Neutral Citation Number: [2016] EWCA Civ 1310

Case No: A3/2015/1980

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM
Upper Tribunal (Tax and Chancery Chamber)
Mr Justice Nugee
FTC 67/2013

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20/12/2016

Before:

LADY JUSTICE ARDEN
LORD JUSTICE IRWIN
and
LORD JUSTICE HENDERSON

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Between:

Totel Limited	**Appellant**
- and -	
The Commissioners for Her Majesty's Revenue and Customs	**Respondents**

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Michael Firth (instructed by **Morrisons Solicitors LLP**) for Totel
Jonathan Swift QC and Rachel Kamm (instructed by **General Counsel and Solicitor to Her Majesty's Revenue and Customs)** for HMRC

Hearing dates: 21 -22 November 2016

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Judgment Approved

LADY JUSTICE ARDEN :

ISSUE ON THIS APPEAL

1. The appellant ("Totel") is a VAT-registered trader. The respondents ("HMRC") have determined that Totel is liable to pay sums amounting to £1,474,351.38, said to have been wrongly treated as inputs in Totel's VAT returns. Totel wishes to appeal this determination to the First-tier Tribunal ("FTT"). VAT appeals, by which I mean any appeal from a determination of HMRC that a person is liable to pay any sum on account of VAT, are subject to a "prepayment rule": that means that before a taxpayer can appeal, he must first pay the tax in issue. There is no similar requirement for income tax appeals or appeals about some indirect taxes such as stamp duty land tax ("SDLT").

2. Totel contends that the prepayment rule for VAT appeals infringes EU law: VAT is derived from EU law and remedies for overpayment must comply with EU law principles, such as the principle of "equivalence", which I explain in paragraphs 7 to 8 below. Totel did not rely on this principle before the Upper Tribunal, and so the Upper Tribunal (Nugee J) did not consider it in its decision dated 27 October 2014, from which this appeal is brought. However, the Upper Tribunal gave permission to appeal on this point because, being a properly arguable point of EU law, the question is one which this Court must consider.

3. As I explain under *Reasons for dismissing this appeal*, I would dismiss this appeal. If Totel is right, and VAT appeals should be treated as equivalent to other tax appeals, Totel's case is undermined by the fact that the prepayment rule applies to a number of indirect tax appeals. If HMRC are right, and VAT is not to be compared with any other tax, then there is no need to apply the equivalence principle. On either basis, a comparison with income tax and SDLT appeals is inappropriate.

4. I first briefly outline the rules about paying tax when appealing and the equivalence principle, and then set out the parties' respective submissions.

WHEN MUST A TAXPAYER PAY THE TAX BEFORE HE CAN APPEAL?

5. In outline, the position is follows:

   (i) *Prepayment not generally required:* There is no general rule in domestic law that a taxpayer must pay the tax in dispute before appealing to the FTT.

   (ii) *Prepayment rule applicable to certain indirect taxes including VAT*: The prepayment rule applies in VAT appeals (see section 84(3) VAT Act 1994 ("VATA"), set out in appendix 1 to this judgment) and in other appeals about indirect taxes, including those listed in appendix 2 to this judgment. There are other indirect taxes to which the prepayment rule does not apply, such as SDLT (see Finance Act 2003, schedule 10, paragraph 39).

   (iii) *Hardship applications (applicable to VAT)*: an appellant may apply for the payment of VAT to be deferred pending an appeal by making a "hardship" application and showing that the payment of the VAT in dispute would cause him to suffer hardship: section 83 (4B) VATA. This limited exception to the

prepayment rule has been held on the facts not to be available to Totel and there is no appeal on that point. There is materially identical provision for hardship applications in respect of each of the other indirect taxes listed in appendix 2 to this judgment.

(iv) *Postponement applications (not applicable to VAT):* The payment of (for example) income tax and SDLT can be postponed if the taxpayer appeals and shows reasonable grounds for appealing (see section 55(6) of the Taxes Management Act 1970 and paragraph 39 (6) of schedule 10 to the Finance Act 2003). This is a different test than that which applies on a hardship application and it is common ground that it imposes a low hurdle in practice.

(v) *Taxpayers' appeals to the Upper Tribunal from the FTT:* the principle that an appeal does not stay enforcement of a judgment applies. If a taxpayer loses his appeal to the FTT and wishes to appeal to the UT, he will be liable to pay the tax in issue unless he obtains a stay of execution (see Rule 5(3)(1) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009; and Rule 5(3)(m) of the Tribunal Procedure (Upper Tribunal) Rules 2008). To obtain a stay, the taxpayer may have to show that without a stay a further appeal will be stifled. Even then, the tribunal has a discretion to grant or withhold a stay having regard to all the circumstances.

THE EQUIVALENCE PRINCIPLE

6. Basing himself on long-standing jurisprudence of the Court of Justice of the European Union ("CJEU", which term includes where appropriate its predecessor court), Lord Hope described the equivalence principle in *Test Claimants in the FII Group Litigation v Revenue and Customs Comrs (formerly Inland Revenue Comrs)* [2012] 2 AC 337 at [21] as follows:

> The principle of equivalence requires that the rules regulating the right to recover taxes levied in breach of EU law must be no less favourable than those governing similar domestic actions.

7. In general, the application of the equivalence principle involves a two-stage process: identifying the similar domestic action and then, if that domestic action is governed by different procedural rules, examining the justification for the difference. According to the jurisprudence of the CJEU, it is for national courts to determine whether domestic actions are similar, and similarity is to be assessed with regard to the domestic action's purpose, cause of action and essential characteristics (see *Pontin v T Comlux SA* (C-63/08) [2009] E.C.R. I-10467 at [45]; *Palmisani v Istituto Nazionale della Previdenza Sociale (INPS)* (C-261/95) [1997] E.C.R. I-4025, [38]; *Preston v Wolverhampton Healthcare NHS Trust (No 2)* [2001] 2 AC 455).

8. So far there is common ground. A number of other issues arise on this appeal about the equivalence principle which are contentious. There is an issue whether there is any clear test as to when a domestic action will be similar for this purpose. There is also an issue about the application of the equivalence principle in the field of tax; particularly whether VAT can be compared with either other indirect taxes or direct taxes, such as income tax. In *Marks & Spencer v Customs and Excise Commissioners* [1999] STC 205 at 232, Moses J held that the equivalence principle only required a

comparison between domestic law claims to recover VAT and claims subject to EU law ("EU-derived" claims) to recover VAT, not between VAT and any other tax. It is contended that this is no longer good law because the proper analysis of all claims to recover VAT now is that they are no longer solely based on domestic law, and that some other comparator action must be found.

9. There is another separate facet of the equivalence principle in issue on this appeal, namely the jurisprudence of the CJEU to the effect that the equivalence principle does not require a member state to extend its most favourable rules to actions to enforce EU rights, provided it does not single out EU-derived claims for the most unfavourable treatment (see, for example, *Littlewoods Retail Ltd v Revenue and Customs Commissioners* (C-591/10) [2012] S.T.C. 1714 at [31]). I refer to this below as the "no 'most favourable treatment' proviso". Thus the CJEU has held that the member state can apply less favourable rules to claims for the recovery of tax than those which it applies to private law claims for the recovery of debts: *Edilizia Industriale Siderurgica Srl (EDIS) v Ministero delle Finanze* (C231/96) [1998] ECR I-4951, [37]. The CJEU there held:

> 37 Thus, Community law does not preclude the legislation of a Member State from laying down, alongside a limitation period applicable under the ordinary law to actions between private individuals for the recovery of sums paid but not due, special detailed rules, which are less favourable, governing claims and legal proceedings to challenge the imposition of charges and other levies. The position would be different only if those detailed rules applied solely to actions based on Community law for the repayment of such charges or levies.

10. There is an issue as to whether the no "most favourable treatment" proviso applies in the circumstances of this case.

SUBMISSIONS OF TOTEL

11. The principal submissions of Mr Michael Firth, for Totel, are summarised in the paragraphs which follow.

Similarity to other domestic actions may be confined to relevant characteristics:

12. Similarity needs to be shown only in relation to the characteristics of a tax claim relevant to an appeal: see, for example, *Lindorfer v Council of the European Union* (C-227/04 P) [2007] E.C.R. 6767, a sex discrimination case, where both the CJEU and Advocate General Sharpston (particularly at [24]) simply compared the provisions setting out different actuarial factors for men and women when calculating transfer credits from one pension scheme to another, and not the totality of the terms of the pension schemes.

13. For the proposition that only relevant aspects of potentially similar actions need be compared, Mr Firth also cites the speech of Lord Slynn in *Preston* at paragraphs 21 to 23 and 30. However, it is not necessary to refer to these passages, as this was a

decision of the House of Lords, and not the CJEU, and further Lord Slynn's conclusion differed on this point from that of the majority, who expressed no view on this point. If this proposition is right, there is no need to consider the broader question whether direct and indirect taxes are in general comparable.

14. Similar claims would include a range of claims which an employee could bring in an industrial tribunal and it was sufficient to show similarity with any one or more of these claims. Thus, in *Levez v TH Jennings (Harlow Pools) Ltd* (C-326/96) [1998] ECR. I-7835, an employer had deliberately concealed from a woman claimant for equal pay, material facts about the higher salary paid to a male comparator, so that she could not bring her claim within the period for equal pay claims under national law. She could bring a claim in tort based on her direct right under EU law but the CJEU held that, because of the equivalence principle, the national court had to consider whether that claim had the same procedural advantages as similar claims brought in an industrial tribunal under the Equal Pay Act 1970.

The no "most favourable treatment" proviso does not apply:

15. Totel's case is that the equivalence principle is a facet of the principle of equal treatment. In *Sante Pasquini v Istituto Nazionale della Previdenza Sociale (INPS)* (C34/02) [2003] ECR I-6515, the issue was whether the equivalence principle was infringed by an Italian law under which the National Institute of Social Insurance could reduce the pension payable to an Italian citizen who had worked in other member states, apart from Italy, on the grounds that he had underpaid his contributions to his pension for a longer period than it would have been able to do if he had worked solely in Italy. The CJEU held that the period of limitation was a matter for national law, but that the national law in that case breached the principle of equal treatment for workers who had exercised their rights of freedom of movement to work in other member states. Moreover, under national law, contributions made by an employee were checked for adequacy on an annual basis when there was no such check on contributions which an employee working in other member states was due to make. That too breached the equivalence principle. The CJEU held that the equivalence principle was "simply the expression of the principle of equal treatment" ([70]).

16. Furthermore, on Mr Firth's submission, an EU-derived claimant was not limited to using the most similar action as a comparator. If EU law permitted member states to attach the least favourable rule to EU-derived claims, the CJEU would not have needed to formulate the no "most favourable treatment" proviso.

17. In addition, on Mr Firth's submission, the no "most favourable treatment" proviso, when it applies, applies only to exclude a requirement to extend the benefit of more favourable rules which were exceptional or unusually beneficial: see the holding of Lord Neuberger in *Revenue and Customs Commissioners v Stringer* [2009] 4 All E.R. 1205 at [81], with which Lords Hope, Rodger and Brown agreed (at [1], [32] and [64]). Lord Neuberger held:

> 81 As Lord Walker explains in para 38, section 23(3) is plainly a provision which is intended to have, and no doubt has, real value to many employees in relation to many claims based on deductions from their wages,

> even though I accept that it may on occasion be capable of being a little "hit and miss" in its effect. This is therefore not a case where it could be said that the appellants are seeking to benefit from the "most favourable rules" of limitation, which I understand to mean exceptional or unusually beneficial rules (as mentioned by the Court of Justice *in Levez v T H Jennings (Harlow Pools) Ltd*, at para 42).

18. So, on Totel's case, the no "most favourable treatment" proviso does not apply to the prepayment rule, as the procedure for claims to which the rule does not apply is neither exceptional nor unusually beneficial.

19. Finally, paragraph 37 of the CJEU's judgment in *EDIS* (see paragraph 9 above) must be read subject to the equal treatment principle. As a result, the equivalence principle is not satisfied unless the claimant has the same right as he would under the *most favourable* claim in domestic law. So, for this reason also, Mr Firth contends that the prepayment rule cannot stand.

VAT is capable of being compared with any other tax:

20. This proposition derives from passages from two Advocate General opinions, which did not find their way into the judgments of the CJEU. The first in time is *Amministrazione dell Finanze dello Stato v San Giorgio SpA* (199/82) [1983] E.C.R. 3595. This case confirmed that it was a breach of EU law if a national law, which qualified a person's right to recover charges for health inspections on dairy products which he had been charged in breach of EU law, rendered the exercise of that right virtually impossible and therefore infringed another EU law principle, namely that of effectiveness. In paragraph 11 of his Opinion, Advocate General Mancini also considered the equivalence principle, and the question which actions to recover overpaid charges would be similar for this purpose. He considered that the over-compartmentalisation of taxes into different sectors of tax ran the risk of rendering the equivalence principle ineffective. He stated that he did not see why manufacturing tax should be different from "any other tax, particularly indirect taxes." The CJEU, however, held that there was a breach of the principle of effectiveness and did not consider equivalence.

21. The second case was *Littlewoods*, where the CJEU held that an award of interest on overpayments of VAT had to comply with the principles of equivalence and effectiveness. The relevant paragraphs of Advocate General Trstenjak's Opinion are paragraphs 38 to 48. The UK government submitted that such actions could only be compared to claims to recover overpaid indirect taxes, and the Commission and other member states made other submissions. The discussion contemplated that the comparison would be only with other claims for indirect taxes. The Advocate General concluded that, at minimum, claims for overpaid VAT would be similar to claims for other overpaid indirect taxes, but that the question whether claims for direct taxes were similar would depend on the facts and she advised that the referring court should make a further order for a reference for clarification.

22. On Totel's case, these paragraphs are inconsistent with any submission that there need be no comparator action, or, if there does need to be a comparator, it must be a comparator action for overpaid indirect tax.

This Court should not follow domestic jurisprudence which holds or indicates that VAT is not comparable to other taxes:

23. Mr Firth submits that the ruling of Moses J in *Marks & Spencer,* and a further passage from the judgment of this Court in *Littlewoods,* relied on by HMRC, do not reflect CJEU jurisprudence on claims to recover VAT as it has developed. In *Marks & Spencer*, Moses J accepted that the right of repayment was a domestic law right but the CJEU has since made it clear that it is an EU-derived right. There is no purely domestic claim: see the decision of the CJEU on a further reference in *Marks & Spencer v Customs & Excise Commissioners* (C-309/06) [2008] STC 1408, [32] to [36]. The Supreme Court confirmed this in *Pendragon plc v IRC* [2015] 1 WLR 2838, [29].

24. The relevant paragraphs of the judgment of this Court in *Littlewoods* (Arden, Patten and Floyd LJJ) are as follows:

> 133 In the present case, the principle of equivalence does not assist the taxpayer either in relation to this issue of selective disapplication or (had it been relevant) in relation to issue 2. Mr Elliott [for the taxpayers] accepts that VATA 1994 contains provisions which are not based on the implementation of the relevant EC Directives but are purely domestic provisions so that not every claim for overpaid VAT is necessarily a *San Giorgio* claim. Since sections 78(1) and 80(7) apply indiscriminately to both domestic and EU law claims for the repayment of overpaid tax, it cannot therefore be said that there is any disparity between the remedies made available for the enforcement of domestic claims for overpaid VAT and those for the enforcement of claims under EU law. In both cases there is a single statutory remedy in the form of sections 78(1) and 80(1). The disapplication of those provisions has therefore to be based, if at all, on the principle of effectiveness.
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> 134 Mr Elliott sought to argue that the principle of equivalence was engaged because the relevant comparator was not a domestic claim for overpaid VAT but a domestic claim for other tax which would not be excluded by sections 78(1) and 80(7) and could be enforced (as in the case of ACT) by a combination of *Woolwich* and *DMG* claims. We are not persuaded by this. As Moses J held in *Marks & Spencer plc v Customs and Excise Comrs* [1999] STC 205, the principle of equivalence has been stated in a tax context to involve a comparison of the treatment of

> infringements of EU law and domestic law "with respect to the same kind of charges or dues": see *Edilizia Industriale Siderurgica Srl (Edis) v Ministero delle Finanze* (Case C-231/96) [1998] ECR I-4951, para 36.

25. On Totel's case, this Court relied on an incorrect concession by Mr Elliott that VATA contained domestic law provisions relating to a claim for overpaid VAT, and the conclusion of this Court that there was no other tax claim which was similar was also wrong, for the following reasons. An overpayment claim is an EU-derived claim: see paragraph 23 above. This is so even if (as in *Littlewoods*) the claim relates to interest. Accordingly, there have to be other actions which are similar for the purposes of the equivalence principle (if, and contrary to Mr Firth's submissions, a comparator is required) and claims for overpaid VAT cannot be the comparator. Other similar actions would include income tax and SDLT appeals.

Totel has discharged the limited onus on it:

26. VAT appeals are properly to be treated as similar to income tax and SDLT appeals for the purposes of the equivalence principle because appeals against a VAT and SDLT assessments both go to the same tribunal (the FTT) and both appeals thus have the same essential characteristics. It is not an objection under the equivalence principle that there are other domestic law appeals (viz from other indirect taxes: see appendix 2) which are similar, but which are subject to the prepayment rule. It is enough to show that there are one or more domestic actions which are more favourably treated and Totel submits that it does this by showing that the prepayment rule does not apply to income tax or SDLT. The onus is on HMRC to show justification. Totel must succeed on the justification issue as HMRC has not purported to demonstrate justification in this case.

If in doubt, this Court should refer:

27. This Court should make an order for a reference for a preliminary ruling from the CJEU if it entertains any doubt about the application of the equivalence principle in this case.

SUBMISSIONS OF HMRC

28. Mr Jonathan Swift QC, for HMRC, primarily submits that the equivalence principle has no role to play on this appeal. His response to Totel's propositions may be summarised as follows.

Moses J in Marks & Spencer and this Court in Littlewoods correctly held that there is no action which is similar to an action for recovery of VAT from HMRC:

29. In summary, HMRC's propositions here are that (i) the rulings of Moses J in *Marks & Spencer* and of this Court in *Littlewoods* were correct. VAT claims are not to be compared with other tax claims; (ii) if there is no claim solely in domestic law to recover VAT, the equivalence principle simply does not apply; (iii) it is not necessary

to find a comparator in every case; and (iv) if VAT claims fall to be compared with other tax claims, they should be claims for other indirect taxes.

30. In the application of the equivalence principle to tax claims, it is clear from the decision of the CJEU in *EDIS* that a comparison falls to be made with "the same kind of charges or dues": see the first part of paragraph 36 of the decision (which goes on to set out the no "most favourable treatment" proviso):

> 36 Observance of the principle of equivalence implies, for its part, that the procedural rule at issue applies without distinction to actions alleging infringements of Community law and to those alleging infringements of national law, with respect to the same kind of charges or dues (see, to that effect, Joined Cases 66/79, 127/79 and 128/79 *Amministrazione delle Finanze dello Stato v Salumi* [1980] ECR 1237, paragraph 21). That principle cannot, however, be interpreted as obliging a Member State to extend its most favourable rules governing recovery under national law to all actions for repayment of charges or dues levied in breach of Community law.

31. As Moses J makes clear in *Marks & Spencer,* it is necessary to compare like with like. The equivalence principle has no application to VAT because VAT is not comparable with rules for direct tax or indeed any other indirect taxes. It is necessary to look for domestic remedies for overpayment of VAT and make any comparison with them.

32. HMRC submit that, if it is correct that the right to seek a repayment is an EU-derived claim, it remains the position that there is no equivalence with any domestic action and so the equivalence principle does not apply. Therefore, this Court in *Littlewoods* was correct.

33. In *Amministrazione delle Finanze dello Stato v San Giorgio SpA* (199/82) [1983] E.C.R. 3595, Advocate General Mancini ultimately went no further than to express an opinion in favour of equivalence with indirect taxes. Significantly, the CJEU did not regard the matter as a question of equivalence at all.

34. In *Littlewoods*, the questions referred did not include any question of equivalence. On the hypothetical basis that the equivalence principle was in issue, Advocate General Trstenjak considered but then ultimately left open the question whether an analogy had to be drawn between VAT and direct taxes. In relation to indirect taxes, she was concerned with a different question from that which arises in this case, namely whether a common law remedy was sufficient to meet the deficiencies in a statutory remedy for monetary relief required by EU law. In any event, the CJEU simply stated the well-known principles. In conclusion, the correct approach is to look for the same charges and taxes.

35. Accordingly, in this case, the principle of equivalence has no substantive role to play.

36. HMRC make no submission as to the rationale of the distinction drawn by the CJEU between direct and indirect taxes. The distinction may be drawn for a number of

reasons, for example, because the consumer is the person who pays the tax but is not the taxable person, or because there are different policy considerations in VAT or some other reason.

37. HMRC's submission does not seek to define the circumstances in which one action will be similar to another for equivalence principle purposes. Mr Swift contends, however, that there is no wide ranging inquiry involved. Thus, in *Levez* the CJEU focused on whether the county court remedies were equivalent to the claimant's statutory claim under the Equal Pay Act 1970 (see, for a similar example, *Preston,* where the issue was whether domestic legislation which restricted part-time workers from bringing equal pay claims breached the equivalence principle, and the House of Lords compared the workers' remedies for breach of contract.)

In any event, the no "most favourable treatment" proviso applies to VAT appeals:

38. As stated above, member states need not apply their most favourable procedural rules to VAT appeals provided that EU-derived claims are not picked out for the worst treatment: see *EDIS*, [37].

39. The no "most favourable treatment" proviso applies in this case because there are other indirect taxes to which the prepayment rule applies. So there is no breach of the equivalence principle.

40. While there is a link between the equivalence principle and the principle of equal treatment, they are different because, under the equivalence principle, but not the equal treatment principle, some unequal treatment is allowed without any need to show justification. In equal treatment, there are two aspects: (i) direct discrimination, where like must be treated alike and no breach can be justified; and (ii) indirect discrimination, which can be justified. By contrast, the equivalence principle is subject to the "no most favourable treatment proviso". That means that the equivalence principle is satisfied if there is equivalence with domestic rules applying to other similar actions which are not in the most favourable category, and justification is not then required. The national rules in that situation provide a floor, but there is no requirement for substantive equality.

41. The equal treatment cases on which Totel relies therefore do not assist. In *Lindorfer*, for example, the reasoning was directed to equal treatment. By way of further example, in *Cordero Alonso v Fondo de Garantia Salarial (Fogasa)* (C-81/05) [2006] E.C.R. I-7569, referred to in Totel's written submissions, the claimants were employees of an insolvent company who had judgment debts against their employer. The question was whether the Directive extended to sums agreed to be paid by means of a compromise as well as those for which there was a judgment debt. The CJEU answered that question in the affirmative by interpreting the expression "claims" in the light of the principle of equality.

42. As to *Stringer,* paragraph 81 of the speech of Lord Neuberger (paragraph 18 above) is based on earlier CJEU authorities and therefore should be interpreted as going no further than EU law.

No need for a reference:

43. HMRC submits that there is no need for a reference for a preliminary ruling in this case and in addition that it would be inappropriate since the matter is basically one for domestic law.

REASONS FOR DISMISSING THIS APPEAL

The no "most favourable treatment" proviso applies

44. There is ample jurisprudence to support the no "most favourable treatment" proviso as an established feature of the equivalence principle. Given the lack of harmonisation at Union level of the remedies for overpayment of taxes and other state dues, and the diversity in the procedural rules set by member states, it was inevitable that there would have to be some leeway in the application of the equivalence principle (see *EDIS*,[33]).

45. *EDIS* provides an illustration of the no "most favourable treatment" proviso. Italy had a three-year limitation period for damages claims against public authorities and a ten-year limitation period for private law damages claims. The CJEU held that it was sufficient that EU-derived claims against the state were subject to the same limitation period as applied to claims against a public authority (*EDIS;* see also *Palmisani*).

46. Totel argues that the equivalence principle is a facet of the equal treatment principle so that the no "most favourable treatment" principle must have a field of operation restricted to exceptional or unusually beneficial rules. Mr Firth finds that restriction in the passage from the speech of Lord Neuberger in *Stringer*, set out in paragraph 17 above. In my judgment it is quite clear that that holding must be read in the light of the CJEU jurisprudence on which it is based, and there is nothing in the cases shown to us to support a restriction of the kind for which Mr Firth contends.

47. I would accept that the equivalence principle shares the same jurisprudential root as the equal treatment principle but that does not mean that it has to have all the same incidents as that principle. The jurisprudence of the CJEU shows that it is open to a member state to apply any available set of rules, which are already applied to similar claims, to an EU-derived claim provided that an EU-derived claim is not selected for the worst treatment. No one suggests that that is the position here. VAT appeals are with respect to the prepayment rule no different from a range of other appeals: see appendix 2. Appeals of the kind mentioned in that appendix meet Mr Firth's test for similarity, and he has not suggested otherwise. So, in my judgment, this appeal must fail on the no "most favourable treatment" proviso alone. There is no need, therefore, for HMRC to justify the different treatment of SDLT and income tax appeals.

48. In addition, Mr Firth's submission would have remarkable results. It would mean that, if there was a more beneficial domestic rule in relation to any action relating to tax (I need go no further to make this point), every other claim in tax which did not enjoy that benefit would have either to be raised to the same level if it were an EU-derived claim or fall to be dealt with on a less advantageous basis: EU-derived claims would be propelled to the top of the queue. This is an improbable result. First, as just stated, procedure is a matter for the national court. Second, equivalence does not seek to raise the standard of procedural rules to the highest: see for example *Palmisani* and *Stringer*, above. Third, it would produce considerable uncertainty in domestic law.

49. The no "most favourable treatment" proviso is sufficient to decide this appeal but there are other grounds too.

Other tax appeals are not similar to VAT appeals for equivalence principle purposes

50. Moses J and this Court in Littlewoods considered that a taxpayer's remedies for overpaid VAT could not be treated as similar to his remedies for other unpaid taxes. The reason is derived from paragraph [36] of *EDIS*, that in the field of tax, the tax must be "the same kind of charges or dues".

51. The jurisprudence of the CJEU does not make it clear how a national court is to determine, for the purposes of the equivalence principle, whether an action is "similar" to some other action or whether a claim is for "the same kind of charge or dues". The national court has simply to do the best it can: the degree of abstraction necessary to find whether similarity exists must be a matter of judgment for the national court, which is better placed to form a view as to similarity than the CJEU. There is no universal rule as to that degree of abstraction and it must be examined in relation to each type of claim. But it is at least clear that some form of restriction is imposed, for otherwise the court would have to look at all other remedies in its legal system.

52. It is also, in my judgment, clear that "the same kind of charge or due" is a subset, or further restriction, on "similar action" and that that restriction means that it is not in general appropriate to look for similarities across different types or sectors of tax. There could be many reasons for this restraint. One reason might be that some taxes are imposed on private individuals and some on businesses. It may be thought that tax which is imposed on a private citizen (for example, income tax), even though it is sometimes borne by individual partners in a partnership, may justifiably be treated differently from a tax which is imposed on an industrial undertaking (for example, a land fill site operator). Most taxes are purely domestic, and not EU-derived. Given that domestic taxes are a manifestation of a member state's sovereign power to raise taxation and fix its own budget, it is likely that the CJEU would take a cautious view about applying the equivalence principle and requiring claims for overpayments (which, when large, could disturb national budgets) to be dealt with by the national law in an identical way.

53. What domestic law action is similar to an action to recover overpaid VAT? Mr Firth submits that the court need only look at the characteristics of the action which are relevant to the issue before it. He submits that income tax and SDLT appeals are similar because they also go to the FTT. I do not consider that this is the right test. First, it would mean, as Lord Justice Irwin remarked in argument, that, if this test was carried to its logical conclusion, there was no way of distinguishing VAT appeals from any other appeal in a civil or tax case, when the CJEU clearly intended that some investigation into similarity was required by the equivalence principle. Second, there is other jurisprudence where the examination of similar actions is not as wide ranging as Mr Firth suggests (see, for example, *Levez* and *Preston* at paragraph 37 above, where the courts compared the claims in issue with a narrow range of alternative remedies).

54. VAT is a very different sort of tax from income tax or even SDLT. Income tax is a tax on revenue received from a particular source. SDLT is a "transactional" tax,

which is levied on a particular event or transaction. VAT is differently designed: it depends on a chain of transactions leading to the production of goods or services in their final form. It is a tax on consumption levied on the ultimate consumer but accounted for by a trader. The way it works is that traders collect the tax by adding VAT to the selling price of their supplies and then account for it to HMRC. Multiple taxation is avoided because traders are also permitted to deduct from the amount for which they account the VAT on their inputs, that is the tax which they themselves were charged by their suppliers. The effect is that VAT is ultimately borne once only, that is by the final consumer who, not being a trader, has no right of deduction. It follows that claims for repayment of VAT have an impact on the proper working of this tax in a way that repayment claims for other indirect taxes do not. These features are sufficient to make VAT a different kind of tax from other indirect taxes.

55. This Court came to the conclusion in *Littlewoods* that VAT claims were not within the equivalence principle, following the ruling of Moses J in *Marks & Spencer*. Mr Firth points out that there was a concession made and he submits that that concession may well be wrong. However, it is clear that, if there is no comparator tax, there is no room for the equivalence principle: see *Palmisani* at [39]. So the view that was expressed in *Littlewoods* must equally be valid as a matter of EU law even if a wrong concession was made.

56. What is the effect of the passages from the opinions of Advocate General Mancini and Trstenjak, on which Totel relies? The opinion of Advocate General Mancini, in paragraph 11 of his Opinion in *San Giorgio*, ultimately came to the view that at most VAT was comparable to other indirect taxes only. In *Littlewoods*, Advocate General Trstenjak also considered that VAT was comparable to other claims for repayment of indirect tax. The doubts felt by her were limited to treating direct tax claims as comparable with VAT overpayment claims.

57. However, I do not consider that either passage is instructive as to the current state of EU law. In neither case was the opinion of the Advocate General adopted expressly or by implication by the CJEU. In my judgment, neither of the Opinions on the points in question can inform this Court as to EU law. Therefore, I do not accept Mr Firth's submission that those passages make it clear that under EU law VAT is to be compared with other indirect, or direct, taxes. The CJEU has not qualified what it said in paragraph [36] of EDIS (above, paragraph 30).

58. There is a point of detail to add. In paragraph 47 of her opinion in *Littlewoods* the Advocate General considered that similarity with direct taxes might have to be examined on a case by case basis, with any national court which needed to do so referring questions to the CJEU for a preliminary ruling. (Again, the CJEU did not refer to this possibility.) In footnote 26 to this paragraph, the Advocate General referred to *Reemstma Cigarettenfabriken GmbH v Ministero delle Finanze* Case C-35/05) [2008] STC 3448, (2007) ECR 1-2425. The parties provided this Court with written submissions on this case, in which the CJEU concluded that the system of direct taxation, as a whole, was not comparable with VAT. Mr Firth submits that this was a ruling for the purposes of that case only, since the relevant paragraph (paragraph 45) of the judgment of the CJEU begins "in the present case". Mr Swift submits that this holding was clearly intended to be generic and not limited to the case in hand. I prefer Mr Firth's submission, which is consistent with the approach of the Advocate General in *Littlewoods*: if Mr Swift was correct, the Advocate General

would have said "contrast" *Reemsta*, not "see, also," *Reemsta* in his footnote 26. But the point remains: the CJEU did not adopt the learned Advocate General's analysis.

59. For all these reasons, I conclude that the equivalence principle does not have the effect that VAT has to be compared with other taxes. It follows that the prepayment rule is not impugned by that principle.

Reference to the CJEU for a preliminary ruling not appropriate

60. In my judgment it is not necessary to make any reference on this issue. The conclusion which I have reached is in accordance with a consistent line of CJEU jurisprudence.

Conclusion

61. I would dismiss this appeal.

APPENDIX 1 AND 2 TO THE JUDGMENT OF ARDEN LJ

Appendix 1

Section 84(3), (3A) AND (3B) of VATA

(3) Subject to subsections (3B) and (3C), where the appeal is against a decision with respect to any of the matters mentioned in section 83(1)(b), (n), (p), (q), (ra) or (zb), it shall not be entertained unless the amount which HMRC have determined to be payable as VAT has been paid or deposited with them.

(3A) Subject to subsections (3B) and (3C), where the appeal is against an assessment which is a recovery assessment for the purposes of this subsection, or against the amount of such an assessment, it shall not be entertained unless the amount notified by the assessment has been paid or deposited with HMRC.

(3B) In a case where the amount determined to be payable as VAT or the amount notified by the recovery assessment has not been paid or deposited an appeal shall be entertained if—

(a) HMRC are satisfied (on the application of the appellant), or

(b) the tribunal decides (HMRC not being so satisfied and on the application of the appellant),

that the requirement to pay or deposit the amount determined would cause the appellant to suffer hardship.

Appendix 2

HMRC's examples of indirect tax appeals where prepayment is required

(1) *Insurance Premium Tax*. Part III of the Finance Act 1994 makes provision for Insurance Premium Tax. Tax is charged on receipt of a premium by an insurer if the premium is received under a taxable insurance contract (see FA 1994 at section 49). Unless regulations provide otherwise, tax is payable by the person who is the insurer in relation to the contract under which the premium is received (section 52). The material appeal provisions are at section 59, FA 1994 (appeal to First-tier Tribunal); and section 60 (requirements to pay equivalent to those at section 84 of the 1994 Act).

(2) *Landfill Tax*. Part III of the Finance Act 1996 provides for Landfill Tax to be charged on taxable disposal of material as waste made by way of landfill at a landfill site (section 40). The landfill site operator is liable to pay Landfill Tax (section 41). Section 54 of the Finance Act 1996 provides for a right of appeal to the First-tier Tribunal. Section 55 is in terms that are materially similar to section 84(3) and (3B) of the 1994 Act.

(3) *Climate Change Levy*. Part II and Schedule 6 of the Finance Act 2000 provides for Climate Change Levy. This levy is charged on supplies of electricity; any gas in a gaseous state that is of a kind supplied by a gas utility; any petroleum gas, or other gaseous hydrocarbon, in a liquid state; coal and lignite; coke, and semicoke, of coal or lignite; and petroleum coke (subject to exceptions) (paragraphs 2 and 3 of Schedule 6). Paragraph 121 of Schedule 6 to the Finance Act 2000 provides for an appeal to the First-tier Tribunal. Paragraph 122 is in materially the same terms as section 84(3) and (3B) of the 1994 Act.

(4) *Aggregates Levy*. Part 2 of the Finance Act 2001 provides for the Aggregates Levy. This tax is charged on aggregate that is subjected to commercial exploitation (subject to exceptions) and it is payable by the person responsible for the aggregate being so subjected on that occasion (section 16). By section 40 FA 2001 an appeal lies to the First-tier Tribunal. Section 41 FA 2001 contains provisions materially similar to section 84(3) and (3B) of the 1994 Act.

Lord Justice Irwin

62. I agree.

Lord Justice Henderson

63. I also agree.