain the right to apply procedural rules provided for under their national legal system, in particular concerning limitation periods or time limits, provided, however, that, in accordance with the principle of effectiveness, those rules are not arranged in such a way as to make the exercise of rights conferred by EU law practically impossible or excessively difficult…
>
> 25. As regards, specifically, limitation periods or time limits, the Court has held that the setting of reasonable time limits in principle satisfies the requirement of effectiveness since it constitutes an application of the fundamental principle of legal certainty which protects both the person and the administration concerned, even though the passing of such time limits is, by its nature, liable to prevent the persons concerned from asserting their rights in whole or in part (see, to that effect, judgments of 20 December 2017, *Caterpillar Financial Services*, C-500/16, EU:C:2017:996, paragraph 42; of 11 September 2019, *Călin*, C-676/17, EU:C:2019:700, paragraph 43, and of 19 December 2019, *Cargill Deutschland*, C-360/18, EU:C:2019:1124, paragraph 52).

28. As can be seen from these cases, the existence of a limitation period together with the conduct of national authorities may breach the principle of effectiveness where the effect is to deprive the person of their ability to exercise their rights. Accordingly, the CJEU has consistently held that the introduction of a *new* time limit on claims, which has the effect of depriving a person of an accrued right to repayment of tax levied in breach of EU law, is incompatible with the principle of effectiveness. Examples of this include the following:

(1) Case C-309/85 *Barra v Belgium and the City of Liege* concerned a supplementary enrolment fee imposed on students from other members states which was found to be contrary to EU law. The CJEU held (at [21]) that the application of a provision of national law introduced after the decision which declared the fee to be unlawful, which barred claims by students for recovery of the supplementary enrolment fee unless those students had brought proceedings before the judgment of the court, was a breach of principle of effectiveness.

(2) Similarly, in *Deville*, the CJEU held (at [18]) that a time limit subsequently imposed under French law on claims to recover a car tax, which in other proceedings the court had found to be contrary to EU law, breached the principle of effectiveness where, in the case in question, the time limit expired before the decision of the court which declared the tax unlawful.

(3) Also, in *M&S*, the CJEU held (at [37] and [38]) that the retrospective imposition of a three-year time limit on reclaims of VAT incorrectly paid was in breach of the principle of effectiveness where it was introduced with immediate effect and without appropriate transitional arrangements.

29. The ability of an individual to bring a claim in respect of an accrued EU law right can, however, be restricted by the imposition of a new time limit where the introduction of the new time limit is subject to transitional arrangements, which allow those with accrued rights an adequate prospective period in which to bring their claims (*M&S* [38]).

The principle of effectiveness: specific issues

30. We should turn now to some of the specific arguments which Mr Maas raises in this case.

Time limits which expire before a CJEU decision establishing the EU law right

31. Mr Maas submits that it is a breach of the principle of effectiveness for a limitation period to commence and end at a time before the basis of Mr Hewitt's claim for reinstatement in the AFRS had been established by the decision of the CJEU in *Shields CJEU*. However, as Ms Belgrano points out, the case law does not support that submission. Indeed, the authorities confirm that there is no rule of law requiring the running of a time limit or limitation period to be deferred until the existence of the right in question has been established by a decision of the CJEU.

32. For example, in *Test Claimants in the FII Group Litigation v HMRC* [2012] UKSC 19 ("*FII*") – a case concerning the application of limitation periods to claims relating to the tax treatment of dividends received by UK-resident companies from non-resident subsidiaries – Lord Sumption said this at [151]:

> 151. The fundamental requirement of the principle of effectiveness is that limitation periods should be reasonable, i.e. not so short as to make recovery by action "impossible or excessively difficult": see *Rewe I*, [1976] ECR 1989, and *Comet v Produktschap voor Siergewassen* (Case 45/76) [1976] ECR 2043, paras 16–18. But the assessment of what is reasonable allows for considerable variation between different national systems. There is abundant case-law concerning limitation periods much shorter than six years, which have been held to be reasonable. Moreover, it is not inconsistent with the principle of effectiveness that under national law the limitation period for the recovery of unlawful charges should run from the time of payment: see *Edilizia Industriale Siderurgica Srl (Edis) v Ministero delle Finanze* (Case C-231/96) [1998] ECR I-4951 , para 35, *Ministero delle Finanze v SPAC* (Case C-260/96) [1998] ECR I-4997 , para 32. Nor is there any rule of EU law requiring the running of a limitation period to be deferred until the existence of a right to recover the payment has been judicially established. It is not uncommon for a claim to repayment to have become time- barred in national law while proceedings are still in progress to determine whether the member state was in breach of EU law. This was, for example, the position in *Rewe I*. It was also the position in many of the decisions about the retrospective curtailment of limitation periods….

33. This position is reiterated in later cases before the UK courts, such as *Leeds City Council v HMRC* [2015] EWCA Civ 1293 ("*Leeds*") (per Lewison LJ at [43]), and before the CJEU, such as *Caterpillar* ([51]-[52]).

Time limits which run whilst claimants are unaware of their rights

34. Mr Maas also submitted that it was contrary to the principle of effectiveness for a time limit to run to deprive potential claimants of accrued rights at a time when those claimants were unaware of their rights.

35. Differing views have been expressed on this question in the cases to which we were referred. In *Jazztel plc v HMRC* [2017] EWHC 677 (Ch), Marcus Smith J (see [72(vi)], [89(ii)], [100(vi)]) took the view that a claimant was denied an effective remedy for a breach of EU law rights if a time limit was running against it at a time when the claimant was unaware of its EU law rights.

36. In *Class 8*, Sir Geoffrey Vos C declined to follow that approach. He said this at [88]-[90]:

> 88. In my judgment, this is a misunderstanding of the EU law cases and of the EU law principle of effectiveness itself. The principle was best expressed in *FII CJEU 3* as follows: "[t]he detailed procedural rules governing actions for safeguarding a taxpayer's rights under EU law … must not be framed in such a way as to render impossible in practice or excessively difficult the exercise of rights conferred by EU law". It is the procedural rules that must not be framed in such a way as makes it impossible to claim. The knowledge of the claimant as to the existence of a claim is nothing to the point.
>
> 89. As Lord Neuberger explained in *Fleming* at paragraph 79(b):
>
> > "[i]t is … open to the legislature to introduce a new time limit, or to shorten an existing time limit, within which such a claim must be brought, even where the right to claim has already arisen (an "accrued right") when the new time limit (a "retrospective time limit") is introduced [see *Marks & Spencer II*, paras 37 and 38]", and "(d) Where a retrospective time limit is introduced, the legislation must include transitional provisions to accord those with accrued rights a reasonable time within which to make their claims before the new retrospective time limit applies: *Marks & Spencer II, para 38 and Grundig II, para 38*".
>
> 90. What these authorities did not say is that the limitation period can only be attenuated when the claimant is shown to have known that he or she had the accrued right in question. That would be contrary to principle, and would, as Mr Ewart submitted, mean that taxpayers could have claims that had accrued in respect of many years past that would be impossible to remove until it could be shown that the taxpayers knew about them. That knowledge might not exist until the CJEU had finally ruled on the nature of the claim, which might be long in the future. As Lord Sumption said, once the CJEU rules, that law is taken always to have existed (see paragraph 176 of *FII SC*). In *Jazztel* itself, of course, the taxpayers could not have known between 2004, when section 320 took effect, and 2009, when the CJEU ruled, that the SDRT in question was being levied in breach of EU law.

37. He therefore concluded (*Class 8* [94]) that a right to bring a claim did not become an ineffective remedy in cases where claimants could show that they did not actually know that they had such a remedy before claims became statute barred.

38. For the reasons given by Sir Geoffrey Vos C in *Class 8* at [90], we respectfully prefer his approach. It is also consistent with the decisions to which we refer above concerning the

commencement and expiry of time limits before the date of a CJEU decision which established the relevant EU law right. Furthermore, a focus on the features of the procedural rule rather than the position of a particular claimant is consistent with decisions which confirm that the claimant's subjective view of the prospects of success of their claim is irrelevant when considering the adequacy or otherwise of the remedy available under domestic law. So, for example, in *Caterpillar* the CJEU found that the claimant company's perception that it was futile to challenge the compatibility of local VAT rules with EU law was not relevant in determining whether it was impossible or excessively difficult to make the claim (*Caterpillar* [48]-[49]).

39. Mr Maas referred us to the decision of the House of Lords in *Deutsche Morgan Grenfell Group plc v Commissioners of Inland Revenue* [2006] UKHL 49 ("*DMG*") in support of his submission that it would be a breach of the principle of effectiveness for a time limit to run when a claimant could not have been aware of the claimant's right to bring a claim under EU law. He relied in particular on passages from the judgments of Lord Hoffman (*DMG* [23] and [31]) and Lord Hope (*DMG* [40] and [71]). We now address the implications of that decision.

40. *DMG* concerned a claim by a UK resident subsidiary of a German company for compensation because under UK domestic law at the time it was required to account for advance corporation tax (ACT) on payments of dividends made to its German parent company in circumstances where, if the parent company had been resident in the UK, it would have been possible to make an election (a group income election) which would have enabled it to make the dividend payments without having to account for ACT. The CJEU found that regime to be contrary to EU law in *Metallgesellschaft*. We refer in more detail to the decision in *Metallgesellschaft* below.

41. Following the decision of the CJEU in *Metallgesellschaft,* the claimant company in *DMG* made a claim for restitution in respect of payments of tax made under a mistake of law, arguing that the company had paid the ACT mistakenly believing that it had to do so as any attempt to make a group income election would have been rejected by HMRC. The House of Lords held by a majority that the claim was not time-barred and that, for the purposes of section 32(1)(c) of the Limitation Act 1980, the mistake could not have been discovered until the decision in *Metallgesellschaft*.

42. The decision in *DMG* does not affect our conclusion. *DMG* is a case concerning the application of limitation periods to claims of mistake and, in particular, the application of section 32(1)(c) of the Limitation Act 1980, which postpones the commencement of limitation periods in certain cases of mistake until the claimant discovers the mistake in question or could with reasonable diligence have discovered that mistake. The comments of the House of Lords to which Mr Maas refers in support of his argument are made in that context. They refer to the time at which the claimant should be regarded as having been able with reasonable diligence to discover its mistake. They are not relevant to the scope of the principle of effectiveness under EU law. In any event, the decision of the House of Lords in *DMG* on those issues has been superseded by the decision of the Supreme Court in *Test Claimants in the Franked Investment Income Group Litigation v HMRC* [2020] UKSC 47.

The effect of a failure to transpose EU law rights into domestic law

43. Mr Maas also submitted that the principle of effectiveness required that the national authorities of an EU member state could not rely upon *any* time limit or limitation period in defence to a claim to enforce directly effective EU law rights where the relevant member state had not properly transposed that right into domestic law. In such circumstances, he says there is no time limit on a claim to enforce those rights. In support of this submission, Mr Maas relied, in particular, on the decision of the CJEU in *Metallgesellschaft* and the decision of the

House of Lords in *Fleming*. Ms Belgrano submits that the case law does not support Mr Maas's submission.

44. Once again, we agree with Ms Belgrano. The case law is clear that a failure to transpose (or properly transpose) an EU law right into domestic law does not prevent a national tax authority from relying on a reasonable limitation period, which forms part of domestic law, against a person seeking to enforce a directly effective EU law right.

45. An example is found in the Court of Appeal decision in *Leeds*. As part of that case, a local authority sought to recover overpaid output VAT which it had incurred as a result of a provision of the relevant EU directive not having been transposed into domestic law. The Court of Appeal dismissed the argument that the principle of effectiveness required that HMRC should not be entitled to rely upon a time limit on claims. Lewison LJ said this (at [41]):

> 41. So far as the first point is concerned, it is clear as a matter of EU law that the fact that a member state has not properly transposed a Directive does not preclude the taxing authorities of that state from relying on a limitation period against a person asserting a directly effective EU right: (Case C-188/95) *Fantask A/S v Industriministeriet (Erhverministeriet)* [1997] ECR 1–6783 at [52]. That case concerned a provision in a Directive that had been wrongly transposed, rather than a case in which a provision had not been transposed at all. Mr Ghosh [counsel for the taxpayer] says that in principle there can be no difference between the two cases. Mr Macnab [counsel for HMRC] agrees, and so do I. There is nothing in this point.

46. We now consider the cases on which Mr Maas relies.

47. Mr Maas refers to the decision in *Metallgesellschaft*. As we have described in our discussion of the *DMG* case, the *Metallgesellschaft* case concerned a claim by a UK company that the imposition of a charge to ACT on dividends paid to its German parent company was contrary to EU law. In relation to one of the questions referred to the court (question 5), the CJEU found that it was not open to the UK to seek to refuse or reduce the claim for compensation or restitution brought by the claimant company for breach of a directly effective EU law right on the grounds that the claimant company did not apply to HMRC to make a group income election in circumstances where, as a matter of UK domestic law, it was not open to the claimant company to do so (*Metallgesellschaft* [105] – [107]). The exercise of those rights would, however, be "rendered impossible or excessively difficult" if their claims for restitution or compensation were rejected or reduced "solely because they had not applied for a tax advantage which national law denied them" (i.e. a group income election) (*Metallgesellschaft* [106]).

48. The decision in *Metallgesellschaft* does not affect our conclusion. In that case, the CJEU decided that the UK authorities could not rely on the company's failure to apply for a group income election to refuse or reduce a claim for overpaid ACT. The question before the CJEU did not concern the application of any time limit (*Metallgesellschaft* [100]).The decision concerned the nature and effectiveness of the remedy itself and not the ability of the taxpayer to make the claim.

49. Mr Maas also relies on the decision of the House of Lords in *Fleming*.

50. The *Fleming* case related to the introduction of a three-year time limit on claims for deduction of input VAT where no previous time limit had applied. There was no transitional period. The taxpayer made a claim for deduction of input VAT after the introduction of the time limit. The House of Lords held that, following the decision in *M&S*, the time limit was incompatible with EU law to the extent that it applied to an accrued right and could not be enforced against the claimant. Furthermore, it was not permissible for the court as a matter of

conforming interpretation to determine an adequate transitional period. That was a matter for Parliament. The time limit therefore had to be disapplied.

51. The decision in *Fleming* therefore concerns the application of a retrospective time limit to an accrued claim. As we have seen, the case law clearly establishes that it is contrary to the principle of effectiveness for retrospective legislation to be introduced to deprive a person of an accrued right under EU law. Any amending legislation that imposes a time limit must include an adequate transitional period to the extent that it is to apply to a claim that has already accrued. The decision in *Fleming* established that it was not, in that case, appropriate for the court to determine what the appropriate transitional period should be. That was a matter for Parliament. It says nothing about the application of the principle of effectiveness. It does not affect our conclusion.

APPLICATION OF THOSE PRINCIPLES IN THIS CASE

52. In this case, Mr Hewitt is seeking permission to make a late appeal against HMRC's decision of 26 October 2012 to cancel his certificate as a flat-rate farmer under the AFRS. We have proceeded on the basis – and HMRC did not seem seriously to challenge this assertion – that, at the time, the cancellation of Mr Hewitt's certificate was a breach of a directly effective right under EU law, namely his right to participate in the AFRS.

53. At the time at which that decision was made, Mr Hewitt had the opportunity to request a statutory review of the decision or to appeal against that decision to the FTT within 30 days of the decision. Mr Hewitt also had a right to apply to the FTT for permission to make an appeal outside the 30-day time limit. The practice of the Tribunal is to exercise that discretion in accordance with the principles set out by the Upper Tribunal in *Martland* (adopting the three-step approach of the Court of Appeal in *Denton*).

Did Mr Hewitt have an effective remedy?

54. The question which arises on this appeal is whether that regime, in principle, provides an effective remedy for the breach of a taxpayer's EU law rights in a case where the taxpayer's certificate as a flat-rate farmer is wrongfully cancelled by HMRC.

55. As we have mentioned in our review of the case law above, the CJEU and the UK courts have recognized that the imposition of a reasonable time limit on claims relating to the infringement of EU law rights is not incompatible with the principle of effectiveness and indeed that time limits are necessary to protect both the taxpayer and the tax administration (for example, *Caterpillar* [42]). The fundamental requirement is that a time limit should not make the enforcement of EU law rights impossible or excessively difficult.

56. Many of the cases to which we have referred concern claims for the repayment of taxes, which, the claimants assert, have been levied in breach of EU law and the application of time limits or limitation periods of several years. The present appeal is rather different. It concerns the retrospective reinstatement of Mr Hewitt as a flat-rate farmer for the purposes of the AFRS together with a claim for reimbursement of the costs which Mr Hewitt has suffered as a result of the cancellation of his certificate in 2012 and a relatively short time period in which to appeal, albeit with a discretion in the Tribunal to permit a late appeal in appropriate circumstances.

57. That having been said, in the context of an appeal against the cancellation of an AFRS certificate, it seems to us that a relatively short period of 30 days in which to appeal is reasonable. The issue or cancellation of a certificate has an immediate effect on the tax status of the person in question and is relevant to transactions with third parties, which are continuing on day-to-day basis. It is important that disputes concerning the issue or cancellation of certificates are identified and resolved promptly. Furthermore, this is not a case in which a

taxpayer does not know that circumstances have arisen that they might wish to challenge. The taxpayer will ordinarily be on notice that the decision has been made to cancel a AFRS certificate and be able to raise a challenge to that decision promptly. In cases where the strict application of the 30-day time limit would be unjust, there remains the possibility for the Tribunal to permit a late appeal in appropriate cases. The time limit does not make the enforcement of Mr Hewitt's rights impossible or excessively difficult.

58. In a case in which the time limit on claims is itself in principle reasonable, the only circumstances in which the imposition of the time limit will be regarded as incompatible with the principle of effectiveness are where the "the conduct of the national authorities, combined with the existence of a limitation period, results in depriving a person of the possibility of asserting his rights before the national courts" (*Caterpillar* [45]). That did not occur in this case. Mr Hewitt had an effective right of appeal, which would have allowed him to assert his rights before the FTT. He chose not to exercise that right; in contrast, Shields did, and was in due course successful.

59. This is not a case – such as *Barra*, *Deville*, *M&S* or *Fleming* – in which the taxpayer has an accrued right under EU law, which is removed or curtailed by the introduction of new, in effect, retrospective legislation. In this case, at the time at which Mr Hewitt's directly effective EU law rights were infringed by the cancellation of his certificate, he had a prospective period in which he had a right to appeal in order to enforce those rights. That period did not change. As we have discussed above, in our view, the period for appeal was a reasonable one and provided Mr Hewitt with an effective remedy.

60. As we have discussed above, Mr Maas made various submissions to the effect that Mr Hewitt had not been provided with an effective remedy in breach of the EU law principle of effectiveness. In summary, those submissions were that:

(1) Mr Hewitt did not have an effective remedy because the 30-day time limit began to run and expired at a time at which Mr Hewitt could not have been aware that he had an enforceable right;

(2) Mr Hewitt did not have an effective remedy because the 30-day time limit began to run and expired before the date on which the Mr Hewitt's right was clearly established by the decision of the CJEU in *Shields CJEU*; and

(3) the relevant provisions of the Principal VAT Directive had not been transposed into UK domestic law, and, in those circumstances, the principle of effectiveness prevented HMRC from relying upon any time limit against Mr Hewitt's claim to enforce directly effective EU law rights.

61. For the reasons that we have given above, we reject all of those submissions. In summary:

(1) The fact that a time limit or limitation period on claims begins to run and expires before the date on which the claimant is aware that they had an enforceable right does not breach the principle of effectiveness (*Class 8* [88]-[90], [94]).

(2) The case law authorities also demonstrate that the fact that a time limit or limitation period for appeals begins to run and expires before the date on which the claimant's right is clearly established by a decision of the CJEU does not prevent the claimant's right to appeal being regarded as an effective remedy (*Leeds* [43], *FII* [151], *Caterpillar* [52]). It is nothing to the point that Mr Hewitt may have regarded the prospects of success at the time of the breach as vanishingly small (*Caterpillar* [48]).

(3) Even if it could be argued that the relevant provisions of the Principal VAT Directive have not been properly transposed into EU law, for the reasons that we have

given, that would not prevent HMRC from relying upon a reasonable time limit in domestic law (*Leeds* [41]).

62. None of these circumstances affects our conclusion. The only question raised by the application of the EU law principle of effectiveness in this case is whether or not the time limit made the enforcement of Mr Hewitt's impossible or excessively difficult. For the reasons that we have given, in our view, the regime that applies to appeals against the cancellation of a AFRS certificate is a reasonable one. It provided Mr Hewitt with an effective remedy. He chose not to exercise it.

63. Our conclusion on this point decides this appeal in favour of HMRC.

The approach before the FTT

64. Mr Maas accepted that his argument was not presented in the same terms before the FTT. It would appear from the reported decision that before the FTT the points relating to the effect of the proceedings before the CJEU in *Shields CJEU* were made in the context of the factors that might be relevant to the exercise of the FTT's discretion rather than as an argument that the regime for appeals against the cancellation of a certificate deprived Mr Hewitt of an effective remedy.

65. Our conclusion that that regime provided Mr Hewitt with an effective remedy and was not in breach of the principle of effectiveness does not, of course, preclude the facts and circumstances surrounding the cancellation of Mr Hewitt's certificate from being considered as part of the exercise of the FTT's power to permit a late appeal. In this respect, the reported decision shows that the FTT did consider and distinguish the case law authorities which Mr Maas put to the FTT in the course of his argument (principally *Deville*, *Metallgesellschaft* and *Fleming*). Although the discussion in the report is relatively brief, the FTT then took into account the relevant facts and circumstances of the case in accordance with the guidance in *Martland* and *Denton* in reaching its conclusion that Mr Hewitt's application should be refused. In doing so, it referred to the decision in *Shields CJEU*. We take that reference to mean that the FTT took account and dismissed in reaching its decision the fact that Mr Hewitt may not have been aware of the prospects of challenging HMRC's decision to cancel his certificate until the decision of the CJEU in *Shields CJEU*.

66. We can see no good reason to disturb the FTT's decision.

DECISION

67. We dismiss this appeal.

Signed on Original

THOMAS SCOTT **ASHLEY GREENBANK**

UPPER TRIBUNAL JUDGES

Release date: 17 September 2021