



11 April 2017

## PRESS SUMMARY

**The Commissioners for Her Majesty's Revenue and Customs (Appellants) v Investment Trust Companies (in liquidation) (Respondents)**

**The Commissioners for Her Majesty's Revenue and Customs (Respondents) v Investment Trust Companies (in liquidation) (Appellants) [2017] UKSC 29**

*On appeal from [2015] EWCA Civ 82*

**JUSTICES:** Lord Neuberger (President), Lord Mance, Lord Reed, Lord Carnwath, Lord Hodge

### BACKGROUND TO THE APPEAL

This appeal and cross-appeal arise out of claims made by certain investment trust companies (“the ITCs”) for refunds of VAT which they had paid on the supply of investment management services from investment managers (“the Managers”). The VAT transpired not to be due, because the supplies in question were exempt from VAT under EU law. The Managers who received VAT from the ITCs paid it to the Commissioners, believing they were entitled to deduct from the VAT chargeable on their supplies to the ITCs (“output tax”) the tax which they had themselves paid on supplies received for the purposes of their businesses (“input tax”). Out of a notional £100 received from the ITCs, the Managers might have therefore accounted to the Commissioners for only £75 after deducting £25 in respect of input tax.

When it transpired that the supplies were VAT exempt, the Managers made claims to the Commissioners for refunds under s.80 of the VAT Act 1994, and passed on the refunded VAT and interest to the ITCs. However, under the statute, the Managers were only entitled to a refund of the VAT they had actually paid the Commissioners (i.e. the notional £75). In addition, they could not claim refunds in relation to accounting periods excluded by the three year statutory limitation period under s.80 (“the dead periods”). The ITCs did not receive the full amount of VAT they had been mistakenly charged and brought proceedings against the Commissioners seeking remedies in unjust enrichment and EU law in respect of the notional £25 and the dead periods.

The judge found that the Commissioners had been enriched by the full amount of VAT the ITCs paid to the Managers (i.e. the notional £100), but that the ITCs’ cause of action at common law was excluded by the statutory scheme, which protected the Commissioners from liability other than as provided in s.80. EU law required that exclusion to be disapplied so as to permit a claim, but still subject to the limitation period in s.80. The claim in relation to the dead periods was therefore dismissed, but payment of the notional £25 outside those periods was ordered. Both sides appealed, and the Court of Appeal allowed both appeals. The statutory scheme did not exclude a common law claim, but it was wrong to treat the Commissioners as having been enriched to the extent of the notional £100, where they had only received £75. There was no claim in EU law for the remaining amounts retained by the Managers. Judgment was given for the notional £75 claim in relation to the dead periods, and the claim for the notional £25 (for all periods) was dismissed.

### JUDGMENT

The Supreme Court unanimously allows the Commissioners’ appeal and dismisses the ITCs’ cross-appeal. Lord Reed gives the judgment, with which the rest of the Court agrees.

## REASONS FOR THE JUDGMENT

The principal issues to be decided were (i) whether the ITCs in principle could make out a claim in unjust enrichment against the Commissioners, (ii) whether such a claim was excluded by the statutory scheme under s.80 and (iii) whether the lack of any such claim was incompatible with EU law.

The extent of the Commissioners' enrichment was limited to the notional £75 which they received from the Managers. It did not include the notional £25 which the Managers retained as an input tax credit, because that was not an amount which the Commissioners owed to the Managers: it was only deductible from output tax that was properly due [25-31]. As to whether the Commissioners' enrichment was at the expense of the ITCs, there has been uncertainty surrounding the approach to be adopted. It would be unwise to attempt a definitive statement of the circumstances in which the "at the expense of" requirement would be satisfied, but as a general rule it will be satisfied where there is a direct transfer of value from the claimant to the defendant, and in situations equivalent to direct transfers, for example where an agent is interposed, or where a series of coordinated transactions can be treated as a single transaction. A further situation where the requirement is satisfied is where the claimant discharges a debt owed by the defendant to a third party. The possibility of genuine exceptions to a direct provision rule should not be ruled out, but beyond direct transfers of value, or equivalent situations, it is generally difficult to maintain that the defendant has been enriched at the claimant's expense. For there to be a transfer of value, the claimant must incur a loss through the provision of the benefit: incidental benefits alone cannot constitute a transfer of value [32-66]. In the present case there is no direct transfer of value, or equivalent situation. The ITCs' payment to the Managers became part of the Managers' general assets, and was not impressed with a special purpose trust, while the Managers' VAT liability to the Commissioners arose independently of whether the ITCs actually paid VAT. The two transactions are separate and cannot be collapsed into a single transfer of value from the ITCs to the Commissioners [67-74].

Even if the ITCs had in principle been able to make out a claim in unjust enrichment, such a claim would have been excluded by s.80. The statute creates an exhaustive code of remedies not just for suppliers who have accounted to the Commissioners, but for the ultimate consumers as well. This is because it set out arrangements for the supplier to reimburse the consumer, subject to a limitation period, removing the need for the consumer to have a direct remedy against the Commissioners. Parliament cannot have intended this scheme for reimbursement of consumers to exist concurrently with non-statutory liabilities – that would be inconsistent with the rationale of the statutory scheme [75-88].

The application of the statutory scheme in the present case is compatible with EU law. The European Court of Justice has accepted that in principle, a system under which only the supplier is entitled to seek reimbursement of VAT from the tax authorities, and the consumer can seek restitution from the supplier, meets the requirements of EU law. In cases where the reimbursement of the consumer by the supplier would be impossible or excessively difficult, the principle of effectiveness would require that the consumer be able to bring a claim directly against the tax authorities. That was not the case here, and it would not be appropriate to consider what the position would be in a hypothetical case where a supplier was insolvent [89-94].

*References in square brackets are to paragraphs in the judgment*

### **NOTE**

**This summary is provided to assist in understanding the Court's decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document. Judgments are public documents and are available at:**

<http://supremecourt.uk/decided-cases/index.html>