

COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM UPPER TRIBUNAL TAX AND CHANCERY CHAMBER
MR JUSTICE WARREN AND JUDGE COLIN BISHOPP
LON/06/0069, LON/06/0067, LON/06/0094
LON/06/0096, LON/08/1101

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 30/07/2010

Before :

LORD JUSTICE LAWS
LORD JUSTICE EHERTON
and
LORD JUSTICE SULLIVAN

Between :

(1) John Wilkins (Motor Engineers) Ltd
(2) Squire Furneaux Group
(3) Margaret Elizabeth Williams
as executrix for Robin Allan Williams (Deceased)
(4) John Pudney Limited t/a Horsham Car Centre
(5) Lookers Plc

Appellants

- and -

Commissioners for Her Majesty's Revenue & Customs

Respondents

Mr Michael Conlon QC and Nicola Shaw (Instructed by McGrigors LLP) for the First to Fourth Appellants

Laurence Rabinowitz QC and James Henderson (instructed by Reynolds Porter Chamberlain LLP) for the Fifth Appellant

Jonathan Swift QC, Mr Peter Mantle and Mr Philip Woolfe (instructed by HMRC Solicitors Office) for the Respondents

Hearing dates : 24th June 2010

Judgment

LORD JUSTICE ETHERTON :

Introduction

1. These are appeals by 5 appellants from a decision of the Tax and Chancery Chamber of the Upper Tribunal (Mr Justice Warren, President, and Judge Colin Bishopp) dated 15 September 2009. The appeals form part of an expanding galaxy of litigation in which taxpayers, who have overpaid VAT to the respondents, the Commissioners for HM Revenue and Customs (“the Commissioners”), claim entitlement to compound interest, rather than simple interest, on those overpayments as a matter of EU and domestic law. These appeals are restricted to procedural points. They are appeals against the decision of the Upper Tribunal that the appellants’ respective notices of appeal to the Upper Tribunal were out of time, and against the Upper Tribunal’s refusal to exercise its power to extend the time for bringing the appellants’ appeals.

Background

2. The appellants are motor traders who made overpayments of VAT throughout the period 1973 to 1996 in respect of bonus payments made to them by motor manufacturers on the purchase of demonstrator vehicles and in respect of the margin attained on the sale of demonstrator vehicles. Input tax credit was not claimed on the purchase of the demonstrator vehicles because the recovery of input tax on such vehicles was “blocked” by domestic legislation. The appellants carry on unrelated businesses. The fifth appellant, Lookers plc (“Lookers”), is the representative member of a VAT group which includes many subsidiaries trading at locations throughout the United Kingdom.
3. Judgments of the European Court of Justice (“the ECJ”) in Case C-317/94 *Elida Gibbs Limited –v- Customs and Excise Commissioners* [1997] QB 499, [1996] STC 1387 (on 24 October 1996) (in respect of ‘manufacturers’ bonuses) and Case C-45/95 *European Commission –v- Italian Republic* [1997] STC 1062 (on 25 June 1997) (in respect of the sale of demonstrator vehicles) established that VAT had been overpaid as a result of the failure properly to transpose Community law into domestic law. The excess tax has all been repaid to the appellants. The Commissioners have also paid simple interest on the capital sums repaid. The appellants claim, however that they are entitled, not merely to simple interest on the overpayments, but to a sum calculated as compound interest. They rely particularly on the decision of the ECJ in Case C-446/04 *Test Claimants in the FII Group Litigation –v- Inland Revenue Commissioners* [2007] STC 326 and the speeches in the House of Lords in *Sempra Metals Ltd –v- Revenue and Customs Commissioners* [2007] UKHL 34, [2008] 1 AC 561 (“*Sempra*”).
4. There has been a plethora of litigation concerning that issue. In *Littlewoods Retail Limited –v- Commissioners for HM Revenue and Customs* [2010] EWHC 1071 (Ch.) (19.5.2010) Mr Justice Vos has directed that the question whether a taxable person, who has overpaid VAT, is entitled under EU law to more than simple interest on the principal sums overpaid be referred to the ECJ, now the Court of Justice of the European Union. In that case, and in *F.J. Chalke Limited –v- Commissioners for HM Revenue and Customs* [2010] EWCA Civ. 313 (25.3.2010) on appeal from *F.J.*

Chalke –v- Commissioners for HM Revenue and Customs [2009] EWHC 952 (Ch.) (Henderson J), the taxpayers asserted a restitutionary claim at common law for the time value to the Commissioners of the overpayments, from the time of receipt until repayment. There were a number of other issues in *Chalke* and *Littlewoods*, but they are not relevant to the present appeals.

5. The present appeals arise, not out of restitutionary claims at common law, but out of claims for interest pursuant to section 78 of the Value Added Tax Act 1994 (“the 1994 Act”). The appellants’ contention is that, in accordance with the *Marleasing* principle (C-106/90 *Marleasing SA v La Comercial Internacional de Alimentation SA* [1990] ECR I-4135), that section must be interpreted so as to conform with EU law, which they say requires compound interest to be paid by the Commissioners on overpayments of VAT. Appeals in respect of claims pursuant to section 78 fell within the jurisdiction of the VAT and Duties Tribunal (“the VAT Tribunal”) until 1 April 2009. From that date, the appeals came within the jurisdiction of the Tax Chamber of the First-tier Tribunal. In the present case, the appeals were originally made to the VAT Tribunal, which directed that they be joined so that they could proceed and be heard together. Following the transfer of jurisdiction to the Tax Chamber of the First-tier Tribunal, they were allocated to the complex category, pursuant to which a direction was made that the appeals be transferred to and determined by the Upper Tribunal. They were, in fact, the first appeals to be heard by the Finance and Tax Chamber of the Upper Tribunal (“the Tribunal”).
6. The chronology of the appellants’ claims for payment of interest is helpfully set out in paragraphs 15 – 22 of the decision of the Tribunal, which I gratefully adopt. They said:

“15. On various dates in May and June 2003 the appellants' representatives submitted claims to HMRC for repayment of the VAT which had been paid in excess of the amount which was properly due. A claim had already been made by the first appellant's accountants, but it had not been accepted because, until the delivery of the ECJ's judgment in [Case C-62/06 *Marks & Spencer plc v. Customs and Excise Commissioners* [2002] ECR I-6325], the Commissioners believed it was time-barred. The first four appellants had the same representatives whose letters of claim, in very similar form, for repayment of the capital sums included a request that "statutory interest is paid to my client". The fifth appellant's representatives wrote, in June 2003, to make the claim for payment of the capital sum and ended with a "request that our client is paid statutory interest". None of the requests was otherwise qualified.

16. Not surprisingly, some of the appellants' relevant records had been destroyed and some estimation and negotiation of the claims was necessary. The capital sums claimed were paid, in some cases after supplementary claims had been made, and in others not until disputes between the parties on the capital sums had been resolved, on various dates between August 2003 and January 2005. The capital sums due are no longer in issue.

17. On 2 September 2003, the first appellant received an interest calculation from the Commissioners showing £18,936.66 as due; it represented simple interest over a certain period. This amount was paid on or about 3 October 2003. In fact, the interest had been calculated over too short a period, and in a letter also dated 2 September 2003 the first appellant questioned the arithmetic of the payment and asked for "the interest to be recalculated for the original claim compounded from 1973". A second payment was made on 12 December 2003; the document which accompanied it referred to "Statutory interest... under VAT Act Section 78" and said nothing about compounding. It is common ground that the interest represented by the two payments was calculated using the rates prescribed by the 1998 Regulations, without compounding. Despite the earlier request for compound interest and the absence of any response to it, the second payment was accepted without immediate comment.

18. The remaining appellants received interest, also calculated at the statutory rates without compounding. The second appellant's claim for capital and interest was made on 23 June 2003 and the payment on 2 April 2004; the third appellant's claim on 29 May 2003 and the payment on 18 February 2005; the fourth appellant's on 28 May 2003 and 19 January 2005 respectively. The fifth appellant's claim was made on 27 June 2003 and payments of interest were made to it in August 2004 and on 24 January 2005. None of the accompanying letters, which appear to have been in a standard form, included any explicit comment about whether the interest had been calculated on a simple or compound basis, but the accompanying calculations made it clear that it was the former. In each case the payment was accepted, again without immediate comment.

19. On 3 August 2005—and therefore nearly 20 months after it had received the second interest payment—the first appellant wrote again to the Commissioners. It had noticed what it thought was an arithmetical error in the calculation of the capital sum due, which is of no present importance, but its letter went on to remind the Commissioners of its letter of 2 September 2003, and the request contained in it that the interest due be compounded, noting that interest had not in fact been compounded. It also referred to "a recent tax case (*Sempra Metals*) in the European Court of Justice" in which "it was decided that it was appropriate to award compound interest in the case of official error". Judgment in that case (under the name *Metallgesellschaft Ltd and others v Inland Revenue Commissioners and Attorney General* (Joined Cases C-397/98 and C-410/98) [2001] STC 452) ("*Hoechst*") had in fact been delivered in March 2001, rather more than four years earlier.

20. The Commissioners replied promptly, on 16 August 2005. The letter acknowledged that the Court of Appeal had agreed in principle, in *Sempra Metals Ltd (formerly Metallgesellschaft Ltd) v Inland Revenue Commissioners* [2005] STC 687 (it seems probable that the first appellant's reference to the ECJ decision should have been to the Court of Appeal's judgment) "that compound interest should be paid in certain circumstances" but added that "at present UK domestic law does not permit the award of compound interest" which they would, accordingly, not pay.

21. The first appellant's representatives continued to correspond with the Commissioners about the matter until December 2005, neither side changing its position. The correspondence included a letter from the Commissioners of 16 August 2005 firmly rejecting the claim, followed by a request, of 14 September 2005, for a "formal independent reconsideration of the Commissioners decision not [to] pay compound interest to our client" which led to a reply, simply restating the Commissioners' position, on 14 December 2005. This appeal was commenced on 9 January 2006. The disputed decision was identified as the letter of 14 December 2005.

22. The other appellants also made claims for compound interest some months after they had accepted the payments of simple interest, and each ultimately received a letter in similar vein to that sent to the first appellant on 14 December 2005. The second to third appellants made their claims in October and November 2005 and received their letters in December 2005; they served notices of appeal on 9 or 11 January 2006. The fifth appellant did not make its claim until 25 April 2006, received a letter of refusal dated 9 May 2006 and served its notice of appeal on 8 June 2006. All those appellants, too, identified the letters of refusal they had recently received as the disputed decision."

The statutory provisions and rules

7. Section 80 of the 1994 Act ("section 80") provided for the repayment of overpaid VAT. The relevant provisions of section 80 as at the date of the Tribunal's decision are set out in the Appendix to this judgment.
8. Section 78 of the 1994 Act ("section 78") provides for interest to be paid by the Commissioners on overpayments of VAT. The relevant provisions of section 78 as at the date of the Tribunal's decision are set out in the Appendix to this judgment.
9. By virtue of section 197 of the Finance Act 1996 the rate of interest applicable for the purposes of section 78 is that specified in The Air Passenger Duty and other Indirect Taxes (Interest Rate) Regulations 1998 SI 1998 1461 ("the 1998 Regulations"). In broad terms, the rate is 5 per cent per annum, with a mechanism for adjustment if

(5) A tribunal may, of its own motion, or on the application of any party to an appeal ..., waive any breach or non-observance of any provision of these rules ... upon such terms as it may think just. ”

The Tribunal’s decision

15. The substantive issue which the appellants wished to bring before the Tribunal was whether, in order to give effect to Community law, the Commissioners were obliged under section 78 of the 1994 Act to pay the appellants compound interest on overpaid VAT in respect of the entire period between payment of the excess and its repayment. The Tribunal concluded that section 78 provided only for simple interest. That decision is the subject of an appeal by the appellants to the Court of Appeal to be heard in due course.
16. Before considering the substantive issue on the proper interpretation of section 78, the Tribunal addressed the questions whether the appeals to the Tribunal were in time, and, if not, whether the Tribunal should extend the time for appealing pursuant to its discretion conferred by Rule 19.
17. The critical issue, on the question whether the appeals were in time, was the identification of the “disputed decision” of the Commissioners in the case of each appellant since the 30 days for appealing prescribed by Rule 4 (1) ran from the time of that decision. The Commissioners’ contention was that the “disputed decision” in each case was the letter by which the Commissioners notified the appellant that they had agreed to pay the “statutory interest” which had been requested, and set out their calculations on the amount due, from which it could be readily ascertained that only simple interest was being paid. If that argument was correct, the appeals were brought between about 10 months and just over two years out of time.
18. The appellants contended that the “disputed decision” in each case was the letter from the Commissioners, following the Court of Appeal’s judgments in *Sempra* handed down on 12 April 2005, which answered and denied the specific written request on behalf of each appellant for compound interest.
19. The Tribunal accepted the analysis of the Commissioners, giving the following reasons:

“34. In our judgment the Commissioners are right, and for the reasons advanced by Mr Swift. Section 83(1)(s) of the 1994 Act enables the tribunal to adjudicate on two issues: whether the Commissioners are liable to pay interest, and on the amount of any interest so payable. The communications the appellants received between September 2003 and February 2005 had two elements: the Commissioners' acceptance that some interest was due, and a determination of the amount they thought was payable. It does not seem to us that what was received then could amount to anything other than a decision susceptible of adjudication by the tribunal. There cannot, we think, be any real doubt that had the appellants wished to challenge, for example,

the period covered by the calculations, they could have brought appeals to the VAT and Duties Tribunal.

35. We do not consider there is merit in the argument that the communications the appellants received notifying them of the amount of interest the Commissioners were paying did not identify themselves as decisions, which the appellants might challenge by appeal to the tribunal if they were dissatisfied. The cases on which Mr Rabinowitz relied establish no more than that it is necessary for the recipient of a communication of this kind to be able to determine what it is he has received. Although it is good practice to inform a taxpayer of his right to appeal a decision, there is nothing in the 1994 Act which requires the Commissioners to do so, and we do not think any of the appellants, all of whom had experienced advisers, could have been under any illusion that the notifications they received were something other than decisions. It is apparent from the first appellant's representatives' request, of 14 September 2005, for a "formal independent reconsideration of the Commissioners decision not [to] pay compound interest to our client" that there was no misunderstanding on their part of the nature of the communication which had been received. We observe in passing that the letters the appellants received reiterating the refusal of the Commissioners to pay compound interest also did not identify themselves as decisions, or inform the appellants of their rights of appeal, but none of the appellants has suggested that those letters did not amount to appealable decisions.

36. What, then, was the nature of the decisions? Did they amount to decisions on claims for simple interest, the decisions being to accept those claims but going no further? Or did they constitute decisions on claims for statutory interest, whatever that might be, the decisions being that amounts of interest, as calculated by the Commissioners, were due, and nothing more? In our view, the answer is clearly the latter. The appellants requested interest pursuant to statute; they were, we consider, asking for all of the interest to which they were entitled. They, like the Commissioners, may have thought mistakenly (according to the appellants' construction of s 78) that their entitlement was only to simple interest. But that does not turn their request—that is to say for everything to which the statute entitled them—into something else—that is to say the amount which they thought they were entitled to and no more.

37. We accordingly determine that the relevant decisions, giving rise to a right of appeal under s 83, were those received when the payments of simple interest were made, that is between September 2003 and February 2005. The appeals were therefore out of time."

20. The Tribunal decided not to exercise their discretionary power under Rule 19 to extend the time for appealing. Their analysis and conclusion were expressed as follows:

“47. We have found this a difficult issue, since we consider that the arguments, including those relating to prejudice, are finely balanced. There is force in Mr Swift's point that good reason should be shown if an extension is to be granted, although we agree with the appellants that the observation of Auld LJ on which he relied, made in the context of an expressly more onerous test, should be treated with some caution in other contexts. We agree with Mr Swift too that the appellants have not acted with a sense of urgency. Although it is true that the claims for compound interest were all made within the three-year time limit imposed by s 78(11) and, had they been the only claims, the second to fifth appellants would have been in time, we consider that it counts against the appellants that they did not commence their appeals once they knew or should have known that they were or might be entitled to compound interest within the same period applicable to an appeal from a decision, namely 30 days. It is one thing to say that an appeal was not made within 30 days of the decision because it was not appreciated that the claim for compound interest could be made; but once it was, or should have been, appreciated that such a claim could be made, the appellants ought to have taken steps to act promptly to appeal the earlier decision to pay simple interest.

48. Further, the possibility, to put it no higher, of an award of compound interest has been known since April 2001, and that possibility became a strongly arguable case following the High Court judgment of Park J [in *Sempra* on 16 June 2004] to which we have referred, factors which also count against the appellants, although it is understandable that they were reluctant to incur the costs of what might have been speculative appeals until the position became even clearer.

49. In the exercise of our discretion, we refuse to extend the time for bringing these appeals. Taking the factors which we have mentioned into account, and whilst appreciating that different judges might come to a different conclusion, we consider that the balance falls in favour of the Commissioners.

50. We should add that we are conscious of the fact that these are only five of a very large number of claims for compound interest made by traders in the position of these appellants. The question whether compound interest may be awarded by this tribunal, or the Tax Chamber of the First-tier Tribunal, is a matter of considerable general importance. We heard full argument on both sides on the merits of the appeals and, as will appear from the next part of this decision, we have addressed

the arguments and reached concluded views. We have done so notwithstanding that these views are, as a result of our refusal to extend time for bringing the appeals, not strictly reasons for dismissing the appeals. If the appellants were to obtain permission to appeal against our decision to refuse an extension of time, we think that the Court of Appeal might prefer to have our views on the underlying issue albeit that Court will be in as good a position as us to decide the matter since the appeals have been conducted on the basis of agreed facts.

51. We consider that it would be wrong in principle to take into account, in deciding whether to extend the time for making the appeals, the fact that many other claims for compound interest are awaiting the decision in these appeals. The rights and wrongs of the recovery from the Commissioners of substantial sums of money cannot, we consider, depend on whether other claimants need to know the answer to the underlying issues.

52. This is particularly so given the case management directions which have been given in these appeals. The application for an extension of time was made a considerable time ago. The VAT & Duties Tribunal, instead of deciding that application, directed that it should be heard at the same time as the substantive appeals. It would have been quite wrong for us, in those circumstances, to have decided the extension of time point and left the substantive hearing for which everyone had prepared to another day. Those case management directions should not, however, be allowed to influence the merits of the application itself.”

The Appellants’ submissions

21. Mr Laurence Rabinowitz QC, for Lookers, submitted that Lookers’ appeal was in time. He made the following points on the history of the correspondence. The letter, on behalf of Lookers, from Deloitte & Touche to the Commissioners dated 27 June 2003 claiming “statutory interest” was made before the Court of Appeal’s decision in *Sempra* raised the realistic possibility of a claim for compound interest, and accordingly was sent at a time when the taxpayers as well as the Commissioners all believed that only simple interest was payable under section 78 on overpayments of VAT. Between the date of that letter and the letter of 25 April 2006 from Deloitte & Touche to the Commissioners, there was no reference in any correspondence to any Community law entitlement or to compound interest. There was no express claim for, or refusal of, such interest. The letter of 25 April 2006, which referred to observations of Chadwick LJ in *Sempra*, for the first time asserted, on behalf of Lookers, that an award of simple interest “does not represent full restitution in respect of the breach of Community law that has occurred in our client’s case” and requested an award of compound interest “to ensure appropriate restitution”. It requested that the compound interest “be calculated at a commercial rate”. The Commissioners

replied by a letter dated 9 May 2006 which specifically addressed and rejected the claim for compound interest, and denied that Lookers had any Community law right to anything other than simple interest on the VAT overpayments. It was that letter which was correctly identified, in Lookers' Notice of Appeal to the VAT Tribunal, as the disputed decision being appealed.

22. Mr Rabinowitz's analysis was as follows. He said that the critical task is to identify the disputed decision against which the appeal was brought, and one would expect that to be a straightforward exercise. By parity of reasoning with the majority speeches in *Mannai Investment Co Ltd v Eagle Star Life Assurance Co. Ltd* [1997] AC 749 (esp. at pp. 767G and 768G) and with *Barclays Bank plc v Bee* [2001] EWCA Civ 1126 (esp. at para [43] (Arden LJ)), the taxpayer, entitled to appeal a disputed decision, should be left in no doubt that a decision has been made on the particular point in question. That is especially important where a limited time period for appeal begins to run. A letter from the Commissioners to Lookers faxed on 3 August 2004 and a letter dated 21 January 2005 from the Commissioners to Lookers, in which the Commissioners agreed to pay statutory interest under section 78 and calculated it at a simple rate, were not expressed to be, and could not reasonably be interpreted as, a refusal to pay compound interest. The Commissioners could not have understood earlier requests for payment of "statutory interest" to have been requests for compound interest since the issue of entitlement or possible entitlement under Community or domestic law to compound interest had not yet been advanced. By contrast, the letter of 25 April 2006 from Deloitte & Touche to the Commissioners was headed 'Claim for Compound Interest', as was the reply from the Commissioners dated 9 May 2006. Until then, the only claim had been, and was understood by the Commissioners to mean, a claim for interest under section 78 without any "adjustment" of its meaning to take account of Community law entitlement to compound interest. The consequence was that the Tribunal wrongly identified as the relevant decision letter one which was written before any dispute ever arose, leading to the counter-intuitive result that the 30 day period for appealing began to run even before there was a dispute.
23. Mr Rabinowitz submitted, further and critically, that the Tribunal was under the mistaken impression that there could only ever be one claim in relation to statutory interest under section 78 in respect of the same capital overpayment. The Tribunal asked themselves the question whether there had been a decision about statutory interest. Having identified such a decision in the letters of August 2004 and January 2005, they regarded that as the end of the matter whereas they should have identified the specific dispute in question (namely entitlement to compound interest) and the decision of the Commissioners on it. The Tribunal's approach proceeded from the incorrect hypothesis that there could not be more than one relevant decision. The proper analysis, Mr Rabinowitz said, is that, if a claim is made that a greater amount is due than has been offered or paid, it is the decision on that particular claim which is the relevant decision for the purposes of the time for appealing, even though the claim, the dispute and the decision upon it are referable back to the original decision about the amount payable. The decision on the subsequent claim and dispute does not turn the earlier decision into a decision on the later dispute.
24. Mr Michael Conlon QC, for the first four appellants, adopted the submissions of Mr Rabinowitz, and, in particular, that there could be more than one successive claim

under section 78. Reference was made, in this connection, to the decision of the VAT Tribunal in *Hayward Gill & Associates Ltd v Customs and Excise Commissioners* [1998] V & DR 352. In that case the taxpayer, who carried on the business of manufacturing and retailing spectacles, contact lenses and other optical items to assist human vision, overpaid VAT. It made a claim for repayment, which was duly met by the payment of £258,199.81 together with statutory interest. Accountants, on behalf of the taxpayer, subsequently submitted a fresh claim for overpayment of VAT using a different method of calculation, resulting in a calculation of £764,803.47. The VAT Tribunal (Mrs R Gilliland, Chairman) rejected the Commissioners' contention that they were entitled to reject the second claim because the original claim had not been expressed to be a provisional or interim claim. The tribunal said:

“25. The language of sub-section (1) of section 80 is clear and unambiguous. It states that if VAT has been paid to the Commissioners which was not due to them, the Commissioners shall be liable to repay the amount which was not due. This is subject to a claim being made supported by appropriate documentation, to the time limit of six years and to the repayment not amounting to an unjust enrichment of the claimant.

26. No question arises in this case as to the adequacy of the form of the documentation provided in either the original or later claim and I do not see that unjust enrichment is relevant and indeed the Commissioners do not rely on it.

27. There is nothing on the face of section 80 which in terms provides that only one claim may be made. If the claimant can show that tax has been overpaid *prima facie* there is a liability on the Commissioners to repay it.

....

29. The Commissioners have submitted that, apart from provisional or interim claims, second claims are not to be entertained under section 80 and that “some sensible limits” have to be read into section 80 on the right to re-claim overpaid VAT. It was contended that if it were open to the taxpayer to make an unlimited number of claims for repayment on the same facts there would not be any certainty or finality and that an Appellant could bring an unlimited number of appeals against refusal to make repayments. Accordingly section 80 must be read subject to the ordinary principles of *res judicata* compromise waiver and estoppel.

....

41. In my judgment section 80(1) is not to be read as subject to the gloss that if a claim is made which is accepted and paid no further claim can be made in respect of the same period unless the claim were a provisional or interim claim. The section does

not in my judgment distinguish between interim or provisional or other claims.”

25. The VAT Tribunal, having rejected the submissions of *res judicata*, compromise, waiver and estoppel, allowed the taxpayer’s appeal that the second claim was admissible.
26. Mr Conlon submitted that the Tribunal’s analysis could lead to the absurd conclusion that, when payments of interest were made by the Commissioners pursuant to new calculations, as the Commissioners did in 2003 in favour of the first appellant, John Wilkins (Motor Engineers) Limited (“John Wilkins”), the Commissioners were acting *ex gratia* and arguably *ultra vires*. He said that the approach of Richards J in *Commissioners of Customs & Excise v Gil Insurance Limited* [2000] STC 204 was the proper approach, namely to identify the decision which engaged the jurisdiction of the Tribunal. He submitted that in every case where a further claim to interest is made because, for example, an incorrect interest rate has been applied or interest has been calculated for the wrong period or there has been a miscalculation for some other reason, there is a new claim for the purposes of section 78 in respect of which an adverse decision by the Commissioners is the “disputed decision” for the purposes of (what was formerly) Rule 4 and the commencement of the 30 day period for appealing. Such genuine further claims, he said, are to be distinguished from further claims which are merely vexatious or abusive in the sense of adding nothing of substance to the original claim. Moreover, he submitted, such an approach, unlike that of the Tribunal, is consistent with the EU law principle of effectiveness, under which taxpayers are to be provided with an effective remedy for breaches of EU law as opposed to making it virtually impossible or excessively difficult for taxpayers to assert their rights.
27. Mr Conlon, like Mr Rabinowitz emphasised that, following the Court of Appeal’s decision in *Sempra*, a new point was raised by the appellants. They were not, he said, merely going over the same ground as their original claim for statutory interest, but were engaging in a new point of substance on the right to compound interest under Community law.
28. In the supplemental skeleton argument for the first four appellants an argument was advanced based on section 121 of the Finance Act 2008, but that was not pursued in Mr Conlon’s oral submissions.
29. Both Mr Rabinowitz and Mr Conlon also submitted that the analysis of the Commissioners failed to take sufficient account of the three year limitation period in section 78 (11), and to distinguish it from the purely procedural time period in Rule 4. They emphasised that the Tribunal failed to appreciate that there was nothing in the statutory scheme which made it abusive to make successive claims within the three year limitation period. The statutory limitation period provided a finite period within which all such claims could be brought, and it was that period which gave effect to the policy of avoiding stale claims.
30. So far as concerns the Tribunal’s refusal to exercise its power under Rule 19 to extend the time for appealing, Mr Rabinowitz submitted that the Tribunal’s decision was flawed because it failed properly and sufficiently to take into account the great unfairness to the appellants if the period for appealing was not extended compared

with the absence of any significant prejudice to the Commissioners if the period was extended. He said that the Commissioners failed to take proper and sufficient account of the fact that the express claims for compound interest were all within the three year limitation period in section 78(11); and that the appellants were all under the impression that they could not appeal until an actual decision on the issue of compound interest had been clearly made; and of the unfair way that the time limit for appealing would operate in the context of a decision by the Commissioners made well before the claims to compound interest and Community law entitlement were fairly raised and expressly dealt with.

31. Mr Conlon adopted and amplified those submissions. He readily accepted that the Court of Appeal has only a limited ability to interfere with the exercise of the Tribunal's discretion, namely if there was a misdirection in law or, accepting a different formulation put by Laws LJ in the course of the hearing, the Tribunal was grossly and obviously wrong. Mr Conlon referred to *Commissioners of Customs and Excise v Neways International (UK) Ltd* [2003] EWHC 934 (Ch). In that case the Commissioners appealed the decision of the VAT Tribunal allowing a taxpayer's appeal where the Commissioners had failed to serve their statement of case within the specified time as extended by the Tribunal. Lloyd J said that the test to be applied on appeal from the Tribunal's decision how to exercise its discretion under Rule 19 was as follows:

“[7]... The test is put differently in different contexts but an appeal has to be on a point of law and, therefore, he [counsel for the Commissioners] has to go so far as to say that to allow the appeal was a legally impermissible exercise of the Tribunal's discretion on the facts.”

32. Lloyd J also said the following:

[29] “Looking at the matter generally, I accept Mr Thomas' submission that time limits are laid down in order that appeals will be processed without unnecessary delay. Such limits, whether as laid down by the rules or as varied by the tribunals, ought to be observed, not just disregarded or forgotten. If, however, a time limit is not kept to, so that the need arises to consider whether, against opposition, to extend it further or otherwise to deal with the default, the Tribunal should conduct a balancing exercise. Essentially, and without seeking to set out the position comprehensively, it should weigh the consequences of the default for the, as it were, innocent party, against the consequences of any possible sanction for the party in default. In any given case there may be several possible courses, ranging from allowing or as the case may be, dismissing the appeal by default at one extreme, to granting an extension on no other terms than that the party in default pays the costs of obtaining the extension on the other, and there may be intermediate possibilities, particularly as regards the imposition of terms. Under Rule 19(5), which I have read, the Tribunal may impose terms as it thinks just when waiving any default. Where the main prejudice is as to delay, the Tribunal

might be prepared to order an expedited hearing, or it may regard the award of interest on any eventual repayment, if that is what is at issue, as a sufficient compensation.”

33. Mr Conlon emphasised that, until the Court of Appeal’s decision in *Sempre*, neither the appellants nor the Commissioners were fairly aware of the potential claim for compound interest. Although the Tribunal said that the appellants had a duty to act promptly once they knew or should have known that they were or might be entitled to compound interest, but failed to do so, the reality was that, following the Court of Appeal’s decision in *Sempre*, the appellants took steps which were entirely normal in VAT disputes. Rather than engage immediately in litigation by way of appeal, each of them wrote reasoned letters to the Commissioners, setting out their claim and analysis, and they then waited for a reasoned response.
34. Mr Conlon submitted that, in emphasising the need for more prompt action by the appellants, the Tribunal were confusing the principles underlying the three year limitation period with the purely procedural thirty day time limit for appealing. This, he said, wrongly coloured the Tribunal’s assessment of the relative prejudice to the appellants, on the one hand, if the thirty day period was not extended, and to the Commissioners, on the other hand, if the period was extended. The limitation period of three years was, he submitted, the period intended to protect the public purse from stale claims, whereas the thirty day period for appealing was merely concerned with the efficient disposal of appeals. The effect of adhering to the thirty day period in the case of the appellants’ appeals to the Tribunal was to exclude potentially meritorious claims brought within the limitation period.
35. Mr Conlon also mentioned a disparate group of points which, he submitted, should have been taken into account by the Tribunal in deciding how to exercise their discretion under Rule 19, bearing in mind particularly that the Tribunal considered that the arguments were “finely balanced”. The Tribunal should have taken account, or greater account, he said, of the importance of the appeals in clarifying the law and of the interest of other taxpayers wanting an early resolution of the substantive point of interpretation of section 78; the fact that the law was in a state of development; and that the Community law principle of effectiveness was incompatible with a time limit accruing and expiring before the appellants were even aware of the matters giving rise to the dispute and, accordingly, when they were unaware of their need to appeal a decision taken by the Commissioners.

Discussion

36. It is necessary to consider at the outset the submission of Mr Jonathan Swift QC, for the Commissioners, that this court has no jurisdiction to interfere with the finding of the Tribunal that in respect of each appellant the “disputed decision”, for the purpose of Rule 4, was the decision by the Commissioners to pay the simple interest which was calculated and paid between 2003 and February 2005. The basis of that submission was that these appeals under section 13(1) of the Tribunals, Courts and Enforcement Act 2007 to the Court of Appeal from the Tribunal are restricted to points of law, but the identification by the Tribunal of the “disputed decision” in the case of each appellant was a finding of fact based on an evaluation of all the evidence. In support of that contention Mr Swift referred to *Edwards v Bairstow* [1956] AC 14,

Proctor & Gamble UK v Revenue & Customs Commissioners [2009] EWCA Civ 407, and *British Telecommunications plc v Sheridan* [1990] IRLR 27.

37. *Edwards v Bairstow* concerned the question whether a joint venture to purchase a spinning plant for a quick resale was an adventure in the nature of trade such as to justify an assessment to income tax under Case 1 of Schedule D to the Income Tax Act 1918. The General Commissioners found that it was not, and the issue before the House of Lords was whether that was a finding of fact or a question of law or mixed law and fact. The House of Lords held that the finding was an inference of fact, but it should be set aside because it was reached without any proper evidential basis. Mr Swift drew attention to various passages in the speeches of Viscount Simonds and Lord Radcliffe. It is sufficient to quote the following passages in the speech of Viscount Simonds at pages 29, 30 and 31:

“ ... I would make it clear that in my opinion, whatever test is adopted, that is whether the finding that the transaction was not an adventure in the nature of trade is to be regarded as a pure finding of fact or as the determination of a question of law or of mixed law and fact, the same result is reached in this case. The determination cannot stand: this appeal must be allowed and the assessments must be confirmed. For it is universally conceded that, though it is a pure finding of fact, it may be set aside on grounds which have been stated in various ways but are, I think, fairly summarised by saying that the Court should take that course if it appears that the Commissioners have acted without any evidence or upon a view of the facts which could not reasonably be entertained.

When the Commissioners, having found the so-called primary facts which are stated in paragraph 3 of their case, proceed to their finding in the Supplemental Case that the transaction, the subject-matter of this Case, was not an “adventure in the nature of trade”, this is a finding which is in truth no more than an inference from the facts previously found... To say that a transaction is or is not an adventure in the nature of trade is to say that it has or has not the characteristics which distinguish such an adventure. But it is a question of law not of fact what are those characteristics, or, in other words, what the statutory language means. It follows that the inference can only be regarded as an inference of fact if it is assumed that the tribunal which makes it is rightly directed in law what the characteristics are and that, I think, is the assumption that is made.”

38. *Proctor & Gamble UK v Revenue and Customs Commissioners* concerned the question whether a savoury snack product known as “Regular Pringles” was a food product zero rated for VAT purposes or an item excepted from such zero rating because it was similar to potato crisps, potato sticks or potato puffs and made from the potato or potato flour or potato starch, in which case it was subject to VAT at the standard rate. The VAT Tribunal agreed with the Commissioners that Regular Pringles fell within the exception from zero rating and was subject to VAT at the

standard rate. It was held by the Court of Appeal that the Tribunal had not made any error of law and its decision could not be overturned on appeal. Jacob LJ, giving the leading judgment, said that the VAT Tribunal was the primary fact finder, and the decision was a question of classification, which called for a value judgment based on the primary facts. Unless the VAT Tribunal had made a legal error in so doing (that is to say, reached a perverse finding or failed to make a relevant finding or misconstrued the statutory tests), it was not for an appeal court to interfere: see esp. paras [7], [13], [14], [16] and [22].

39. *British Telecommunications Plc v Sheridan* concerned the claim of an employee that he had been constructively and unfairly dismissed, having resigned from his job after he had been downgraded for falsifying his timesheet and having had a disagreement with his immediate superior over his performance appraisal. The Industrial Tribunal dismissed the employee's complaint, the majority holding that the employers were entitled to conclude on the evidence that the employee had been guilty of falsifying his timesheet and that the penalty of downgrading was reasonable for that offence and did not amount to a fundamental breach of contract by the employers; and all members of the Industrial Tribunal holding that, although the employee had a legitimate cause for complaint concerning his appraisal, his complaints were not so weighty as to amount to a fundamental breach of contract by the company, and the majority finding that those matters were not in any event causative of his resignation. The Employment Appeal Tribunal ("the EAT") allowed an appeal against the Industrial Tribunal's majority decision. The Court of Appeal allowed an appeal, holding that the EAT had not identified any error of law in the Tribunal's decision or made any finding that the decision was perverse, and so there were no grounds for allowing the appeal from the Industrial Tribunal.
40. I do not accept Mr Swift's proposition that, in respect of each appellant, the Tribunal's finding that the letters from the Commissioners between 2003 and February 2005 calculating and agreeing to pay interest on the overpayment of VAT was the "disputed decision" for the purpose of Rule 4 was a finding of fact. The answer to the question whether there was any decision at all by the Commissioners on the subject of interest payable under section 78 is a question of fact. Whether or not any such decision was the "disputed decision" within the meaning of Rule 4 seems to me, quite clearly, to be a question of law. That issue turns on the proper interpretation of the correspondence in the context of the proper meaning of Rule 4. Both of these are matters of law. I can see no relevant comparison between that issue on these appeals and the issue in *Edwards v Bairstow*, and the *Proctor & Gamble* and *British Telecommunications* cases.
41. I agree with the Tribunal that the letters written by the Commissioners between 2003 and February 2005, calculating and agreeing to pay the interest due under section 78 in respect of the appellants, were the relevant decisions, that is to say the "disputed decisions", on compound interest for the purposes of Rule 4.
42. First, I agree with the Tribunal that the claims for interest by the appellants during that period were for all such interest as was legally due under section 78 in respect of the amounts of capital to which the appellants were entitled under section 80. That is the natural meaning of the language used in the appellants' requests. In each case the claim was for "statutory interest". In the case of John Wilkins there was also an express claim for compound interest in its letter of 2 September 2003. The

interpretation of those letters cannot depend upon the subjective intentions of the appellants or their advisers. In any event, no evidence was adduced before the Tribunal as to such subjective intentions or as to the appellants' and their advisers' actual knowledge or understanding of the law and relevant cases. Further as regards the general context of that correspondence, for an objective interpretation of the requests for "statutory interest" and the Commissioners' responses, as the Tribunal observed:

"[48]... the possibility, to put it no higher, of an award of compound interest has been known since April 2001, and that possibility became a strongly arguable case following the High Court judgment of Park J [in *Sempra*]."

43. Those observations anticipated what I said in *Chalke*:

"[71] There are other reasons why I do not accept the claimants' basic submission that, prior to the Court of Appeal's decision in *Sempra*, any proceedings commenced by them for compound interest on overpaid VAT would undoubtedly have been dismissed. [Case C-397/98 *Metallgesellschaft Limited v IRC* [2001] ECRI-1727, [2001] Ch. 620] arose out of domestic proceedings brought by *Sempra*, then called *Metallgesellschaft Ltd*. The proceedings were not dismissed, but were stayed pending the reference to the ECJ, which was ordered as long ago as October 1998. Following the ECJ's decision [on 8.3.2001], *Sempra* brought its proceedings in restitution for compound interest. Those proceedings succeeded at first instance before Park J [[2004] EWHC 2387 (Ch.), [2004] STC 1178 (16.6.2004)], and successive appeals by the Revenue to the Court of Appeal and the House of Lords were dismissed. Although *Sempra* itself concerned the remedy for premature payment of tax, Park J expressed the view at first instance (paras [37] to [40]) that he could see substantial arguments that the entitlement to interest on unutilised ACT (that is, ACT not set off against MCT and so, in effect, overpaid tax) should also depend on the principles of Community law explained in *Metallgesellschaft* rather than section 35A of the Supreme Court Act 1981. In the Court of Appeal Chadwick LJ (at para.[53]) endorsed that view. In the circumstances, I see no reason to think that, if the claimants had instituted their proceedings at any time prior to *Sempra*, they would have been dealt with in any more disadvantageous way than the actions commenced by *Metallgesellschaft/Sempra*. "

44. Indeed, as I have said, well before the Court of Appeal's decision in *Sempra*, John Wilkins, acting on the advice of its accountants, sent its letter of 2 September 2002 to the Commissioners expressly claiming compound interest. In those circumstances, I can see no basis for any other objective interpretation of the correspondence from the Commissioners between 2003 and February 2005, in response to the requests by the

appellants for payment of statutory interest, than that the Commissioners had decided that all that was due under section 78 was simple interest calculated at the prescribed rate in accordance with the 1998 Regulations.

45. Secondly, I do not accept the appellants' argument that, even where a claim has been made for all the statutory interest that may be due under section 78, and the Commissioners have calculated and paid such amount as they considered due in respect of statutory interest on the overpayment, every subsequent claim for a greater amount in respect of precisely the same overpayment will always constitute a new claim in respect of which any negative decision by the Commissioners gives rise to a new "disputed decision" for the purposes of Rule 4. I agree with the Tribunal and Mr Swift that, on the facts of the present appeals, the substance of the matter, whatever the form, is that demands for compound interest and their rejection by the Commissioners were a challenge by the appellants to, and an affirmation by the Commissioners of, the Commissioners' original decisions and those decisions were the "disputed decision" for the purposes of Rule 4.
46. I do not accept that *Hayward Gill* is, by way of analogy, authority for the proposition that the post February 2005 claims by the appellants for compound interest gave rise, in the case of each appellant, to a new "disputed decision" within Rule 4. Underlying the whole of the analysis in that case was the undoubted proposition that the Commissioners were only entitled to receive and retain VAT lawfully due, and that section 80 required the Commissioners to repay any amount not due (subject to the taxpayer's use of appropriate documentation, compliance with the limitation period, and repayment not amounting to unjust enrichment of the taxpayer). The VAT Tribunal decided that, if new facts emerged after an initial claim for repayment under section 80 had been submitted and met, there was nothing in section 80 itself to preclude a new claim based on the new facts for a greater amount than the first claim. The VAT Tribunal expressly rejected the proposition that a taxpayer could bring a succession of claims on the same facts, with a series of appeals to the tribunal in respect of each claim:
- "33. It was further put to me that if more than one claim could be brought it would be open to a taxpayer to bring a succession of claims on the same facts with a series of appeals to the tribunal in respect of each claim. In my judgment this submission is unsound also. It would not be open to a taxpayer to bring a second appeal based on the same facts. The first decision of the tribunal on the facts would be binding on both parties and neither could re-litigate the issues at a subsequent hearing."
47. There were new facts giving rise to the second claim in *Hayward Gill*. What was in issue was the proper apportionment of VAT in respect of a supply that was partly standard rated for VAT (such as spectacles) and which was partly exempt from VAT (the services of a dispensing optician). Accordingly, the fees received by an optician had to be apportioned between the chargeable supply and the exempt supply. Apportionment of direct costs and general overheads was also required. Many opticians' records were, however, such that it was difficult to ascertain how much of the sum charged to the customer was properly attributable to the taxable supply. In *Hayward Gill* the taxpayer's first claim was based on a calculation of the dispensing

service fees included in the price charged to the customer disclosed by the taxpayer's records. After that claim had been submitted and paid, the Commissioners issued a Business Brief in which they specified the different methods of apportionment that would be acceptable. One of those was the Full Cost Apportionment Method. The taxpayer's second, higher, claim was based on that method, which had not been publicised by the Commissioners as an acceptable method at the time of the first claim. Although the VAT Tribunal did not expressly say so, it appears that the publication by the Commissioners of the Business Brief specifying the Full Cost Apportionment Method as an acceptable method of apportionment was considered to be a new fact justifying a second claim. In addition, it appears that the new claim covered a longer period than the first claim, and it seems also to have included lens dispensing fees which had not been included in the first claim (see para. 14 of the VAT Tribunal's decision).

48. I cannot see that the facts, analysis or conclusion of the VAT Tribunal in *Hayward Gill* assist at all on the present appeals. That was a case concerned with the right of the Commissioners only to receive and retain VAT lawfully due, and the consequent right of the taxpayer to submit new claims for overpaid VAT if new facts emerged showing the original claim was for less than the full overpayment. The present appeals are concerned with identifying "the disputed decision" for the purposes of Rule 4 where a claim was made for all statutory interest that might be due on a specified overpayment, the Commissioners paid all such statutory interest as they considered was due, and a subsequent claim was then made for a greater amount of interest on precisely the same amount of capital overpayment.
49. I would add, moreover, although I do not consider it makes any difference to the analysis, that I cannot see that any new facts emerged between the original claims of the appellants for statutory interest and their later claims for compound interest. As I said above, no evidence was led by the appellants before the Tribunal as to their subjective state of mind or their knowledge or understanding of the law; and, as the Tribunal found, and I agree, the possibility of an award of compound interest had been known since April 2001, and that possibility became a strongly arguable case following the judgment of Park J in *Sempra*. Even if, which I very much doubt, clarification of the law is a relevant consideration in the present appeals, there is no finding of the Tribunal that it was only the decision of the Court of Appeal in *Sempra* which in fact alerted or ought to have alerted the appellants to a right to compound interest. Indeed, John Wilkins had made a claim to compound interest as early as 2003.
50. Thirdly, although there is nothing expressly stated in section 78 which precludes successive claims to interest, and although, critically, each case will turn on its own particular facts, the notion of a general right to make an unlimited series of claims (limited only by the three year limitation period), each giving rise to a "disputed decision" and a new right of appeal for the purpose of Rule 4 in respect of precisely the same VAT capital overpayment, does not seem consistent with a sensible statutory scheme for disposing of disputed claims in an efficient and timely manner.
51. Fourthly, the existence of a wide discretion under Rule 19 to extend the time for appealing avoids the need for such an interpretation of the statutory scheme and is consistent with the Tribunal's approach. Contrary to the submission in Mr Conlon's skeleton argument, the approach of the Tribunal, in the light of the wide discretion

under Rule 19, does not contravene the Community or EU principle of effectiveness, for the exercise of the discretion must take into account all relevant considerations.

52. Fifthly, I reject Mr Conlon's submission that, on the Tribunal's approach, the Commissioners would or might be acting *ex gratia* and *ultra vires* in agreeing subsequent adjustments to interest calculations and making a further payment. I agree with Mr Swift that, even if there was a right of appeal by the taxpayer in relation to the original decision, the Commissioners would plainly be acting lawfully since they would properly be carrying out a function incidental to the discharge of their statutory functions.
53. Finally, on any footing, the authorisation and payment by the Commissioners of simple interest in response to the letter from John Wilkins of 2 September 2003 requesting compound interest was, in respect of that appellant, the disputed decision for the purposes of Rule 4.
54. I turn, then, to the issue of the exercise of the Tribunal's discretion under Rule 19. The Tribunal considered the arguments as to whether or not to extend the time for appealing to be finely balanced. This Court can only interfere with the Tribunal's exercise of their discretion if the Tribunal reached its decision in a legally impermissible manner. The Tribunal had to carry out a balancing exercise, having regard to all the relevant facts and circumstances, and giving due weight to them, and ignoring all irrelevant ones.
55. I have found this aspect of the appeal a difficult one in view of the impressive arguments advanced by Mr. Rabinowitz and Mr Conlon and the understandable perception of the appellants that the 30 day period for appealing in Rule 4 has operated harshly to exclude potentially legitimate claims to substantial sums for interest on undoubted overpayments of VAT. I have come to the conclusion, however, that the Tribunal did take into account all relevant considerations and reached a decision which they were entitled to reach on whether or not to exercise the discretion, even though, as they frankly acknowledged, other judges might legitimately have come to a different decision.
56. The Tribunal took into account the development of Community and domestic law concerning possible entitlement to compound interest on overpayments of tax, and the place of the Court of Appeal's decision in *Sempre* in that development; the relative prejudice to the appellants if the time for appealing was not extended and the prejudice to the public purse and other taxpayers if the period was extended; the fact that the express claims for compound interest were within the three year limitation period; whether or not the appellants had acted with a sense of urgency after they knew or ought to have known of the possible claim for compound interest; and that the appellants were only five of a much larger number of taxpayers in a similar position claiming compound interest and that the point of substance as to such entitlement needed to be resolved. It is not possible in those circumstances to hold that the Tribunal's refusal to extend the time for appealing was plainly wrong or legally impermissible. It is also important to bear in mind that the Tribunal is a specialist tribunal, and this Court should be slow to interfere with the exercise of its procedural powers, which are exercised in the light of its knowledge and experience of the types of cases that it deals with, both looking to the past and anticipating the future, doubtless attempting to apply some consistency of approach while making due

allowance for the particular facts of individual cases. Finally, I should say that, bearing in mind all the factors taken into account by the Tribunal, I do not accept Mr Conlon's submission that the Tribunal failed to have regard, or adequate regard, to the Community or EU legal principle of effectiveness. The Tribunal did take account of the prejudice to the appellants if the time for appealing was not extended, but balanced against that the appellants' lack of urgency once they knew or ought to have known of the possible claim for compound interest.

Conclusion

57. For those reasons, I would dismiss these appeals.

APPENDIX

78 Interest in certain cases of official error

(1) Where, due to an error on the part of the Commissioners, a person has—

(a) accounted to them for an amount by way of output tax which was not output tax due from him and, as a result, they are liable under section 80(2A) to pay (or repay) an amount to him, or

(b) failed to claim credit under section 25 for an amount for which he was entitled so to claim credit and which they are in consequence liable to pay to him, or

(c) (otherwise than in a case falling within paragraph (a) or (b) above) paid to them by way of VAT an amount that was not VAT due and which they are in consequence liable to repay to him, or

(d) suffered delay in receiving payment of an amount due to him from them in connection with VAT,

then, if and to the extent that they would not be liable to do so apart from this section, they shall pay interest to him on that amount for the applicable period, but subject to the following provisions of this section.

(1A) In subsection (1) above-

(a) references to an amount which the Commissioners are liable in consequence of any matter to pay or repay to any person are references, where a claim for the payment or repayment has to be made, to only so much of that amount as is the subject of a claim that the Commissioners are required to satisfy or have satisfied; and

(b) the amounts referred to in paragraph (d) do not include any amount payable under this section

...

(3) Interest under this section shall be payable at [the rate applicable under section 197 of the Finance Act 1996.

(4) The “applicable period” in a case falling within subsection (1)(a) or (b) above is the period—

(a) beginning with the appropriate commencement date, and

(b) ending with the date on which the Commissioners authorise payment of the amount on which the interest is payable.

(5) In subsection (4) above, the “appropriate commencement date”—

(a) in a case where an amount would have been due from the person by way of VAT in connection with the relevant return, had his input tax and output tax been as stated in that return, means the date on which the Commissioners received payment of that amount; and

(b) in a case where no such payment would have been due from him in connection with that return, means the date on which the Commissioners would, apart from the error, have authorised payment of the amount on which the interest is payable;

and in this subsection “the relevant return” means the return in which the person accounted for, or (as the case may be) ought to have claimed credit for, the amount on which the interest is payable.

(6) The “applicable period” in a case falling within subsection (1)(c) above is the period—

(a) beginning with the date on which the payment is received by the Commissioners, and

(b) ending with the date on which they authorise payment of the amount on which the interest is payable.

(7) The “applicable period” in a case falling within subsection (1)(d) above is the period—

(a) beginning with the date on which, apart from the error, the Commissioners might reasonably have been expected to authorise payment of the amount on which the interest is payable, and

(b) ending with the date on which they in fact authorise payment of that amount.

...

(10) The Commissioners shall only be liable to pay interest under this section on a claim made in writing for that purpose.

(11) A claim under this section shall not be made more than three years after the end of the applicable period to which it relates.

80 Recovery of overpaid VAT

(1) Where a person-

(a) has accounted to the Commissioners for VAT for a prescribed accounting period (whenever ended), and

(b) in doing so, has brought into account as output tax an amount that was not output tax due,
the Commissioners shall be liable to credit the person with that amount.

(1A) Where the Commissioners-

(a) have assessed a person to VAT for a prescribed accounting period (whenever ended), and

(b) in doing so, have brought into account as output tax an amount that was not output tax due,
they shall be liable to credit the person with that amount.

(1B) Where a person has for a prescribed accounting period (whenever ended) paid to the Commissioners an amount by way of VAT that was not VAT due to them, otherwise than as a result of-

(a) an amount that was not output tax due being brought into account as output tax, or

(b) an amount of input tax allowable under section 26 not being brought into account,

the Commissioners shall be liable to repay to that person the amount so paid.

(2) The Commissioners shall only be liable to credit or repay an amount under this section on a claim being made for the purpose.

(2A) Where-

(a) as a result of a claim under this section by virtue of subsection (1) or (1A) above an amount falls to be credited to a person, and

(b) after setting any sums against it under or by virtue of this Act, some or all of that amount remains to his credit,

the Commissioners shall be liable to pay (or repay) to him so much of that amount as so remains.

(3) It shall be a defence, in relation to a claim under this section by virtue of subsection (1) or (1A) above, that the crediting of an amount would unjustly enrich the claimant.

....

(4) The Commissioners shall not be liable on a claim under this section-

(a) to credit an amount to a person under subsection (1) or (1A) above, or

(b) to repay an amount to a person under subsection (1B) above,

if the claim is made more than 3 years after the relevant date.

(4ZA) The relevant date is-

(a) in the case of a claim by virtue of subsection (1) above, the end of the prescribed accounting period mentioned in that subsection, unless paragraph (b) below applies;

(b) in the case of a claim by virtue of subsection (1) above in respect of an erroneous voluntary disclosure, the end of the prescribed accounting period in which the disclosure was made;

(c) in the case of a claim by virtue of subsection (1A) above in respect of an assessment issued on the basis of an erroneous voluntary disclosure, the end of the prescribed accounting period in which the disclosure was made;

(d) in the case of a claim by virtue of subsection (1A) above in any other case, the end of the prescribed accounting period in which the assessment was made;

(e) in the case of a claim by virtue of subsection (1B) above, the date on which the payment was made.

In the case of a person who has ceased to be registered under this Act, any reference in paragraphs (b) to (d) above to a

prescribed accounting period includes a reference to a period that would have been a prescribed accounting period had the person continued to be registered under this Act.

...

(6) A claim under this section shall be made in such form and manner and shall be supported by such documentary evidence as the Commissioners prescribe by regulations; and regulations under this subsection may make different provision for different cases.

(7) Except as provided by this section, the Commissioners shall not be liable to credit or repay any amount accounted for or paid to them by way of VAT that was not VAT due to them.

LORD JUSTICE SULLIVAN

58. I agree with the judgment of Laws LJ and would allow these appeals for the reasons he gives.
59. We are all agreed that there is nothing in the 1994 Act which expressly precludes successive claims for interest. The statutory scheme contains a very detailed, and in many respects a highly prescriptive code. In these circumstances it would not be appropriate to impose by way of implication such a restriction upon the taxpayer's ability to claim interest on overpaid VAT, and it is not necessary to do so in order to produce consistency with "a sensible statutory scheme".
60. The statutory scheme permits claims for interest under section 78(10) to be made relatively informally; the only requirement is that they must be made in writing. Unlike a claim under section 80(6) for overpaid VAT, which must be made in such form and manner and be supported by such documentary evidence as the Commissioners may prescribe by Regulations, a claim for interest may be made by letter.
61. The Act does not require the Commissioners to respond to the claim in any particular manner, other than by paying the claimant the interest which is due. In practice, the Commissioners respond to claims by letter. In effect, the Act envisages that claims for interest will be made and determined in correspondence between claimants and the Commissioners. Such a decision-making process is not to be equated with other "once and for all" administrative decisions, e.g. to grant or refuse applications for a permission or licence to carry out some activity. In such cases there will be a formal decision notice which will usually inform the recipient of any right of appeal.
62. Given the informality of the procedure contemplated by the statute, I can see no reason why a claimant who has received an unfavourable letter in response to his claim should not, subject always to the three year limitation period in section 78(11), be able to write again to the Commissioners, restating his claim and seeking to explain, by reference, if appropriate, to further facts or to some more recently decided legal authority, why the Commissioner's letter was wrong. If the Commissioners

agree, they will say so, by letter; likewise if they disagree. In substance the parties will have been sensibly resolving the dispute by way of a further exchange of correspondence; in form there will have been another claim in writing and another decision by the Commissioners.

63. An example of the way in which this informal statutory scheme operates in practice is to be found in the correspondence bundle in the Lookers' appeal. The Commissioners set out their calculation of the interest due in a letter faxed on 4th August 2004. In an email dated 2nd December 2004 Lookers made a revised claim for interest over an additional period. In a letter received on 13th January 2005 the Commissioners agreed to make a further repayment of interest based on periods from 1st January 1976. Although the new decision in that case was made on the basis of "further information which has come to light...", it demonstrates how the system works: not by claim form, decision notice and notice of appeal, but by an informal exchange of correspondence.
64. The time for appealing against a "disputed decision" under the 1986 Rules is very short: only 30 days. It would be most unfortunate, and entirely contrary to the informal procedure for making and determining claims under section 78, if a claimant who was dissatisfied with the Commissioners' initial letter in response to his claim for interest was compelled to appeal within 30 days in order to protect his position, (he could not safely assume that the discretion conferred on the Tribunal by regulation 19 would be exercised in his favour), rather than simply writing to the Commissioners, repeating his claim, and explaining why they had wrongly paid him too little interest because, e.g. they had erroneously adopted too low an interest rate, paid interest for too short a period, or simply made some arithmetical error.
65. If repeat claims under section 78(10) are permissible in principle, there is no reason why they must be based on the emergence of some new fact which shows that the decision on the original claim was wrong, and may not be based on a new decision of the Court which clarifies the law in such a way as to demonstrate, or at least lend support to, the claimant's contention that the Commissioners' rejection of the earlier claim was wrong. As Laws LJ says, a repeat claim which has nothing new to say, whether factually or legally, will be rejected by the Commissioners as abusive. If there is any evidence that a significant number of repeat claims are being made in an abusive manner so as to be inconsistent with the operation of a sensible statutory scheme, Parliament can legislate to curb the abuse.

LORD JUSTICE LAWS

66. I have had the advantage of reading the judgment of my Lord Etherton LJ in draft. I adopt with gratitude his account of the facts, the material legislation, and related judicial decisions. However I disagree with his conclusion that section 78 of the 1994 Act does not allow successive claims for interest on input tax wrongly withheld in respect of the same period. I would hold the contrary, and if that is right the appellants' appeals to the Tribunal were in time: each was brought within 30 days (the time specified by Rule 4(1) of the 1986 Rules) of the "disputed decision".
67. As Etherton LJ states (paragraph 17), the critical issue is the identification of the "disputed decision" made by the Commissioners in the case of each appellant. By Rule 2 of the 1986 Rules that expression means the decision of the Commissioners

against which an appellant appeals or proposes to appeal. The appellants assert that the disputed decisions were the Commissioners' letters, sent following the delivery of this court's judgment in *Sempre* [2005] EWCA Civ 389, refusing each appellant's claim for compound interest. That submission could only be correct if the scheme of section 78 and associated appeals pursuant to section 83(1)(s) and the 1986 Rules allowed for successive claims under section 78 (and thus successive appeals) for all the interest due in respect of the same period: here the appellants had of course made earlier claims for interest, in response to which they received simple interest only, in respect of the period for which after *Sempre* they sought compound interest. And I agree with the Tribunal, as did Etherton LJ (paragraph 42), that the original claims for interest by the appellants between 2003 and February 2005 were put forward to recover all such interest as was legally due under section 78 in respect of the capital sums to which the appellants were entitled under section 80. There is in my judgment no doubt but that the claims for compound interest were second, or repeat, claims. Does that fact rule them out of section 78 and the appeal provisions?

68. At paragraph 19 Etherton LJ sets out the reasoning of the Tribunal (at paragraphs 34 – 37 of their determination) supporting their acceptance of the Commissioners' argument that that there was only one disputed decision in each appellant's case, and that was the first decision awarding simple interest. But this reasoning is, with respect, unsatisfactory, or at least incomplete. The Tribunal goes no further than to decide that the original claims were advanced to recover all such interest as was legally due under s.78 (paragraph 36: "[t]he appellants requested interest pursuant to statute; they were, we consider, asking for all of the interest to which they were entitled"). They offer no reasons for the further, and from the Commissioners' point of view essential, proposition that once it is shown that the original claim was brought under section 78 and led to an appealable decision, there could be no second section 78 claim in respect of statutory interest for the same period. Mr Rabinowitz QC for the appellant Lookers implicitly advanced this very criticism, as his argument is recorded at paragraph 23 of Etherton LJ's judgment.
69. Etherton LJ sets out the parties' submissions in this court at paragraphs 21 ff. I will not replicate or repeat his account. I should indicate at once that I respectfully agree with his rejection (paragraph 40) of the submission of Mr Swift QC for the Commissioners that the Tribunal's finding that the letters from the Commissioners between 2003 and February 2005 dealing with the first claims were the disputed decisions for the purpose of Rule 4 was a finding of fact. The question whether any decision is properly to be regarded as a disputed decision within the meaning of the Rules is, as Etherton LJ says, a question of law. It turns on the proper interpretation of the correspondence in the context of the proper scope of Rule 4. Both of these are matters of law.
70. I turn to the substantive issue: does section 78 permit successive claims for interest due in a single period, with concomitant appeal rights? I would first emphasise the fact that there is nothing whatever in the statute to show that there may not be such successive claims. The only formal requirement for a claim is that it be made in writing (section 78(10)). Accordingly the Commissioners have to justify a limitation upon the operation of section 78 which cannot be found in the statutory language.
71. It is to be noted that the VAT Tribunal has held in *Hayward Gill & Associates Ltd v Customs and Excise Commissioners* [1998] V & DR 352 that there may be successive

claims to recover principal sums by way of overpaid VAT within section 80 of the 1994 Act. The appellants submit that by parity of reasoning this decision is of considerable assistance to them in addressing the parallel question arising under section 78. Neither the Tribunal in the present case, nor the Commissioners, nor with respect my Lord Etherton LJ have sought to say that *Hayward Gill* was wrongly decided.

72. Etherton LJ addresses *Hayward Gill* at some length. He concludes (paragraphs 46 – 48) that it does not assist the appellants. Since I do not share that view, I should explain my approach to the decision. The facts were straightforward. A claim to recover overpaid VAT was put in by the taxpayer. Later a fresh claim was submitted using a different method of calculation and resulting in a much higher claimed figure. The VAT Tribunal held that the second claim was properly made within section 80. Etherton LJ (paragraph 24) has set out the central passages in the Tribunal’s determination, but for clarity and ease of reference I will repeat them:

“27. There is nothing on the face of section 80 which in terms provides that only one claim may be made. If the claimant can show that tax has been overpaid *prima facie* there is a liability on the Commissioners to repay it.

....

29. The Commissioners have submitted that, apart from provisional or interim claims, second claims are not to be entertained under section 80 and that ‘some sensible limits’ have to be read into section 80 on the right to re-claim overpaid VAT. It was contended that if it were open to the taxpayer to make an unlimited number of claims for repayment on the same facts there would not be any certainty or finality and that an Appellant could bring an unlimited number of appeals against refusal to make repayments. Accordingly section 80 must be read subject to the ordinary principles of *res judicata* compromise waiver and estoppel.

....

41. In my judgment section 80(1) is not to be read as subject to the gloss that if a claim is made which is accepted and paid no further claim can be made in respect of the same period unless the claim were a provisional or interim claim. The section does not in my judgment distinguish between interim or provisional or other claims.”

73. Obviously *Hayward Gill* does not bind this court, but Etherton LJ seeks in any event to distinguish it. He states, with respect rightly (paragraph 47 of his judgment), that there were new facts giving rise to the second claim. He draws attention (paragraph 46) to this passage in the Tribunal’s determination:

“33. It was further put to me that if more than one claim could be brought it would be open to a taxpayer to bring a succession

of claims on the same facts with a series of appeals to the Tribunal in respect of each claim. In my judgment this submission is unsound also. It would not be open to a taxpayer to bring a second appeal based on the same facts. The first decision of the Tribunal on the facts would be binding on both parties and neither could re-litigate the issues at a subsequent hearing.”

74. It is not I think clear whether in this passage the Tribunal meant to indicate that a repeat claim with no new facts would be barred as a matter of jurisdiction, or liable to be dismissed out of hand as being abusive. In my judgment the latter must represent the correct position. If a subsequent claim is in principle admissible, issues as to that claim’s quality – legal or evidential – will go to remedy (whether in the hands of claimant or respondent) and not to jurisdiction. And here is the basis for my respectful disagreement with Etherton LJ as to the impact of *Hayward Gill*. At paragraph 48 he contrasts that case, as being concerned with “the right of the Commissioners only to receive and retain VAT lawfully due, and the consequent right of the taxpayer to submit new claims for overpaid VAT if new facts emerged...”, with these appeals as being concerned with “identifying ‘the disputed decision’... where a claim was made for all statutory interest that might be due on a specified overpayment... and a subsequent claim was then made for a greater amount of interest on precisely the same amount of capital...” As I see it, however, these factual differences do not touch the essential question common to both cases: does section 78 (or section 80) allow successive claims for the recovery of interest (or capital) in respect of the same period? In the circumstances I regard *Hayward Gill*, which is of course a decision of the specialist Tribunal, as offering, by parity of reasoning, material support to the appellants’ position on the issue of repeat claims for the purposes of section 78.
75. More generally, my Lord Etherton LJ considers (paragraph 50) that
- “...the notion of a general right to make an unlimited series of claims (limited only by the three year limitation period), each giving rise to a ‘disputed decision’ and a new right of appeal for the purpose of Rule 4 in respect of precisely the same VAT capital overpayment, does not seem consistent with a sensible statutory scheme for disposing of disputed claims in an efficient and timely manner.”
76. But repeat claims with nothing new to say would be dealt with summarily by the Commissioners as being abusive, and it is to be expected that such a robust response would be supported when necessary by the Tribunal and by this court. Moreover the possibility of repeat claims, responsibly conducted, may in fact be perfectly appropriate for the sensible conduct of tax affairs between taxpayer and Commissioners. There must often be circumstances where in the course of correspondence between tax experts on either side views will be adjusted on such matters as section 78 interest claims. I doubt whether the taxpayer or the Revenue would be well served by a rigid and inflexible construction of the statute requiring in every case that the taxpayer accept the Commissioners’ first response or appeal. As Mr Conlon QC for the appellants other than Lookers observed on the facts of this case (see paragraph 33 of Etherton LJ’s judgment), rather than engage immediately in

litigation by way of appeal over the issue of compound interest, each of these appellants wrote reasoned letters to the Commissioners, setting out their claim and analysis, and then waited for a reasoned response.

77. In addition the protection offered by the three year limitation period in s.78 (11) has to be borne in mind – and distinguished from the purely procedural (and extendable) time for appealing given by the Rules.
78. In my judgment there was here a perfectly proper basis for a second section 78 claim being made, whether or not it ultimately prospers. Mr Rabinowitz and Mr Conlon both correctly submitted that the first claims were made before the Court of Appeal's decision in *Sempre* raised the realistic possibility of a claim for compound interest, and thus at a time when the taxpayers as well as the Commissioners all believed that only simple interest was payable under section 78 on overpayments of VAT. And although the Tribunal said that the appellants had a duty to act promptly once they knew or should have known that they were or might be entitled to compound interest, but failed to do so, the reality was that, following *Sempre*, the appellants took steps which were entirely normal in VAT disputes.
79. For all these reasons I would hold that the appellants' claims for compound interest were properly brought within section 78, that the Commissioners' responses to those claims were disputed decisions within the 1986 Rules, and that in consequence the appeals to the Tribunal were brought in time. I would accordingly allow the appeal.
80. I should add that if I am wrong, and the only disputed decisions were those made in response to the original claims, I agree with Etherton LJ for the reasons given by him that no sufficient basis has been shown to justify this court in overturning the Tribunal's discretionary decision not to extend time for appealing under Rule 19.