Neutral Citation Number: [2020] EWHC 11 (Ch)

Case No: RL-2019-000003

**IN THE HIGH COURT OF JUSTICE**
**BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES**
**REVENUE LIST (ChD)**

7 Rolls Buildings,
Fetter Lane, London, EC4A 1NL

Date: 13 January 2020

**Before**:

**The Hon. Mr Justice Fancourt**

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**Between:**

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| **MCX DUNLIN (UK) LIMITED** | **Claimant** |
| **- and -** | |
| **THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS** | **Defendant** |

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**David Goldberg QC** (instructed by Ernst & Young LLP) for the **Claimant**
**Julian Hickey** (instructed by The Commissioners for Her Majesty's Revenue and Customs) for the **Defendant**

Hearing dates: 11, 12 December 2019

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# Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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THE HONOURABLE MR. JUSTICE FANCOURT

## Mr Justice Fancourt:

1. This case concerns the taxation of profits made in the 1980s from the Dunlin oilfield in the North Sea. The field is now disused: oil production ceased permanently in 2015. In the 1980s, Shell UK Ltd and Esso Exploration and Production Ltd ("the old participators") operated the Dunlin field and made profits that were assessable to Petroleum Revenue Tax ("PRT") and they duly paid that tax and other taxes. In 2007, the claimant company ("MCXD") and another company bought operating and non-operating interests in the field from the old participators. Under the terms of the sale and purchase agreements, the old participators agreed to pay MCXD any refund of tax that they received as a result of any later allowable losses of the buyers being able to be carried back to the earlier profitable years of the field.

2. In 2015 HMRC determined allowable losses incurred by MCXD and others and then issued the old participators with amended tax assessments relating to the period 1983 to 1986. Tax refunds were consequently paid to the old participators, who paid the refunds to MCXD under the terms of the sale and purchase agreements. Nothing about that is in dispute. However, the tax refunds were paid by HMRC with interest only to the extent that PRT had been paid by the old participators in cash. To the extent that PRT liability had been discharged by way of set-off from Advance Petroleum Revenue Tax ("APRT") previously paid, HMRC contends that no interest is payable.

3. There is no factual dispute and MCXD therefore issued a Part 8 claim seeking a declaration that HMRC should have paid interest on the repaid tax to the extent that the PRT had been paid by way of set-off of APRT. The repayments in question ("the Relevant Repayments") are in excess of £36 million in aggregate, so it can be appreciated that statutory interest on that amount from the mid-1980s until the date of payment would be substantial.

4. The claim is defended by HMRC and its defence gives rise to two issues on which I heard argument on 11 and 12 December 2019. MCXD was represented by Mr David Goldberg QC and HMRC was represented by Mr Julian Hickey of Counsel.

5. The first issue is whether the Court should decline to grant declaratory relief in favour of MCXD because the question of entitlement to interest is a matter between HMRC and the old participators, not between HMRC and MCXD. Neither of the old participators has itself claimed interest from HMRC. The second issue is whether, as a matter of statutory construction, the repayment to which the old participators were entitled and which has been repaid by HMRC was of excess APRT credit, which pursuant to FA 1982, Sch. 19, para 14 is repayable without interest. If the repayment was of PRT or overpaid APRT then it is common ground that interest was payable on it.

6. HMRC did not suggest that the Court should decide the issue about the locus standi of MCXD and the appropriateness of making a declaration in its favour before hearing detailed argument about the statutory materials. Indeed, the first issue appears to have been something of an afterthought on the part of HMRC, since in its acknowledgment of service it seeks alternative declaratory relief against MCXD. At the hearing, Mr Hickey dealt first with the substantive issue before turning to the procedural issue. I propose to take the same course in this judgment.

The Substantive Issue

7. It is necessary to say a little more about the scheme of taxation of profits made from exploiting licences to drill for oil in the North Sea and then consider the detailed statutory provisions that apply in this case.

8. The Oil Taxation Act 1975 came into force on 8 May 1975 and created PRT. PRT was chargeable, initially at the rate of 45%, on assessable profits (reduced by allowable losses and other allowances) accruing to each participator in an oil field in a chargeable period, where the oil was won under a Government licence. Chargeable periods were every half year period ending on 30 June and 31 December after the oil field first achieved a specified level of production. Each half year period would give rise to an assessable profit or an allowable loss, the basis of calculation of which is specified in s.2 of the 1975 Act. The detail of the basis of calculation is immaterial for this claim.

9. Allowable losses are relieved under s.7 of the 1975 Act. This permits such losses to be carried forward or backwards to set against assessable profits in other chargeable periods. Provision was made in particular for allowable losses to be carried back and set against assessable profits in earlier chargeable periods where the winning of oil from the field in question had permanently ceased. That was achieved by treating the assessable profit for such a period as reduced by the amount of the later allowable loss:

> "Where –
>
> > (a) the Board have determined under Schedule 2 to this Act that an allowable loss has accrued to a participator in a chargeable period from an oil field; and
> >
> > (b) the winning of oil from that field has permanently ceased,
>
> then so much of that allowable loss as cannot under subsection (1) or (2) above be relieved against assessable profits accruing to the participator from the field shall be relieved under this subsection by treating the assessable profit accruing to him from the field in any chargeable period as reduced by the amount of the loss, or by so much of that amount as cannot be relieved under this section against the assessable profit so accruing to him in a later chargeable period." (s.7(3)).

10. The mechanics of the regime are set out in Schedule 2 to the 1975 Act. For each chargeable half year period, a participator is required to prepare and deliver to HMRC a return within 2 months of the end of the period (para 2). HMRC then makes an assessment to PRT where an assessable profit has accrued to the participator in that period. If an allowable loss has accrued in that period, HMRC makes a determination that the loss is allowable and gives notice of the determination to the participator. An assessment must state the amount of any allowable losses that have been set against

assessable profits for the period in question (para 10). Any PRT due must be paid within 6 months of the end of the chargeable period in which the assessable profit arises or, if later, 30 days after the issue of the notice of assessment (para 13). PRT so paid is deductible for the purpose of assessing the liability of the participator to corporation tax in a relevant accounting period (s.17 of the 1975 Act)

11. An assessment or determination can only be altered pursuant to the 1975 Act, which entitles a participator to appeal against an assessment or determination within 30 days of the date of issue of the assessment or determination (Sch 2, paras 10, 14). Where it appears to HMRC that the amount of the allowable loss or the assessable profit is wrong, it has power to make such assessment or determination or amendment of assessments or determinations as may be necessary for the chargeable period in question and other chargeable periods in consequence (para 12). A time limit of 4 years after the end of the chargeable period to which the assessment or amendment relates applies generally, but, importantly, that time limit does not apply in the case of an amendment made in consequence of carrying back allowable losses under s.7 of the 1975 Act.

12. That means that, in principle, allowable losses accrued on the winding up of oil production of a field many years after a chargeable period can be carried back and set against assessable profits in a much earlier period, with the consequence that HMRC must then amend the assessment of PRT for that period.

13. With effect from 31 January 1980, a participator was required itself to calculate the PRT payable when submitting a half-yearly return and to make a payment on account of PRT liability equal to the amount so calculated (Petroleum Revenue Tax Act 1980, s.1). Any excess shown to have been paid, when a notice of assessment was later issued for the period in question, would be repaid to the participator.

14. The Finance Act 1980 ("FA 1980") further required a participator to pay in advance of PRT for the following chargeable period 15% of the greater of the tax calculated by the participator to be payable for the current period and the tax assessed for the immediately preceding period. It also made detailed provisions in relation to PRT in a case where a participator transferred all or part of its interest in a field to a new participator. As subsequently amended by the Finance Act 2004, FA 1980, Sch 17, para 15 extends the carry back relief provided by s.7(3) of the 1975 Act in relation to terminal losses to a case where the interest (or part of an interest) of a former participator in a field had previously been acquired by a new participator. The effect is that allowable terminal losses incurred by the new participator are – if otherwise unrelieved – carried back and set against assessable profits previously made by the old participator, resulting in a repayment of tax paid by the old participator. Those provisions remain in force and are directly material to MCXD's claim.

15. By the Finance Act 1982 ("FA 1982"), important changes were made to the PRT regime. The rate of PRT was increased to 75% with respect to chargeable periods ending after 31 December 1982. Apart from that, in broad terms the existing provisions for prepayment and advance payment of tax liability were repealed with effect from 30 June 1983 and replaced with a new tax, known as advance petroleum revenue tax ("APRT"). Although, as enacted by FA 1982 APRT was to be an open-ended regime, the Finance Act 1983 amended its provisions to limit APRT to a period

expiring on 31 December 1986. It is the provisions of FA 1982 as so amended that are in issue in this case.

16. FA 1982 s.139, as amended, provides (so far as material):

> "(1) For each of the following chargeable periods, namely –
>
> (a) the first chargeable period ending after 31 December 1982 and before 1 January 1987 in which, subject to sections 140 and 141 below, a gross profit accrues to a participator from an oilfield, and
>
> (b) every one out of the immediately succeeding chargeable periods (if any) which ends before 1 January 1987 and in which, subject to those sections, a gross profit accrues to him from that field,
>
> the participator shall be liable to pay an amount of petroleum revenue tax (to be known as "advance petroleum revenue tax" and in this Chapter referred to as "APRT") in accordance with this section.
>
> (2) Subject to sections 140 and 141 below, APRT shall be payable on the gross profit accruing to the participator in the chargeable period in question….
>
> (3) The aggregate of –
>
> (a) any APRT which is payable and paid by a participator in respect of any chargeable period and is not repaid, and
>
> (b) any APRT which is carried forward from the previous chargeable period by virtue of subsection (4) below,
>
> shall be set against the participator's liability for petroleum revenue tax charged in any assessment made on him in respect of the assessable profit accruing to him in the period referred to in paragraph (a) above from the oil field in question (which liability is in this Chapter referred to as his liability for petroleum revenue tax for a chargeable period) and shall, accordingly, discharge a corresponding amount of that liability.
>
> (4) If, for any chargeable period, the aggregate of –
>
> (a) any APRT which is payable and paid by a participator for that period and not repaid, and
>
> (b) any APRT carried forward from the previous chargeable period by virtue of this subsection,

> exceeds the participator's liability for petroleum revenue tax for that period, the excess shall be carried forward as an accretion to any APRT paid (and not repaid) for the next chargeable period; and any reference in this Chapter to a participator's APRT credit for a chargeable period is a reference to the aggregate of any APRT paid for that period and not repaid and any APRT carried forward from the previous chargeable period by virtue of this subsection.
>
> ….
>
> (6) The provisions of Schedule 19 to this Act shall have effect for supplementing this section…"

It will be noted that this section contemplates that, during the pendency of the APRT regime, APRT paid may be repaid to the participator. This may arise, under FA 1982 Sch 19, upon it appearing that too much APRT has been paid, or on an amendment of an assessment or as a result of an appeal. In such circumstances the excess is repayable with interest.

17. Unlike PRT, which is calculated on assessable profit as defined in the 1975 Act, APRT is calculated on gross profit. The APRT levied was 20% of gross profit for the chargeable period ending on 30 June 1983 and thereafter reducing until it reached 5% for chargeable periods ending in 1986. Any APRT payable and paid by a participator (and not repaid) was set against the participator's PRT liability for that chargeable period. Section 17(1A) of the 1975 Act, inserted by FA 1982, provides:

> "If and so far as any liability to an amount of petroleum revenue tax for any chargeable period is satisfied by an amount of advance petroleum revenue tax paid for that or any earlier chargeable period, that amount of petroleum revenue tax shall be treated for the purposes of this section as having been paid on the date on which it became due."

So where APRT has been paid it is "set against" and discharges pro tanto a liability for PRT, and by virtue of this subsection is deemed to have been paid on the day on which the PRT for the chargeable period became due.

18. FA 1982 Sch 19 contains the machinery for collection of APRT and other miscellaneous provisions. By para 1(1):

> "APRT which a participator is liable to pay in respect of any chargeable period for an oil field shall be due on the date on which the return for that period and that field is made by the participator in accordance with paragraph 2 of Schedule 2 to the principal Act or, if a return is not so made, on the last day of the second month following that period "

The liability arises without the need for any assessment to be made. Para 2 provides for monthly advance payments of APRT as instalments on account of APRT liability for the following chargeable period. If it becomes apparent to HMRC that any APRT

payable has not been paid on the due date, they may make an assessment to tax. HMRC may amend an assessment when it appears to them that any gross profit charge to tax ought to have been larger or smaller. A participator can appeal against any assessment or amendment of an assessment within 30 days of the date of issue of the notice.

19. The following further provisions of Schedule 19 are material:

> "9—(1) Where in respect of any oil field a participator has paid an amount of APRT for a chargeable period which exceeds the amount of APRT payable therefor the amount of that excess shall be repaid to him.
>
> (2) Where in respect of any oil field the amount paid for any chargeable period by a participator by way of instalments under paragraph 2 above exceeds the aggregate of his liability as mentioned in sub-paragraph (4) of that paragraph, the amount of that excess shall be repaid to him.
>
> 10—(1) APRT payable for a chargeable period but not paid before the end of the second month after the end of that period shall carry interest from the end of that month until payment.
>
> (2) Any amount payable by a participator as an instalment in respect of a chargeable period for a field and not paid by him in the month in which it ought to be paid shall carry interest from the end of that month until –
>
> (a) payment of the amount, or
>
> (b) two months after the end of that period, whichever is the earlier.
>
> …..
>
> (4) Where an amount of APRT or an amount paid by way of instalment becomes repayable, that amount shall carry interest from –
>
> (a) two months after the end of the chargeable period in respect of which the APRT or the instalment was paid, or
>
> (b) the date on which the amount was paid,
>
> whichever is the later, until the order for repayment is issued.
>
> ……
>
> 14—(1) If a participator in an oil field has an excess of APRT credit for the ninth chargeable period following the first chargeable period referred to in section 139(1)(a) of this Act, then, on the making of a claim the amount of that excess shall be repaid to him.

> (2) For the purposes of this paragraph there is an excess of APRT credit for the ninth chargeable period referred to in sub-paragraph (1) above if any of that credit would, apart from this paragraph, fall to be carried forward to the next chargeable period in accordance with section 139(4) of this Act; and the amount of the excess is the amount of the credit which would fall to be so carried forward.
>
> …..
>
> (5) Paragraph 10(4) above shall not apply to any amount of APRT which is repayable only on the making of a claim under sub-paragraph (1) above."

20. Paragraph 14 is central to this claim. The effect of para 14 and s.139 FA 1982 is that "unused" APRT is carried forward and, after the last of the periods that are chargeable to APRT, if not set against a PRT liability in that period, can then be re-claimed by the participator as excess APRT credit. If excess APRT is claimed and repaid in those circumstances, it is repaid without interest. There is therefore a distinction between a repayment of overpaid APRT – which is repayable with interest – and a claim for repayment of excess APRT credit at the end of the duration of the APRT regime. Overpaid APRT arises where too much was paid by the participator in respect of a given chargeable period (or by way of instalments on account of the next chargeable period); excess APRT credit arises where the correct amount of APRT was paid for the chargeable periods but was not all needed to be set against PRT by the end of the APRT regime in 1987. HMRC claims that the latter is what happened in this case, even though the repayment was made in 2015 and not in or shortly after 1987.

21. The facts that are material to MCXD's claim can be shortly stated.

22. The old participators made substantial assessable profits between the chargeable period ending on 31 December 1983 and that ending on 31 December 1986. They paid APRT in respect of those chargeable periods. They were assessed to PRT in respect of the same periods. They paid the PRT due, in part by way of set-off of APRT paid for each such period (or unused APRT carried forward from a previous chargeable period) pursuant to FA 1982 s.139(3) on the date on which the PRT was due, and as to the remainder of the PRT for each chargeable period in cash. No claim for repayment of excess APRT credit was made by the old participators in or after 1987 because all the APRT paid was set against PRT liabilities accrued before the end of 1986.

23. On 21 December 2007, MCXD acquired an interest in the Dunlin field from the old participators. An interest was also acquired by Fairfield Betula Ltd ("FBL"). MCXD, FBL and others entered into a joint operating agreement. From 2008, MCXD and FBL, the new participators in the Dunlin field, incurred substantial allowable losses in connection with winding down the production of oil from the Dunlin field. After production was certified as having ceased, FBL as the responsible body for the field gave notice to HMRC that production had ceased. Returns made by FBL and MCXD for the chargeable periods ending from 31 December 2008 up to 31 December 2015 identified allowable losses, which were determined as such in due course by HMRC.

24. Thereafter, and without any claim having to be made by or on behalf of the old participators, HMRC issued amended tax assessments in favour of the old participators. This was in accordance with FA 1980, Sch 17, para 15, which, as explained above, allows losses made by new participators in a field to be carried back and set against the most recent unrelieved assessable profits of the old participators. Documents disclosed at a late stage by HMRC demonstrate how this was done in relation to the chargeable period ending on 31 December 1986.

    i) An amended assessment dated 1 May 1996 had assessed a PRT liability for that period of £1,580,034, of which £422,061 was discharged by way of APRT credit, leaving a liability of £1,157,973.

    ii) A further amended assessment dated 26 August 2015 assessed the amount of PRT payable as nil, on the basis that £3,987,270 of allowable losses were first set against the assessable profit and then £2,033,468 of oil allowance or exempt allowance was set against the residual amount of assessable profit. That amended assessment included a figure of £1,157,973 labelled as "Discharge", which correlates to the amount of liability shown (and presumed paid) in the 1 May 1996 amended assessment.

    iii) Then a further amended assessment dated 18 December 2015 assessed the amount of PRT payable as nil, but this time on the basis that £5,756,114 of allowable losses were first set against the assessable profit and then £264,624 of oil allowance or exempt allowance set against the residual amount of assessable profits. This document contains no equivalent "Discharge" figure. That may be because the £1,157,973 had already been repaid by HMRC.

    It therefore appears that further carry back losses made by the new participators were applied in the amended assessment dated 18 December 2015, which further amended the amended assessment dated 26 August 2015.

25. There were, doubtless, further amended assessments (not disclosed) for other chargeable periods, such that allowable losses from 2008 to 2015 were carried back and used to extinguish in whole or in part the assessable profits for other chargeable periods. When one of the old participators challenged the amounts of tax repaid, which did not appear to include the amounts of APRT that had been set against PRT liabilities for the chargeable periods in question, HMRC said by email dated 8 September 2015 that a form PRT1007 would need to be completed to claim a repayment of APRT. No such claim (to repayment of APRT as such) was made by an old participator. HMRC nevertheless made a repayment on 10 February 2016 of the PRT that had been discharged by setting paid APRT against the PRT liability. HMRC had paid interest on the repaid tax that represented PRT discharged by the old participators in cash, but no interest was paid on the repaid amounts that represented PRT discharged by APRT. This can only have been justified (and HMRC seeks to justify it) on the basis that FA 1982 Sch 19 para 14 applies, and so para 10(4) – which provides for interest on repayments of overpaid APRT – is disapplied.

26. The most important facts emerging from this (none of which are disputed) are:

    i) that all APRT paid by the old participators was used by being set against PRT liabilities in the relevant chargeable periods (1983-1986);

ii) there was therefore at the time no APRT that was carried forward and unused after the last of the nine APRT chargeable periods that could have been claimed back by the old participators under FA 1982 Sch 19, para 14; and

iii) the carry back of allowable losses made by the new participators to the years 1983-1986 results in lower assessable profits (or no such profits) in those years and therefore an obligation on HMRC to repay the tax that the old participators paid in those years in an agreed amount;

iv) to the extent that the PRT was paid in cash, HMRC repaid the tax with interest; to the extent that it was paid by crediting APRT, no interest was paid.

27. The old participators paid the repaid tax and interest that was paid by HMRC to MCXD, which claims to be entitled to all such repayments as against the old participators under the 2007 sale and purchase agreements and as against FBL by reason of a forfeiture of FBL's interests in the field under the joint operating agreement. This forfeiture and entitlement of MCXD was confirmed by a deed made on 6 April 2016 ("the forfeiture deed"). FBL has not disputed MCXD's entitlement to the repaid tax.

28. The remaining substantive question is therefore whether HMRC are correct in saying that the tax repaid on 10 February 2016 was APRT that was repaid under FA 1982 Sch 19, para 14. If it was, no interest is payable because para 14(5) so provides. If it is not, interest is payable, either because the tax repaid is properly to be characterised as PRT, not APRT, or, if it is APRT, because FA 1982 Sch 19, para 10(4) applies but para 14 does not apply.

29. MCXD's case is straightforward. Mr Goldberg submits that when APRT is "set against" an assessed liability to PRT, pursuant to FA 1982 s.139(3), it discharges a liability to PRT and so can no longer be regarded as APRT paid by a participator. As a matter of historic record, the money in question was originally paid as APRT and is held by the Exchequer as such for a time; but as soon as the "set against" provisions of s.139(3) apply – as they do, as confirmed by Sch 2 para 17(1A) of the 1975 Act, when a payment of PRT is due – the money is no longer APRT credit but money that has discharged a liability to PRT. Prior to the due payment date, the participator had a liability to PRT; afterwards he did not. The APRT therefore cannot at one and the same time have reduced or extinguished the PRT liability and remain as APRT credit. Any amount carried forward as APRT credit to the next chargeable period (if any) will exclude the amount set against the PRT liability in the current period. If the APRT had not been used to discharge the PRT, interest would still be running on unpaid PRT.

30. To support this argument, Mr Goldberg relied on Burton v Mellham [2006] UKHL 6; [2006] 2 All ER 917. That was a case concerned with advance corporation tax (ACT). ACT was payable by a company on a foreign income dividend but was not paid. The company had a valid (but disputed) claim at the time for double taxation relief. The lower courts held that the ACT had not in fact been paid, and so could not be "repaid" by the Revenue, and accordingly that interest was payable by the company on the unpaid ACT. The House of Lords allowed the company's appeal. Lord Walker of Gestingthorpe held that interest could not continue to be payable if the ACT had been paid by way of set-off of the relief to which the company was

entitled. The set-off was treated as discharging the liability to mainstream corporation tax. That case decides that in principle a set-off can discharge a tax liability in the same way as does a payment of tax, but it casts no further light on the question of statutory construction that arises on this claim.

31. The next step in the argument of Mr Goldberg is that when, many years later, allowable losses are able to be carried back to the chargeable period in question to reduce or extinguish the assessable profits, resulting in an obligation on HMRC to repay tax, what is repayable is PRT, not APRT. It is PRT that has been overpaid, when viewed from the time of the later allowable losses. Until that time (about 2015), PRT had not been overpaid. It follows that, in 1987, at the end of the ninth consecutive chargeable period for APRT, there was no excess APRT credit to which the old participators could claim repayment. It was only in 2015 that it then appeared that a repayment of PRT paid in 1983-1986 was due. It is inappropriate and unnecessary, he argues, to re-write history, by saying that there was (with the benefit of hindsight) no liability to PRT in those years, therefore the APRT paid in them could not have been set against a PRT liability, therefore the APRT paid did not cease to be APRT credit and must have been carried forward as excess APRT that could have been (but was not in fact) reclaimed in 1987.

32. To support that argument, Mr Goldberg points out that what gives rise to repayment of tax, where there is carry back of allowable losses, is a reassessment of assessable profits, which is the basis of assessment of PRT: s.7(3) of the 1975 Act. There is no provision for reassessment of gross profits, which is the basis of assessment of APRT, nor any provision for loss relief that applies against an APRT assessment.

33. Mr Goldberg further argued that if substantial allowable losses had been incurred during the 1983-1986 period, e.g. in chargeable periods in 1985, after large assessable profits in earlier chargeable periods, e.g. in 1983, the allowable 1985 losses could be carried back under s.7(2) of the 1975 Act to reduce the profits previously made. The repayment made would necessarily then be of PRT overpaid, not APRT, because no excessive APRT was paid for the profitable years and the time for repayment of excess APRT credit had not arrived. If repayment of tax is a repayment of PRT in such a case, then, Mr Goldberg argues, repayment under s.7(3) in this case must be of the same character and not a repayment of APRT.

34. Mr Goldberg submits that, as FA 1982 Sch 19 shows, the references in FA 1982 for repayment of APRT are there because, on an amended assessment or an appeal, it may appear that the APRT paid was excessive in comparison with the gross profits for a chargeable period, or that advance APRT paid on account turned out to be excessive, and therefore there is a need for repayment provisions. Such repayments carry interest (Sch 19, para 10(4)) but interest is not payable in the case of excess APRT credit. He submits that this is because the scheme underlying APRT was that participators would effectively advance money to the Government interest-free for a maximum defined period, which could be used to set against PRT when due but otherwise would be retained by the Government and only repaid in 1987.

35. Thus APRT accelerates payment of PRT that is due and otherwise provides a short-term interest-free loan of any surplus APRT. It makes no sense, Mr Goldberg submits, if the provisions for almost unlimited carry back of allowable losses can have the effect of entitling the Government to retain overpaid tax interest free for a much

longer period. Equally, it makes no sense that if PRT has been overpaid as a result of losses carried back, part of the PRT (that was paid in cash) is repayable with interest but part (that was paid out of APRT) is repayable without interest.

36. HMRC's case is that APRT and PRT are different taxes and that there is nothing in the legislation that says that APRT when set against a PRT liability becomes PRT for all purposes. The provisions of FA 1982 should be read as deeming available APRT to reduce PRT liability, but that there is nothing that deems a repayment of tax to be a repayment of PRT if and to the extent that a PRT liability was deemed discharged out of APRT.

37. As the argument of HMRC developed, it was clear that considerable reliance was placed on FA 1982, s.142, which it was argued recognises that PRT and APRT are different taxes and that if a PRT liability is extinguished a repayment should be treated as a repayment of APRT if it was paid as APRT. There was nothing in the statutory provisions, Mr Hickey argued, that was inconsistent with money paid being retrospectively treated as APRT. HMRC also relied on a decision on ACT as being analogous to the provisions for APRT and argued that where losses were carried back APRT should be treated as unused and so, in hindsight, excess APRT credit.

38. Section 142 of FA 1982 provides (so far as material) as follows:

> "(1) If it appears to the Board –
>
> > (a) that any amount of APRT credit which has been set off against a participator's assessed liability to petroleum revenue tax for any chargeable period ought not to have been so set off, or that the amount so set off has become excessive, or
> >
> > (b) that, disregarding any liability to or credit for APRT, a participator is entitled to a repayment of petroleum revenue tax for any chargeable period,
>
> then, for the purpose of securing that the liabilities of the participator to petroleum revenue tax and APRT (including interest on unpaid tax) for the chargeable period in question are what they ought to have been, the Board may make such assessments to, and shall make such repayments of, petroleum revenue tax and APRT as in their judgment are necessary in the circumstances.
>
> (2) In a case falling within paragraph (a) of subsection (1) above, any necessary assessment to petroleum revenue tax may, where the revised amount of set off is ascertained as a result of an appeal, be made at any time before the expiry of the period of six years beginning at the end of the chargeable period in which the appeal is finally determined; and in a case falling within paragraph (b) of that subsection any necessary assessment to APRT may be made at any time before the expiry of the period of six years beginning at the end of the chargeable period in which the participator became entitled as mentioned in that paragraph."

Subsections (3) and (4) of s.142 amended s.17 of the 1975 Act, by making provision for APRT in connection with the computation of corporation tax for the period in which PRT was paid, and inserting into s.17 subsection (1A) (set out in [17] above), deeming APRT to satisfy a liability for PRT on the date on which the PRT became due.

39. In my judgment, although s.142 clearly does treat a liability to APRT and a liability to PRT as separate liabilities, it does not, as HMRC argues, require a repayment of PRT to be made (in whole or in part) by means of crediting or repaying APRT. The section is somewhat opaque, but it appears to be concerned with amending assessments for APRT and/or PRT that, as a result of other amended assessments or appeals, are proved to be excessive in amount, and then making provision for consequential adjustments to liability for PRT or APRT. Subsection (2) is concerned to impose time limits for assessments that increase liability to PRT in consequence of a reduction in set-off of APRT, or that increase liability to APRT in consequence of an entitlement to a repayment of PRT.

40. The tailpiece to subsection (1) indicates that the purpose of the subsection is to ensure that the participator's liabilities are what they ought to have been for the chargeable period in question and (in context) not more than the correct amount. Subsection (2) recognises that, in consequence, there *may be* a need to reassess a further liability to PRT or APRT and, if there is such a need, it imposes a time limit for such a reassessment. The section as a whole does not stipulate that an entitlement to a repayment of PRT must – in so far as it was originally discharged out of APRT – be satisfied by a retrospective credit of APRT. It provides only for any *necessary* and consequential assessment to APRT to be made before the expiry of the specified time. Thus, although s.142(1)(b) can be said with the benefit of long hindsight to apply here, it says nothing about whether the repayment of overpaid PRT must be made by way of retrospective credit of APRT used in part to discharge the original PRT liability. It is therefore not necessary for me to decide whether Mr Goldberg is right in arguing that s.142 can in any event only apply during the period (1982-1987) when the APRT regime was in force.

41. As for the ACT authority, Mr Hickey referred to Procter & Gamble Ltd v Taylerson [1988] STC 854; [1990] STC 624 and drew attention to the similarity of the wording of s.85(1) Finance Act 1972 (which introduced ACT) and s.139(3) FA 1982, in that both refer to advance tax that has been paid being "set against" and "discharging" a liability for the full tax (CT and PRT respectively). In that case, the taxpayer company claimed to make use of excess ACT that was liberated by the carry back of losses from subsequent years. It was held by Vinelott J and the Court of Appeal that it was too late for it to do so, but Mr Hickey emphasises that the argument only arose if the ACT, initially set against a liability for CT, was then "released" as a result of the carry back of losses and could – in principle – then be utilised as excess ACT. In other words, the repayment of excessive CT was achieved by release of the excess ACT previously used to discharge it.

42. Although the wording of s.85 FA 1972 was doubtless the model for the APRT provisions of FA 1982 and the language of the comparable subsections is almost identical, APRT and ACT are not direct analogues. FA 1972 s.85 provides for "surplus advance corporation tax" (ACT that cannot be used for specified reasons) to be carried back to previous years as if it were ACT paid in respect of distributions in

those years, with the consequence that CT for those years (not ACT paid in a later year) would be repaid accordingly. That is a very different regime from APRT, which in so far as not set against a liability for PRT in the chargeable period in which it is payable and paid is carried forward and used to discharge PRT in subsequent years and only to the extent not so used is repayable as excess credit in 1987.

43. I do not accept that it is possible to apply the consequences of express, different statutory provisions for ACT in the context of APRT in order to reach a conclusion that carry back of losses results in surplus APRT credit being resurrected after the contemporaneous assessments of liability for APRT and PRT had been concluded.

44. Mr Hickey however also relied on Elf Enterprise Caledonia v IRC [1994] STC 785, a case on PRT concerned with the application of the statutory cap on interest payable on repayments of tax resulting from the carry back of losses. Sir Donald Nicholls V-C addressed at p.795d-g an argument of the taxpayer that the application of the cap could apply anomalously, if HMRC's interpretation of the legislation was correct, in a case where not just PRT but APRT was repaid. That implied that a carry back of losses might give rise to a repayment of both. A statutory amendment in 1993 appeared to require the cap on interest to be applied taking into account any APRT repaid as well as PRT. The Vice-Chancellor was not impressed by the significance of any such anomaly and rejected the argument. He did not therefore have to consider whether the argument advanced had a sound premise and did not express a view on that. The case is certainly not authority for the proposition that if PRT was discharged by APRT the repayment had to be a repayment of APRT credit rather than a repayment of PRT. This issue has not previously been addressed in any authority.

45. HMRC also argued that FA 1982 s.139(3) and s.17(1A) of the 1975 Act only deem APRT to be a payment of PRT, but that although APRT discharged a PRT liability it remained in substance a payment of APRT, such that any repayment must to that extent be a repayment of APRT. I reject that argument. FA 1982 s.139(3) is not a deeming provision: it provides for a statutory set-off in discharge of a PRT liability. It does not reduce the PRT liability with the consequence that APRT is paid instead of PRT. The only deeming provision is in s.17(1A) of the 1975 Act and the deeming relates to the time at which the set-off occurs (namely when the PRT becomes due). Apart from the timing, there is no deemed discharge of any PRT liability. The APRT is in fact used to set against a liability for PRT and it discharges that liability *pro tanto*. By that means, the taxpayer has paid PRT. If losses are subsequently carried back and reduce the assessable profit for that chargeable period, a refund of PRT is due because the taxpayer has paid too much PRT. It has not paid too much APRT unless there is an amended assessment of the liability for APRT.

46. A further difficulty in applying the tax legislation to oil field participators arises if HMRC is right in its argument about excess APRT credit. Section 17 of the 1975 Act, as amended, provides that an amount equal to any PRT paid will be deducted from income arising for the purposes of CT in that year; further, that if PRT is so deducted but subsequently repaid, the deduction is thereupon reduced or extinguished and an additional assessment to CT for the year of the losses may be made. It is understood to be HMRC's case that the repayment of tax to the old participators (including what HMRC contend to be a repayment of excess APRT) results in a reduction of the relevant deductions for CT purposes. In other words, the PRT paid (in part by way of set-off of APRT) was fully deductible for CT purposes and now

that deduction should be reversed as a result of the repayment of tax. However, if HMRC is right on its arguments in this case, the tax repaid is excess APRT credit, APRT is a separate tax from PRT, and so PRT was not repaid within the meaning of s.17(2) of the 1975 Act. The effect, if HMRC is right, is that no CT adjustment would be required. That difficulty does not arise if the repayment of tax is treated as a repayment of PRT.

47. There is also the further difficulty for HMRC that if the legislation is to be read as providing for a re-crediting of APRT upon carry back of losses, with the effect that the set-off and discharge of PRT is retrospectively reversed, there would retrospectively have been additional APRT in the chargeable period in question to carry forwards and set-off against PRT liability for the next chargeable period, resulting in an overpayment of PRT by cash in that chargeable period. If the legislation does indeed require the re-writing of history in the way that HMRC suggests, it is unclear why the re-writing is only partial so as to produce a notional excess of APRT in 1987 when, if history were fully re-written, that would not have been the case.

48. For all the reasons given above, I consider that MCXD is correct and that the tax repaid to the old participators in 2015 was overpaid PRT, not excess APRT credit. There was no excess APRT credit capable of being the subject of a claim by the old participators in 1987 because all the APRT paid was in law validly used before then to discharge PRT liability. It is only as a result of the loss carry back provisions that the PRT liability is seen to have been excessive, with the simple consequence that a repayment of PRT was due and should have been repaid with interest.

The Procedural Issue

49. HMRC contends that the claim by MCXD for declaratory relief on the above question is an abuse of process because either MCXD does not have a sufficient interest in the determination of the issue, which is therefore an academic question, or the proper course for the old participators (or MCXD) to take in order to challenge the repayment of tax in part without interest would have been to appeal the amended assessment, or issue a prompt claim for judicial review.

50. If it were the case that HMRC would not pay further interest to the old participators, even if the Court decided that interest should be paid on all the repaid tax, or that the old participators were disputing MCXD's right to any such interest, as between themselves and MCXD, then there would be some force in the argument that MCXD lacked sufficient standing to bring this claim. However, the reverse is the position. HMRC confirmed, as one would expect, that if the Court were to decide the issue of interest against HMRC, HMRC would abide by the Court's decision (subject to any appeal) and pay the interest due to the old participators. The old participators paid the repaid tax (and interest on part) to MCXD and FBL did not dispute MCXD's right to all such monies. There is no suggestion that the old participators would take a different stance and refuse to pay MCXD any further interest on repaid tax that they subsequently receive. The terms of the sale and purchase agreements and the forfeiture deed appear to support MCXD's rights, though in the absence of the counterparties the court cannot reach a decision on the meaning of those documents.

51. In those circumstances, it seems to me to be artificial and wrong to argue that MCXD lacks sufficient interest in this claim or that the determination of the substantive question is academic. The final determination of the substantive issue in favour of MCXD will very likely result in MCXD receiving further sums by way of interest. Even if one of the old participators were somewhat unexpectedly to change its position and seek to retain the further interest paid by HMRC, MCXD could then bring a claim against it to establish its rights under the sale and purchase agreement. The Court's determination will therefore not be academic. It is likely to be the most effective and economic way of determining the dispute.

52. On the question of the appropriateness of making a declaration of right, Aikens LJ in Rolls-Royce plc v Unite the Union [2009] EWCA Civ 387; [2010] 1 WLR 318 said at [120]:

> "(1) The power of the court to grant declaratory relief is discretionary.
>
> (2) There must, in general, be a real and present dispute between parties before the court as to the existence or extent of a legal right between them. However, the claimant does not need to have a present cause of action against the defendant.
>
> (3) Each party must, in general, be affected by the court's determination of the issues concerning the legal right in question.
>
> (4) The fact that the claimant is not a party to the relevant contract in respect of which a declaration is sought is not fatal to an application for a declaration, provided that it is directly affected by the issue;…
>
> (5) The court will be prepared to give declaratory relief in respect of a 'friendly action' or where there is an 'academic question' if all parties so wish, even on 'private law' issues. This may particularly be so if it is a 'test case' or it may affect a significant number of other cases, and it is in the public interest to decide the issue concerned.
>
> (6) However, the court must be satisfied that all sides of the argument will be fully and properly put. It must therefore ensure that all those affected are either before it or will have their arguments put before the court.
>
> (7) In all cases, assuming that the other tests are satisfied, the court must ask: is this the most effective way of resolving the issues raised? In answering that question it must consider the other options of resolving this issue."

53. Although the general requirement for a present dispute about the existence of a legal right between the parties is not satisfied in this case, it is not always required. The issue raised is in any event not a matter of "private law", although MCXD has a

legitimate private interest in it. There is no doubt that all relevant arguments have been advanced by the parties before the court and, as I have already indicated, the short and relatively cheap Part 8 procedure is the most effective and appropriate way of resolving the dispute on a question of law.

54. As for the argument that bringing this particular Part 8 claim for the declaration sought is an abuse of process, there are two subsidiary questions. First, did the old participators (or MCXD standing in their shoes) have a statutory right of appeal against HMRC's amended assessment that they were required to pursue if they wished to challenge the refusal to pay interest on part of the repaid tax? Second, if not, should this claim have been brought by way of judicial review within the time limit applying to such claims?

55. MCXD's position on the first question is that there is no statutory right of appeal against a decision of HMRC not to pay interest pursuant to para 16 of Sch 2 to the 1975 Act. The allowable losses are relieved automatically under s.7(3) of that Act, without the need for any claim. Para 12 of Sch 2 to that Act empowers HMRC to amend assessments, without limit of time in the case of relief granted under s.7, and under Sch 2 para 14 a participator may appeal against an amendment of an assessment within 30 days. However, there is no assessment of the amount of interest payable; only of the assessable profits for a chargeable period and the tax payable.

56. HMRC did not in terms dispute that analysis, but nevertheless pointed to the terms of the amended assessment dated 26 August 2015, which identified a "discharge" (repayment) of £1,157, 973. This was the principal amount of tax paid pursuant to a 1996 amended assessment for that chargeable period, net of APRT credit. The amended August 2015 assessment was therefore an assessment that only the PRT liability paid in cash should be discharged by oil allowance or exempt allowance leaving an obligation to repay tax. The tax chargeable was shown on that amended assessment as nil. It is difficult to understand how the old participators could have sought to appeal an assessment of nil, other than as regards the appropriateness of the use of allowances rather than allowable losses to set against assessable profits. Even if they could have done so, that amended assessment was not in fact the end of the process of revising their liability to PRT for the chargeable period in question, and HMRC did later repay all PRT paid by means of APRT credit as well as that paid in cash.

57. A further amended assessment dated 18 December 2015 made a nil assessment on the basis that all except a small part of the assessable profits was reduced by allowable losses, with the final small part reduced by oil or exempt allowances. This amended assessment said nothing about the amount of tax to be repaid. In any event, I accept Mr Goldberg's submission that it is no part of an amended assessment of liability to calculate a repayment of tax (or interest) that is due, even if it might helpfully include such information. The old participators therefore could not have appealed the December 2015 amended assessment on the ground that HMRC did not pay full interest on the repaid tax.

58. Accordingly, I reject the argument that the old participators could and should have appealed one or other of the amended assessments, if they wished to challenge a decision made by HMRC about what sums were to be repaid.

59. As to whether bringing a Part 8 claim rather than judicial review proceedings is an appropriate means of having a legal dispute of this nature adjudicated, I note in passing that that is exactly what happened (although in those days the claim was called an originating summons) in the Elf Enterprise case, where the issue was the correct calculation of interest payable on a repayment of PRT. Apart from that, it is unclear why HMRC say that this claim should have been brought by way of judicial review. HMRC, though a public body, did not in declining to pay interest on part of the repaid tax exercise a discretion or judgment in a public law sense, or mistake its decision-making power, but simply considered the effect of the relevant statutory provisions and acted accordingly. The issue would – had there been an assessment about the amount to be repaid with interest – have been brought before the First-tier Tribunal (Tax Chamber) by way of appeal, not before the Administrative Court. The absence of such a route of appeal does not mean that the withholding of interest is therefore a matter for a judicial review. The dispute – which is purely one about the meaning and effect of a tax statute – is one that was appropriate for the Chancery Division to determine in the way that it has done.

60. I therefore reject the argument that the Court should refuse to grant declaratory relief because the Part 8 proceedings are an abuse of process or otherwise inappropriate for the grant of such relief. I will grant a declaration that the "Relevant Repayments" (to be defined in the Order) carry interest to be calculated in accordance with paragraphs 16 and 17 of Schedule 2 to the 1975 Act and such other relief as is appropriate.