TC02605

Appeal numbers: TC/2010/08402 & TC/2011/02644

VAT – group of companies – mistaken assumptions that two companies were part of existing group registration – transactions undertaken by VAT group members with those companies – assessments made in respect of supplies – applications made for retrospective group registration of those companies – applications refused – whether Tribunal has jurisdiction to consider such appeals – yes – nature of jurisdiction as in John Dee – different jurisdiction where outright refusal of application explicitly on grounds of protection of revenue – nature of HMRC's powers under s 43B(4) VATA 1994 – factors to be taken into account in considering "retrospective" applications – discretion open, and not to be constrained by HMRC's published guidance – held, as HMRC had not acted within terms of s 43B(4), applications must be remitted to them for reconsideration

Option to tax – whether exercised – on facts, yes – application for belated notification refused – not established that HMRC could not reasonably have been satisfied that there were grounds for refusal

Misdeclaration penalty – held, to be confirmed in amount assessed, subject to result of reconsidered group registration application

Procedure – outcome of appeals dependent on result of relevant group registration application – time limit for further appeals adjusted

FIRST-TIER TRIBUNAL
TAX CHAMBER

COPTHORN HOLDINGS LIMITED **Appellant**

- and -

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

TRIBUNAL: JUDGE JOHN CLARK
ELIZABETH BRIDGE

Sitting in public at 45 Bedford Square, London WC1B 3DN on 12, 13, 14 and 15 November 2012

David Southern of Counsel, instructed by Allen & Overy LLP, for the Appellant

Christiaan Zwart of Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. Copthorn Holdings Limited ("CHL") appeals against:

(1) the refusal by the Respondents ("HMRC") to accept belated notification of an option to tax in respect of land at Unity Mill, Heywood, Lancashire and against a consequent assessment to VAT made on CHL ("the First Appeal");

(2) a misdeclaration penalty in respect of that assessment ("the Second Appeal");

(3) the decision by HMRC to refuse retrospective inclusion of Countryside 28 Limited ("C28") in the CHL VAT group ("the Third Appeal");

(4) the decision by HMRC to refuse to allow CHL's application to include Countryside 26 Limited ("C26") in the CHL VAT group with retrospective effect ("the Fourth Appeal").

The First, Second and Third Appeals were consolidated under reference TC/2010/08402, the Fourth Appeal being numbered TC/2011/02644. It had been directed by a Judge that the appeals under these respective numbers should be heard consecutively, for two days each; as will appear from this decision, this direction was not followed, and all the appeals were heard together, dealing separately with the factual issues concerning C28 and C26.

The background facts

2. The evidence consisted of a bundle of documents and correspondence, together with two witness statements given by Ms Wendy Colegrave, the Group Finance Director for the Copthorn Holdings Limited Group. In addition to her witness statements, Ms Colegrave gave oral evidence, and (as explained below) was later recalled to give further oral evidence. From the evidence we find the following background facts.

3. Copthorn Holdings Limited ("CHL") is the holding company of the CHL corporate group. CHL is also the representative member of the CHL VAT group. The corporate group and the VAT group are not coterminous, as the corporate group is larger than the VAT group. The CHL corporate group is a large and extensive group, with a substantial number of subsidiaries. A number of those subsidiaries are classified as dormant. As this decision relates to a number of appeals, we set out separately the background facts relating respectively to C28 and C26, the two separate companies within the corporate group whose circumstances have given rise to the matters under appeal.

The facts relating to C28

4. According to its Directors' Report and Accounts for the period ended 30 September 2007, C28 was incorporated on 23 February 2007. C28 was a wholly-

owned subsidiary of Countryside Properties (UK) Limited ("CPUKL"), and its ultimate parent company was CHL.

5. The business of CPUKL, which had at an earlier stage been a publicly listed PLC, was (and continues to be) that of a developer of residential property; the nature of its business is such that to a preponderant extent the CHL VAT group is treated as a fully taxable person, although (as Ms Colegrave stated in oral evidence) the extent of partial exemption may vary from year to year.

6. A VAT "Group Registration Record" provided to CHL by the Respondents ("HMRC") on 17 June 2010 showed the companies included as at that date in the CHL VAT group; C28 did not appear in that list.

7. On 26 July 2007 a corporate meeting was held in Warrington. Ms Colegrave referred to this in evidence as a meeting of the CPUKL Northern Divisional Board. Details of the meeting were recorded in a document described as "Countryside Properties (Northern) Limited: Minutes of the Meeting of the Board of Directors held on Thursday 26 July 2007. . ." We consider later in this decision the question of the entity to which the decisions taken at that meeting related.

8. The meeting lasted from 8 am until 1.45 pm. In the Minutes, under the heading "Operational Review", discussions concerning a number of property projects were recorded. The final one under that heading was as follows:

> "**Unity Mill, Heywood**
>
> Outline planning permission granted. Scheme has potential for betterment in density, said BJC. Layout is only at preliminary stage and needs improving. GSC considers the sales and marketing costs to be too tight. Land to be owned by new SPV, but IHS explained that contractually land to be acquired by CPPLC. WEC said that CPPLC could acquire land and then sell to SPV, but VAT needed to be charged between CPPLC and SPV. It was, therefore, agreed that an election to waive VAT exemption would be made by CPPLC.
>
> Pack needs to come down to Brentwood for next CMC meeting."

9. On 27 July 2007 the Unity Mill property was sold by Tetrosyl Properties Limited ("Tetrosyl", an independent third party) to CPUKL. The price was £12.5 million, exclusive of VAT. As Tetrosyl had elected to waive exemption in respect of the property, VAT of £2,187,500 was payable. Contracts were exchanged on 27 July 2007 and completion was on 30 July 2007. In the contract for sale, the Buyer was identified as CPUKL, and the Transferees were Countryside Properties Land (One) Limited and Countryside Properties Land (Two) Limited ("the Nominees"). The contract specified that £6 million (plus VAT) of the purchase price was to be paid on completion, and the balance of £6.5 million (plus VAT) was to be paid on the expiry of a lease from CPUKL to Tetrosyl.

10. The transaction was completed on 30 July 2007 by two transfers of the land. The first ("Transfer 1") was from Tetrosyl to the Nominees, by direction of CPUKL. The consideration, receipt of which was acknowledged, was £12.5 million. No

reference was made in the Transfer 1 document to VAT, or to the payment of the consideration by instalments. The second transfer ("Transfer 2") was from the Nominees to C28. The Transfer 2 document was in similar form, showing the consideration as £12.5 million without mention of VAT or payment by instalments, and indicating receipt by the Nominees of that amount from C28.

11. Two Stamp Duty Land Tax ("SDLT") Land Transaction Return Forms were completed. The first gave particulars of the sale from Tetrosyl to the Nominees. One page was missing from the copy of this form included in the bundle, but we find, on the basis of the second form described below, that the purchasers were the Nominees (the second nominee company being shown as "Additional Purchaser" in this first form). The consideration, including VAT, was shown as £14,687,500, of which the VAT element was identified as £2,187,500. The second nominee company was declared to be acting as trustee; on the basis of our above finding, we further find that the first nominee was also declared to be acting in the same capacity.

12. The second Form SDLT 1 gave particulars of the sale from the Nominees (particulars of both being given in the form) to C28. The details of the consideration were the same as in the first form. In the details relating to C28 as purchaser, it was declared that C28 was not acting as a trustee.

13. Tetrosyl rendered two VAT invoices for the consideration, dated (respectively) 30 July 2007 and 7 December 2007. The invoices were addressed to CPUKL and the Nominees. Pursuant to the invoices, payment was made in two stages. The first instalment of £6 million plus VAT was paid in July 2007, and the second, of £6.5 million plus VAT, was paid in December 2007.

14. As CPUKL was a member of the CHL VAT group, CHL as representative member recovered input VAT in respect of the purchase in the group VAT returns for July 2007 and December 2007.

15. In an undated letter received on 10 February 2010 by Richard Sharp, the Group Financial Controller of the CHL corporate group, Mrs Howes, an officer of HMRC dealing with VAT matters, indicated that she had been unable to trace any VAT registration number for C28. She understood, from the Directors' Report to the annual accounts for the year ended 30 September 2008, that C28 had acquired a freehold interest in land known as Unity Mill. She asked whether full planning permission had since been obtained, what supplies C28 intended to make, and what its VAT registration number was, if it had one.

16. A note of meeting made by Mrs Howes showed that on 26 February 2010, Ms Colegrave and Mr Sharp met Mrs Howes and her colleague Chris Harcourt (an Inspector of Taxes) to discuss the position concerning C28, as Ms Colegrave had asked for a meeting. Ms Colegrave had discovered that C28 had incorrectly been treated as part of the CHL VAT group, and that VAT in the region of £2 million had been claimed by the VAT group.

17. At the meeting, Ms Colegrave explained the history of the Unity Mill transaction. The property had been acquired with the intention from the outset of developing the land for residential use. It had been decided that the property should be transferred into a "stand-alone" entity in case it was decided to enter into a joint venture arrangement in relation to the site. The immediate transfer from CPUKL to C28 on the same day would have worked if C28 had been in the VAT group.

18. She explained that there had been changes in personnel around the time of the transactions. [We consider this at a later stage below.] Planning permission had since been obtained, and there had been £140,000 of expenses in relation to the intended development upon which VAT would have been claimed in the VAT group. CPUKL had claimed the VAT and gone on to make an exempt supply. It was peculiar that there was no paper trail in respect of the transactions involving C28. She had looked into the possibility of C28 applying to be a member of the VAT group with retrospective effect. This was discussed at the meeting; HMRC's view was that the situation which Ms Colegrave had described did not fall within "exceptional circumstances" as referred to in HMRC's VAT Manual.

19. Mr Harcourt raised the question whether CPUKL could give a belated notification of an "option to tax". Mrs Howes distinguished between a belated notification of a decision to exercise an option and the notion of a backdated option to tax; there was no such thing as the latter. She explained that in the absence of an option to tax, the input tax was not deductible within the VAT group. She referred to checking pre-registration input tax in the event that C28 registered for VAT as a single entity. She then discussed questions relating to penalties.

20. In a letter to Mrs Howes dated 16 March 2010, Ms Colegrave referred to the board minutes (see paragraph 8 above). She asked for guidance on how to progress with a retrospective "opt to tax" application.

21. On 17 March 2010 Mrs Howes wrote to Richard Sharp setting out HMRC's views on the matters discussed at the 26 February meeting. In relation to the possible application by C28 for retrospective VAT group membership, this could be accepted only in "exceptional circumstances"; the situation described at the meeting was not considered to amount to such circumstances so as to permit agreement to such a retrospective application.

22. In relation to belated notification of an option to tax, Mrs Howes' understanding from the discussion at the February meeting was that no decision to opt to tax had been taken. As a result, an exempt supply of the land had been made to C28. She commented that, if CPUKL had had a valid option to tax (and she had seen no evidence that this was the case), then the input tax would be attributable to a taxable supply of the land to C28, which was outside the VAT group. This was on the assumption that the option to tax was not disapplied. She set out a summary of the relief for pre-registration VAT, but emphasised that she was not aware that CPUKL had made a decision to opt to tax.

23. Mrs Howes indicated that she intended to disallow the VAT claimed by the VAT group in connection with the C28 development. She asked for confirmation that the amounts set out in the letter were correct, and for any comments or additional information. She also asked for information concerning the expenditure of £140,000.

24. Following further correspondence, Richard Sharp wrote on 25 March 2010 to HMRC's Option to Tax Unit enclosing form VAT 1614A in respect of a belated application to notify an option to tax. He also enclosed a copy of the Board Minute as set out at paragraph 8 above.

25. On 27 May 2010, Mr Sharp wrote to Mrs Howes in response to her letter dated 29 April 2010, in which she had requested further information. Among the information which he provided, he confirmed that C28 had paid SDLT of £587,500 in August 2007 following the transfer of the land from CPUKL. The SDLT had been determined on the VAT inclusive amount of £14,687,500. In an appendix (which HMRC subsequently indicated that they had not received, so it was forwarded by email on 9 June 2010) the total input tax incurred by C28 was set out, with details of the periods and respective amounts incurred in each period. The total was shown as £158,763.

26. On 29 June 2010 HMRC's Option to Tax Unit wrote to Mr Sharp, explaining that as a result of discussion with Mrs Howes, it appeared that exempt supplies might have been made as a result of the sale of Unity Mill, on which VAT was not charged. HMRC asked that an authorised signatory should provide an explanation as to why no VAT was charged on this transaction, as this was after the requested effective date of the belated notification of option to tax.

27. On 22 July 2010 Mrs Howes wrote to Mr Sharp. She referred to certain requested information remaining outstanding. She enclosed a Notice of Assessment in respect of VAT. This contained two assessments, the "Preferred Assessment" and the "Alternative Assessment". The Preferred Assessment was divided between two VAT periods, ie £1,050,000 in respect of period 07/07 and £1,137,500 in respect of period 12/07. The Alternative Assessment was in the sum of £2,187,500 in respect of period 07/07.

28. She explained the background to the Preferred Assessment, and stated that the VAT claimed of £2,187,500 was considered to be attributable to an exempt supply of the land, and non-deductible. She then set out the reasons for the Alternative Assessment; to protect HMRC's position, if the Option to Tax Unit were to accept the belated notification, output tax would be due in respect of period 07/07 on the disposal of the property. She also referred to the effect of the misdeclaration penalty rules. In relation to the development costs, she indicated that she would be disallowing the claims; a Notice of Assessment in the amount of £158,766 would follow. If the Option to Tax Unit were to accept the belated notification, there might be an element which related to the acquisition of the property and the onward supply; she requested details within 30 days.

29. On 2 August 2010, Ms Colegrave wrote to Ms Thompson at HMRC's Option to Tax National Unit. The main part of her letter stated:

> "As requested, I am writing to explain why despite our having made an option to tax, it appears that we did not act in accordance with the option to tax when we did not charge VAT on the transaction in question.
>
> 1. In anticipation of the future exploitation of the property, a decision to opt to tax was made on 26 July 2007, during the board meeting of Countryside Properties (Northern) Limited, which is a member of the VAT Group Registration.
>
> 2. The land was then acquired by Countryside Properties (UK) Ltd on the purchase.
>
> 3. Input VAT was claimed by Countryside Properties (UK) Ltd on the purchase.
>
> 4. On the same day, the land was then sold to Countryside 28 Ltd, which was erroneously assumed also to be a member of the Group VAT registration. On this basis no VAT invoice was raised, on what was, erroneously, treated as an intra-VAT Group transaction.
>
> 5. VAT would, of course, have been properly charged had it been identified at the time that Countryside 28 Ltd was not a member of the Group VAT registration.
>
> In summary, therefore the original transaction was that Countryside Properties (UK) Ltd transferred the land to Countryside 28 Ltd on the same day that it was purchased. Although we had made an option to tax, the transfer was not treated by us as an exempt supply for the purposes of VAT due to two separate errors/oversights on our part.
>
> 1. The decision to opt to tax had previously been made and recorded, however was not notified due to a clerical oversight.
>
> 2. Countryside 28 Ltd was treated as being included in the Group VAT registration. I can confirm that Countryside 28 Ltd is not as a company registered for VAT.
>
> Unfortunately, the errors took place in the department during a six month period when several senior members of staff had resigned or were working their notice periods, and we can only offer our sincere apologies for the errors and omissions which have arisen as a consequence.
>
> I confirm that I signed the VAT 1614A form on behalf of the Company.
>
> I trust this provides you with the explanation you require, and that, in the circumstances, you will now be able to accept our belated notification of the Option to Tax. I apologise again for the inconvenience this matter has caused."

30. On the following day, Ms Colegrave wrote to Mrs Howes, enclosing a copy of the above letter, and explaining that CHL proposed to make a payment to HMRC on the basis of the Alternative Assessment.

31. On 19 August 2010, Ms Colegrave wrote again to Mrs Howes requesting a reconsideration of HMRC's decision in relation to the assessment against CPUKL in respect of the disposal of Unity Mill to C28, and also in relation to the misdeclaration penalty.

32. On 24 August 2010 Ms Thompson of the Option to Tax National Unit wrote to Ms Colegrave to inform her that HMRC had decided not to exercise their discretion to extend the period for notification of an option to tax. (The terms of this letter are considered later in this decision.)

33. On 7 September 2010, Ms Colegrave wrote to Ms Thompson requesting an independent review of the decision, and setting out further explanations of the matters raised in the 2 August letter. Ms Colegrave requested HMRC to reconsider their decision not to exercise their discretion to accept CPUKL's belated notification.

34. In a letter to CHL dated 29 September 2010 Steve Braeger, an officer in HMRC's Appeals and Reviews Unit, set out the results of his review of Mrs Howes' decision in respect of the Preferred and Alternative Assessments, and of Ms Thompson's decision not to accept belated notification of an option to tax. He set out in detail the history, and in his conclusions referred to the HMRC policy requiring output tax to be properly charged and accounted for "from the date of the supposed option". He continued:

> You have said in your letter dated 7 September that output tax was not charged/accounted for on the supply to Countryside 28 Ltd because you mistakenly believed Countryside 28 Ltd was in the same VAT group as Countryside Properties (UK) Ltd.
>
> I have not seen any credible evidence to show that you had reasonable grounds to believe that Countryside 28 Ltd was in the same VAT group as Countryside Properties (UK) Ltd. No application to include Countryside 28 Ltd in the same group registration has ever been received and you have not claimed that any such application was ever made.
>
> I have also noted there is no mention in the minutes of the board meeting that took place 26 July 2007 of including Countryside 28 Ltd in the VAT group. Indeed, there would have been no need for your advice to the Board that 'VAT needed to be charged between CPPLC and SPV' if there was an intention to include Countryside 28 Ltd in the group registration. This is because, as you have pointed out, if Countryside 28 Ltd was included in the group registration the supply would have been disregarded and no VAT would have needed to be charged.
>
> I do not therefore accept that there are reasonable grounds for you believing that Countryside 28 Ltd was in the VAT group and that the supply made to them could properly be treated as a disregarded taxable supply.
>
> As output tax has not been properly charged and accounted for on the supply of the property since the date of the supposed option I have

> concluded that the decision not to exercise our discretion and accept the belated notification of the option to tax should be upheld.
>
> Because the belated notification of the option to tax has not been accepted it follows that the supply of the property to Countryside 28 Ltd is an exempt, rather than a taxable supply. The input tax claimed on the purchase of the property is therefore attributable to that exempt supply and consequently the preferred assessment, to disallow the input tax, is upheld.
>
> My decision means that the alternative assessment, charging output tax on the sale of the property, is cancelled."

35. On 1 October 2010 another HMRC officer, Mr Gradwell, wrote to CHL. He referred to Mr Braeger's letter, and continued:

> "Having read the letter I note that in the final paragraph of the section entitled 'My conclusion' Mr Braeger has advised that the alternative assessment issued by Lynne Howes on 22 July 2010 has been cancelled.
>
> Having taken advice, I have to advise that the cancellation of the alternative assessment was made in error. Therefore, to correct the position I enclose for your attention a replacement alternative assessment in the sum of £2,187,500."

36. In a letter to CHL dated 15 October 2010, HMRC gave notice of assessment of a misdeclaration penalty in the sum of £59,718; the percentage of mitigation allowed was 65 per cent. In a separate letter of the same date, Mrs Howes set out the basis for the penalty. (We consider this at a later point in this decision.)

37. In a letter to Ms Colegrave dated 22 October 2010, Mr Gradwell referred to the need to review an assessment dated 5 August 2010 made in respect of the disallowance of £158,766 of VAT incurred in respect of development costs relating to the Unity Mill project. He requested further information.

38. On 28 October 2010, CHL gave Notice of Appeal to the Tribunals Service against HMRC's refusal to accept belated notification of the option to tax in respect of Unity Mill. On 12 November 2010, CHL gave Notice of Appeal against the misdeclaration penalty.

39. On 24 November 2010 Ms Colegrave wrote to HMRC applying for C28 to be included in the CHL VAT group with retrospective effect from 20 July 2007. She set out the history of the transactions concerning Unity Mill, and indicated that CHL was submitting the request on the basis that:

> "(a) it has (acting as the representative member of the VAT group, on behalf of CUK [ie CPUKL]) consistently acted since 30th July 2007 in a manner consistent with its mistaken belief that C28 was already included in its VAT group;
>
> (b) had the application been made before rather than after the transfer of property to C28, there would have been no grounds for refusing the application;

(c) while unfortunate the omission to make the application at the right time was solely due to an administrative slip-up such as can occur in the best regulated organisation;

(d) no prejudice to the Revenue or loss of tax has been caused by the delay in making the application to group;

(e) on the contrary, the belated inclusion of C28 in the group will enable Copthorn Holdings to get its tax affairs in order;

(f) the potential loss of a tax windfall to HMRC is not a relevant consideration.

We would be grateful if HMRC allow the retrospective inclusion of C28 in the Copthorn Holdings VAT group, effective from 30 July 2007. This is right, sensible and in the interests of all parties."

40. On 9 December 2010 HMRC's VAT Registration Service wrote to CHL to inform it that its application dated 24 November had been refused. (The relevant parts of this letter are set out in full later in this decision.) That letter did not reach CHL, and following a letter from CHL dated 22 December 2010 indicating that no response to its application had been received, a copy of the refusal letter was sent to CHL on 11 January 2011. As a result of a further exchange of letters, HMRC confirmed that the period of 30 days for requesting a review or appealing to an independent tribunal would run from 11 January 2011.

41. On 7 February 2011 CHL gave Notice of Appeal to the Tribunals Service against the decision by HMRC to refuse retrospective inclusion of C28 in the CHL VAT group.

The facts relating to C26

42. The Directors' Report forming part of the Directors' Report and Accounts of C26 for the year ended 30 September 2008 states that C26 was incorporated on 29 March 2007. Its principal activity was stated to be that of property development.

43. On 8 October 2002, a company named Lakenmoor Ltd ("LL"), a subsidiary of EH Booth & Co Ltd ("EHB") opted to tax certain land and buildings off Queen Street, Preston. LL notified HMRC of the option on 24 October 2002.

44. According to the Schedule to Mr Harcourt's letter dated 28 April 2010 (see below), it was recorded in LL's accounts for the period to 1 April 2006 that a contract had been signed to dispose of the company (ie LL itself) subject to obtaining planning consent for the investment property. This statement was repeated in LL's accounts for the following year.

45. On 14 April 2008 EHB opted to tax a further parcel of land at Queen Street (title LA664237).

46. According to the above Directors' Report, on 18 April 2008 C26 acquired the total issued share capital in LL for £100 and a freehold interest in various pieces of land off Queen Street, Preston owned by EHB for the sum of £348,009 together with

the freehold interest in land held by Maple Grove Developments Ltd for £521,991. C26 also acquired a freehold interest in the land held by LL for the price of £7,722,075. (A note to the accounts of LL stating that the property had been transferred to C26 for nil consideration was stated by Mr Sharp at a subsequent meeting with HMRC to be incorrect.) A note to the Accounts of C26 to 30 September 2008 showed that C26 owed its subsidiary £7,722,175.

47. Mr Harcourt's letter dated 28 April 2010 indicates that on 28 April 2008, LL was deregistered in its own right and joined the CHL VAT group. Confirmation of LL's commencement of membership of that group is also given in the "Group Registration Record" sent with HMRC's letter dated 17 June 2010.

48. On 30 September 2008, Ms Colegrave wrote to Mrs Howes enclosing a notification of option to tax in respect of land at Queen Street; the title numbers were LA 923116, LA359177, LA837738, LA518072, LA760973 and LA518156. The effective date of the option was 30 September 2008.

49. On 28 April 2010, Mr Harcourt wrote to Mr Sharp in relation to the interaction of C26 and LL. He referred to an earlier exchange between Mr Sharp and Mrs Howes concerning LL's activities for VAT purposes. As matters were not clear, Mr Harcourt summarised the information available from the companies' accounts and otherwise available to HMRC, and requested various additional items of information.

50. On 20 July 2010, Mrs Howes wrote to Mr Sharp, referring to earlier correspondence concerning LL. Mr Sharp had stated, in a letter dated 25 March 2010, that LL had not made and did not intend to make any taxable supplies. Mrs Howes set out her understanding of the position in relation to VAT. She referred to a telephone conversation between Mr Harcourt and Mr Sharp on 16 July in which Mr Sharp had confirmed that there had been a supply of the property by LL. She understood that a meeting had been arranged to discuss the position. She set out her calculations of the output tax due. She was unable to trace a VAT registration number for C26, and requested information concerning its VAT position. In the absence of further information being provided, she would assume agreement with her preliminary findings and might proceed to make an assessment.

51. A meeting took place on 12 August 2010 between Ms Colegrave, Mr Sharp and Paul Hickey on behalf of the CHL Group and Mrs Howes, Mr Gradwell and Mr Harcourt for HRMC. Mr Sharp provided information on a number of matters concerning C26 and LL.

52. On 29 September 2010, Mr Gradwell wrote to Mr Sharp enclosing a VAT assessment against LL in the sum of £1,150,096 in respect of the sale by LL to C26 of the freehold interest in the Queen Street land. He explained that, as LL had been deregistered for VAT with effect from 28 April 2008, he had raised the assessment by letter. He referred to possible interest, and also indicated that LL might be liable to a misdeclaration penalty.

53. Mr Sharp wrote to Mr Gradwell on 12 October 2010, making no reference to the VAT assessment. He provided information in response to the letters from Mr Harcourt and Mrs Howes, and to questions raised at the August meeting. In relation to VAT, he indicated that C26 was not currently registered for VAT, and that LL had been deregistered on 24 April 2008 and had been added to the CHL group registration. When the tangible fixed assets had been transferred from LL to C26, no output VAT had been charged, on the basis that the land was not opted to tax. The information provided in Mrs Howes' letter dated 20 July 2010, that the land had been opted to tax from 8 October 2002 (presumably by EHB), had not been evident at the time when the CHL group had acquired the land. Mr Sharp asked HMRC to verify which parcels of land had been opted to tax as at 18 April 2008. He indicated that an application to opt to tax the land had been made by CPUKL and was effective from 30 September 2008 without the prior knowledge of the land's taxable status. He stated that it was the CHL VAT group's intention to apply for a belated registration for C26 at 18 April 2008 and also to opt to tax the land on the basis that it would make taxable supplies in the future.

54. Mr Gradwell replied on 26 November 2010. He stated that two parcels of land, LA 664237 and LA432345, had not been included in the CPUKL option made on 30 September 2008 or any other option held on file for that company. He referred to the transfer of work in progress mentioned by Mr Sharp. This supply was in the value of £2,226,311. However, Mr Sharp had stated that no VAT was charged by CPUKL in respect of this transaction; an assessment to VAT at the standard rate would be required. He referred to the position of LL, which as he understood had sold the property on 18 April 2008 to C26. As LL had made an election to tax the property, VAT should have been charged. He referred to the assessment which he had made, and asked for confirmation of receipt. He stated that two parcels of land, LA837738 and LA518072, had been included in the CPUKL option but not in LL's option on 8 October 2002. It appeared that VAT might have been brought into account by the wrong entity, and therefore Mr Gradwell indicated that he would need to consider this further.

55. In his reply dated 27 January 2011, Mr Sharp stated that according to CPUKL's records, parcel LA 664237 had been opted to tax by EHB on 14 April 2008. He provided various items of information to Mr Gradwell.

56. On 23 February 2011 Ms Colegrave wrote to HMRC requesting that they should accept a belated application for C26 to be included in the CHL VAT group with effect from 18 April 2008. She set out the history of C26. Due to an administrative oversight, no application to include C26 in the VAT group had been submitted. Following the acquisition of LL, it had transferred the Queen Street land, which had been opted to tax, to C26; no VAT had been charged on this transfer. This position had been subject to an assessment by HMRC of VAT underdeclared and the outstanding output VAT paid. In relation to land purchased by C26 from EHB, one parcel of which had been opted to VAT by that company, VAT had been charged to C26. In the mistaken belief that C26 was a member of the CHL VAT group, that VAT had been recovered through the CHL VAT group return. In November 2008, leases on the property had been assigned from EHB and LL. No VAT had been charged on the

assignment by LL, as it was at that stage a member of the CHL VAT group (with effect from 28 April 2008), and the assignment was assumed to be made between two members of the same VAT group. Ms Colegrave referred to the option by the CHL VAT group made on 30 September 2008, on the assumption that the property was held by a member of that group.

57. Based on that option, VAT was charged on the rental income received for the opted portion of the property leased by C26, and this was shown in the books of CPUKL, which Ms Colegrave described as the representative member of the CHL VAT group. The legal and beneficial interest in the work in progress on the property had also been transferred from CPUKL to C26; again, no VAT had been accounted for on this transaction, as it was assumed to be an intra-group supply. Ms Colegrave explained that in order to rectify the VAT registration status of C26, she wished to submit a belated application to include C26 in the CHL VAT group with effect from 18 April 2008. She set out various arguments in support of the application; as these matters were the subject of submissions by both parties, we do not set them out here.

58. On 8 March 2011 HMRC's VAT Registration Service replied, refusing the application. The letter was in similar terms to the letter dated 9 December 2010 concerning C28, but was written by a different officer. (We consider both the C26 and C28 letters below.)

59. On 30 March 2011, CHL gave Notice of Appeal to the Tribunals Service against HMRC's decision to refuse to allow the application to include C26 to be included in the CHL VAT group with retrospective effect.

Arguments for CHL

60. Mr Southern submitted that underlying all four appeals was the same essential point, namely refusal to allow group membership with retrospective effect. The question raised was, what were the consequences of the transactions? Did the taxable group suffer an irrecoverable VAT charge (as HMRC argued)? Or was the problem capable of resolution? Indeed, having regard to regulation 111 of the VAT (General) Regulations (SI 1995/2518) ("the Regulations"), need there be a problem at all?

61. The essential question before the Tribunal was this: where there has been an innocent administrative oversight, does the law – interpreted in the light of the public interest, ie what is reasonable – require the damage to be reparable or irreparable? Administrative mistakes were regrettable, but they did occur. Specifically, should HMRC admit the two companies concerned to the CHL VAT group with retrospective effect? If the answer to this question was "Yes", all the costs, legal issues and complications would disappear at the stroke of a pen. This would produce a sensible commercial result. It would also accord with EU law. CHL's essential submission was that this outcome would best accord with the will of Parliament.

62. In the context of the neutrality principle, Mr Southern referred to the nature of the business carried on by the CHL VAT group. Its core business was that of housing; in principle, it was making wholly taxable supplies. It should not, therefore, be

incurring VAT as an economic cost. The effect of the events which had occurred was to produce a large VAT charge which the CHL VAT group would not otherwise have had to bear.

The C28 issues (the First, Second and Third Appeals)

63. In relation to Unity Mill, the basis of the Preferred Assessment was that the supply by CPUKL to C28 was exempt, and accordingly the input tax which had been claimed and recovered as a result of the CHL group's VAT returns for July 2007 and December 2007 was wholly irrecoverable. The Alternative Assessment was on the basis that the option to tax had been exercised and late notification allowed, and that in consequence, output tax should have been accounted for on the transfer from CPUKL to C28. The Alternative Assessment had been cancelled but then reissued. The reissued Alternative Assessment might therefore be out of time.

64. If the relevant part of the First Appeal (against HMRC's refusal to accept late notification of the option) were to be allowed, there would have been a taxable supply by CPUKL to C28, in which case the output tax charged by the Alternative Assessment (if it was valid) would have been due.

65. However, C28 could then register separately for VAT in order to recover input tax charged to it, rendering both the Preferred Assessment and the Alternative Assessment pointless.

66. If C28 had been a member of the CHL VAT group, it would have been irrelevant whether or not the option to tax had been exercised or, if exercised, notified within the specified period.

67. If the Third Appeal was allowed, it would follow that CHL rightly recovered the VAT and no output tax was due. Nor would any VAT have been misdeclared.

68. The difficulties had arisen because two mistaken and related assumptions had been made in July 2007. The first assumption was that C28 was a member of the CHL VAT group ("the grouping assumption"). The second was that CPUKL had exercised and notified the option to tax in respect of Unity Mill, but by reason of the grouping assumption this was a secondary matter.

69. There was a further possibility. The property had been acquired by CPUKL and immediately transferred on to C28. CPUKL never acquired any beneficial interest in the property. In conveyancing terms, it was simply a conduit. There had been a taxable sale by Tetrosyl to C28. C28 had to pay the input tax, but could recover it by registering for VAT.

70. Yet another possibility was that because CPUKL had never been paid by C28, C28 simply held the property on a purchase money resulting trust (referred to in Megarry & Wade, The Law of Real Property, p 415).The VAT treatment would then have been correct.

71. These possibilities had not been argued or taken further on the principle: why make things complicated if they could be made simple? (These and other possibilities referred to by Mr Southern are considered later in this decision.)

72. The same principle applied to the putative separate VAT registration of C28. Mr Southern referred to regulation 111 of the Regulations. This provided a complete code for the recovery of pre-registration input tax. It was a sufficient basis for C28 to make an input tax claim in respect of input tax which it incurred on the acquisition of Unity Mill. All the pre-conditions were satisfied. The provision expressed an underlying principle of recoverability of input VAT by persons making taxable supplies.

73. The provision had not yet been explored, because it was not the commercially sensible structure for the CHL Group's business. If these appeals were unsuccessful, it would be the Group's next step. However, the fact that this possibility was open to the Group suggested that it would be sensible if the law could offer a simpler route to the same outcome.

74. On the issue of grouping with retrospective effect, CPUKL was a member of the CHL VAT group. If C28 had been a member of the CHL VAT group (and not simply a member of the CHL corporate group), the transfer of the land by CPUKL to C28 on 30 July 2007 would have been disregarded. The input tax paid on the purchase price could have been attributed to the taxable supplies of the CHL VAT group as a whole, and so would have been recoverable. If C28 could be grouped retrospectively, then all the difficulties would disappear at a stroke. It would make no difference which member of the CHL VAT group acquired Unity Mill, because for VAT purposes all acquisitions from and supplies to third parties were treated as made by CHL.

75. CHL had accordingly made an application under s 43B(2)(a), (b) for C28 to be treated as a member of the CHL VAT group with effect from 30 July 2007. HMRC's refusal to accede to this request had given rise to the third appeal. HMRC had identified three obstacles to acceding to this request. (We examine these below, together with Mr Southern's detailed submissions relating to HMRC's refusal of the application.)

76. Mr Southern also made detailed submissions concerning the First Appeal. As these submissions raised questions both of law and fact, we consider them later in this decision.

77. The Second Appeal (against the misdeclaration penalty) would only be relevant if:

(1) the Third Appeal and the First Appeal were to fail in their entirety; or

(2) the Third Appeal were to fail, the First Appeal were to succeed as regards the Preferred Assessment but to fail as regards the Alternative Assessment.

78. Mr Southern made submissions concerning the extent to which the CHL VAT group would be punished in such circumstances without the additional burden of the misdeclaration penalty; as these submissions were of a factual nature, we return to these later.

The C26 issues (The Fourth Appeal)

79. In relation to the Fourth Appeal, the same erroneous grouping assumption had been made in relation to C26 as had been made concerning C28. The same principles of law applied, and CHL relied on the same arguments.

Arguments for HMRC

The C28 issues (the First, Second and Third Appeals)

80. Mr Zwart made a number of submissions concerning C28, which we summarise as follows:

(1) HMRC had been entitled to decide as they had in relation to the group election;

(2) HMRC had applied Parliament's scheme (concerning group registration) reasonably on available evidence;

(3) HMRC had fairly applied penalty mitigation;

(4) There was no evidence that C28 itself, which at the relevant time was not a member of the CHL VAT group, had actually made a waiver of exemption in respect of Unity Mill at any point up to the end of the requisite period for notification;

(5) The First, Second and Third Appeals should be dismissed with costs.

81. As Mr Zwart's submissions involved detailed questions both of fact and law, we find it more convenient to deal with these together with Mr Southern's submissions in the "Discussion and Conclusions" section of this decision.

The C26 issues (The Fourth Appeal)

82. In summary, Mr Zwart's submissions relating to C26 were:

(1) HMRC had been entitled to decide as they had done in refusing to backdate the group registration of C26;

(2) HMRC had concluded reasonably on the available evidence that exceptional circumstances had not arisen;

(3) The Tribunal did not have jurisdiction in respect of a refusal by HMRC to backdate a group registration;

(4) The Fourth Appeal should be dismissed with costs.

83. Again, for the reasons set out in paragraph 81 above, we deal with these submissions below.

Discussion and conclusions

HMRC's "conscious process" allegations

84. As a preliminary and general matter, we find it necessary to deal first with HMRC's description in argument of the CHL Group's thought process in relation to the group registration issues and the "option to tax".

85. In each of Mr Zwart's skeleton arguments relating respectively to C28 and to C26, he stated:

> "CHL's complaint distils to re-writing its VAT history – to achieve for it a more 'commercial result' – so as to avoid the fiscal consequences of its particular corporate (and taxation) approach. This does not qualify as 'most exceptional circumstances'."

86. As the word "most" in the latter sentence is derived from a passage in HMRC's VAT Manual which was not inserted until 2012, and which Mr Zwart accepted should be deleted from his skeleton argument for that reason, we treat that sentence as referring merely to "exceptional circumstances", being the expression used in HMRC's published guidance available at the times of the respective applications by the CHL VAT group.

87. In referring to Ms Colegrave's letter dated 24 November 2010 to HMRC enclosing the application for group registration for C28, Mr Zwart submitted that, rather than seeking (by belated inclusion of C28 in the CHL VAT group) to enable CHL to get its tax affairs in order, CHL was attempting not to rectify but to rewrite the VAT supply history as a commercial preference ex post facto. At a later stage, in summarising the argument in order to enable Mr Southern to note it down, Mr Zwart's description of the thought process appeared to imply that the CHL group had in some way deliberately held back on the group registration issue and had only decided later to pursue applications in the light of commercial circumstances subsequently prevailing, including the impact of the "credit crunch".

88. At a later stage, Mr Zwart stated HMRC's view that there had been a supply in each case, and that VAT was properly due; this was the contemporaneous result of CHL's choices. Rather than a problem needing to be rectified, it was a problem which ex post facto was sought to be rewritten. It was difficult to see the relevant group registration statutory provision being used as a "commercial parachute" to cure the consequences of the CHL Group's commercial decisions ex post facto. CHL's argument was that it was rectifying the problem; HMRC's view was that CHL was trying to rewrite the position, as it was uncomfortable with the commercial consequences.

89. In summarising his arguments on both sets of appeals, Mr Zwart concluded that in relation to C28 there had been a simple supply chain and that VAT was due; the position in relation to C26 was the same. In both cases the credit crunch had intervened; CHL sought to cure the position by rectification, which HMRC considered to amount to rewriting the supply history.

90. At the beginning of his reply, Mr Southern described this argument as "novel", not having been included in HMRC's Statement of Case or in its skeleton arguments. It carried implications which may not have been intended, but were disturbing. Mr Southern read out a note which he had taken of the summary of this HMRC argument given the previous day by Mr Zwart.

91. Mr Southern commented that, in short, HMRC were asserting deliberate acts and saying that CHL was now trying to rewrite history. None of this had previously been pleaded, either in HMRC's Statement of Case or in their skeleton arguments. None of these points had been put to Ms Colegrave when she gave her evidence.

92. The first (and less important) point was that CHL should not be ambushed in this way; this was procedurally unfair to CHL.

93. Secondly, and more importantly, the whole of CHL's case was premised on mistake. Both in correspondence and in her evidence before the Tribunal, Ms Colegrave had stated that it had been administrative oversights and administrative mistakes which had been the cause of the unforeseen VAT liabilities. The novel argument for HMRC was tantamount to accusing Ms Colegrave of fraud. HMRC were entitled to do so if:

(1) this was pleaded in detail in advance;

(2) there was cogent evidence to support the accusation;

(3) the accusation was put to the witness in cross-examination.

94. In the present case, no such accusation had been pleaded, no evidence had been cited to support such a contention, and Ms Colegrave's evidence was undisputed.

95. In fairness, this HMRC thesis was inconsistent with other submissions made by Mr Zwart, in which he had referred to "errors", "riding two horses", and so on. However, the words involving the new contention had been spoken. Mr Southern submitted that HMRC had disentitled themselves from putting forward the arguments which they had done; there had been abuse of process on a grand scale. The appeals should simply be allowed.

96. Our view after hearing the latter submission from Mr Southern was that if any allegation of fraud had been made, this should simply be "carved out" from the matters before the Tribunal and put aside so that it could be ignored in reaching decisions on the appeals. Mr Southern responded that he had had to make the point in order to represent CHL properly, and out of deference to Ms Colegrave, whose integrity had been impugned.

97. Mr Zwart responded to Mr Southern's argument. It had been said that HMRC had alleged fraud, but the word which Mr Southern had used was "tantamount". Mr Zwart stated that, in putting HMRC's arguments, he had expressly spelt out to the Tribunal that there was no such element. HMRC were not alleging fraud. HMRC had tested the position, and it was clear that there were gaps in the explanation. The

explanations had appeared unclear due to the muddle going on at the time. HMRC did not allege fraud, and had never done so.

98. In relation to notice of the position, Mr Zwart submitted that reference had been made to the argument in HMRC's Consolidated Statement of Case. He had cross-examined Ms Colegrave on this issue. There had not been a procedural ambush. The summary put to the Tribunal had been his own summary as to what was going on commercially. He hoped this clarified the position and showed that there had been no allegation of fraud.

99. This was all a matter of evidence, how far one could infer or not from that evidence. He did not wish HMRC's position to be misinterpreted. He had made no suggestion of deception. He had highlighted the absence of a "paper trail" in putting points to Ms Colegrave, as there were gaps in what had occurred. He did not understand the credibility of Ms Colegrave's evidence to have been in issue. It had been unclear, from the lack of documents, as to what had occurred.

100. Mr Southern made two further points in response. First, it was common ground between the parties that the process had started off with genuine mistakes, ie administrative oversights. This was what Ms Colegrave had referred to in correspondence and in her evidence. Secondly, the implications of the points put by HMRC may not have been intended, but references had been made to "rewriting history". This was a very, very dangerous phrase. As soon as those words were used, the user was alleging deceit.

Conclusions on the "conscious process" issue

101. Our view as expressed to the parties at the hearing was that it was for us to examine the evidence and to reach our own conclusions concerning the state of mind of the persons involved on the CHL Group's behalf. It was neither appropriate nor necessary for us to arrive at any such conclusions during the course of the hearing. We therefore continued to hear Mr Southern's reply submissions.

102. Having considered the issue since the hearing, our conclusion is that it is inconsistent with the evidence to suggest that any conscious thought process was involved. We deal in detail below with our findings of fact concerning the matters relevant to all the appeals, and our overall view on the basis of all the evidence is that we are satisfied that the chaotic results were the product of omission and inadvertence. We would describe the apparent implications of HMRC's argument as being an ex post facto rationalisation of a series of unconnected events, not justified by the evidence. Ms Colegrave's credibility as a witness was not impugned, and we take her evidence at face value. We have therefore considered the issues raised by the appeals without taking any further account of HMRC's suggestion that any of the actions or omissions in question may have been intentional. Both Ms Colegrave's evidence and the documentary evidence support the conclusion that the failures to take appropriate action were the result of inadvertence. For the record, we do not consider that the reference in HMRC's Consolidated Statement of Case relied on by Mr Zwart as giving notice of the argument is a sufficiently clear indication of the

nature of the argument. Although his two skeleton arguments contain the words set out at paragraph 85 above, we do not consider that those words contain any suggestion that there may have been any consideration of the implications in the light of changes in prevailing commercial circumstances before the group registration applications were prepared and lodged.

103. One of the cases cited in Mr Zwart's skeleton argument relating to C28 is *Marlow Gardner & Cooke (Directors Pension Scheme) v HM Revenue and Customs* [2006] EWHC 1612 (Ch), [2006] STC 2014. This concerned the option to tax (as it stood under the legislation applicable before the 2006 VAT Directive). At [26], when considering the effect of the option to tax legislation, Mann J acknowledged that it inevitably built in "an element of retrospection (if that is the right word)". From Mann J's comments, we derive the broader conclusion that the consequences of taking certain actions pursuant to VAT legislation may well be to amend, with retrospective effect, the VAT position which previously applied and would otherwise have continued. We do not consider it appropriate to conclude, merely because there is "an element of retrospection", that any adverse or negative motivations should be attributed to the taxable person seeking the amended VAT position. In *Marlow Gardner & Cooke*, the relevant VAT legislation resulting in an adjustment of the VAT position was held to apply; in the particular circumstances, this was viewed by the appellant as being to its detriment. In our view, a taxable person should not be criticised for seeking application of VAT legislation which would have the effect of adjusting the VAT position to that taxable person's advantage, or (as contended here by CHL) to eliminate liabilities to VAT which would not have arisen in the event that certain steps had been taken at the points when they had implicitly and erroneously been assumed to have been taken.

The group registration issue

104. As the issues raised by the Third Appeal and the Fourth Appeal are the same, we deal with both together. We deal first with the various questions of law concerning this issue, and then consider the facts as appropriate in the light of our conclusions on the law.

105. Under s 43(1) of the Value Added Tax Act 1994 ("VATA 1994"):

> "(1) Where under sections 43A to 43D any bodies corporate are treated as members of a group, any business carried on by a member of the group shall be treated as carried on by the representative member, and—
>
> (a) any supply of goods or services by a member of the group to another member of the group shall be disregarded . . ."

106. Section 43B VATA 1994 deals with applications in relation to VAT groups. The following provisions of s 43B are relevant here:

"(2) This section also applies where two or more bodies corporate are treated as members of a group and an application is made to the Commissioners—

(a) for another body corporate, which is eligible by virtue of section 43A to be treated as a member of the group, to be treated as a member of the group . . .

(4) Where this section applies in relation to an application, it shall, subject to subsection (6) below, be taken to be granted with effect from—

(a) the day on which the application is received by the Commissioners, or

(b) such earlier or later time as the Commissioners may allow.

(5) The Commissioners may refuse an application, within the period of 90 days starting with the day on which it was received by them, if it appears to them—

. . .

(c) in any case, that refusal of the application is necessary for the protection of the revenue.

(6) If the Commissioners refuse an application it shall be taken never to have been granted."

107. Although the content of the relevant letters may appear to be an issue of fact, it is necessary at this point (for reasons which will become apparent below) to set out the main part of the text of the respective HMRC letters to CHL dated 9 December 2010 and 8 March 2011 refusing the applications relating to C28 and C26 respectively:

"Further to your application dated **24/11/10** in respect of **Countryside 28 Limited**.

I have to advise you that your request that your company be treated, together with the other associated companies listed on forms VAT 50 & 51 has been refused.

The reason for this refusal is as per VAT Notice 700/2.

'**2.14 Can I backdate my application for more than 30 days?**

Only in exceptional circumstances:

if we lose your application and you can supply details of your original application and your attempts to follow it up; or

if the delay was caused by lack of action on our part.'

Under the provisions of the VAT Act 1994, section 43B(6) your application is to be treated as if it were never made and we must return you to your VAT status at the time your application was made.

If your have any further information that you want me to consider, please send it to me now.

If you do not agree with my decision, you can

- ask for my decision to be reviewed by an HMRC officer not previously involved in the matter, or
- appeal to an independent tribunal

If you opt for a review you can still appeal to the tribunal after the review has finished.

If you want a review you should write to [name/team] at [address] within 30 days of the date of this letter, giving your reasons why you do not agree with my decision We will not take any action to collect the disputed tax while the review of the decision is being carried out.

If you want to appeal to the tribunal . . ."

"Further to your application dated **24/11/10** in respect of **Countryside 26 Limited (6193011)**.

I have to advise you that your request that your company be treated, together with the other associated companies listed on forms VAT 50 & 51 has been refused.

The reason for this refusal is as per VAT Notice 700/2.

'**2.14 Can I backdate my application for more than 30 days?**

Only in exceptional circumstances:

if we lose your application and you can supply details of your original application and your attempts to follow it up; or

if the delay was caused by lack of action on our part.'

Under the provisions of the VAT Act 1994, section 43B(6) your application is to be treated as if it were never made and we must return you to your VAT status at the time your application was made.

If your have any further information that you want me to consider, please send it to me now.

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- ask for my decision to be reviewed by an HMRC officer not previously involved in the matter, or
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If you opt for a review you can still appeal to the tribunal after the review has finished.

If you want a review you should write to [name/team] at [address] within 30 days of the date of this letter, giving your reasons why you do not agree with my decision We will not take any action to collect the disputed tax while the review of the decision is being carried out.

If you want to appeal to the tribunal . . ."

108. It is clear from these two extracts that (as Mr Southern submitted) the letters were in identical terms, other than their dates and the companies to which they related. Further differences were that the signatories were not the same, the first being

signed "Yours faithfully" by HMRC Officer Andrew Milner, and the second being signed "Yours sincerely" by HMRC Officer Mrs J King.

109. As indicated above, Mr Southern submitted that the difficulties in relation to C28 and C26 could be solved easily if HMRC were to accept the applications for inclusion of those companies within the CHL VAT group with effect from the dates referred to in the respective applications. HMRC had raised three obstacles to this course. The first was that the discretion conferred on HMRC by s 43B(4) VATA 1994 was "pure" rather than limited and thus unappealable. The second was that the position did not fall within the terms of HMRC's published guidance. The third was the discretion provided to HMRC under s 43B(5) VATA 1994 to refuse an application ". . . for the protection of the revenue".

110. As a finding that the Tribunal had no jurisdiction would have the effect of preventing us from considering the issues concerning the refusal of the group registration applications in respect of C28 and C26, and instead would require us to strike out the Third and Fourth Appeals, we deal first with the jurisdiction issue.

(a) Submissions on the jurisdiction issue

111. Mr Zwart made the following submissions concerning the Tribunal's jurisdiction in relation to s 43B(4) VATA 1994. Section 83 VATA 1994 sets out the matters with respect to which an appeal shall lie to the tribunal. Section 83(1)(k) states that an appeal lies in respect of:

> "the refusal of an application such as is mentioned in section 43B(1) or (2)"

Section 43B(5) VATA 1994, under which HMRC could refuse an application, appeared on the face of s 83(1)(k) to be within the Tribunal's jurisdiction. However, s 43B(4) did not use the term "refusal". Mr Zwart submitted that the exercise of HMRC's discretion engendered a refusal in relation to the granting of an application with effect from an earlier or later time, but this was all that s 43B(4) did.

112. Although HMRC submitted in their Statements of Case that the discretion in s 43B(4) VATA 1994 was a pure discretion and that in consequence the Tribunal had no jurisdiction to entertain the Third and Fourth Appeals, Mr Zwart made no further submissions to support this contention.

113. Mr Zwart referred to *University of Essex v Revenue and Customs Commissioners* [2010] UKFTT 162 (TC), TC00467 at paragraph 50 onwards. He submitted that the Tribunal in that case had not given an explanation of its reasoning in relation to s 43B(4)(b) VATA 1994.The question in the present case was whether the scope of s 83(1)(k) VATA 1994 embraced a refusal engendered by a refusal on HMRC's part to exercise their discretion under s 43B(4)(b) in favour of the CHL VAT group. If this was the case, the *University of Essex* case gave guidance as to the content of the appellate jurisdiction.

114. Mr Southern responded on the jurisdiction issue. The High Court had held in *Customs and Excise Commissioners v Save & Prosper Group Ltd* [1979] STC 205 that the right of appeal under the previously applicable legislation extended to the refusal to accept an application for retrospective grouping. The submission for HMRC appeared to suggest that the wording in the current legislation had reversed the conclusion of the High Court in *Save & Prosper*. This suggestion was fundamentally improbable. The simple answer was that 'refusal' was dealt with in s 43B(6), so that must be within the scope of s 83(1)(k), and the provisions relating to applications were in s 43B(3)-(5), so the reference to 'application' also brought in those sub-sections. If there was no right of appeal, he questioned why the Third and Fourth appeals were being heard.

(b) Conclusions on the jurisdiction issue

115. We deal with the respective submissions made by each party. If Mr Zwart's submissions as to jurisdiction were to be accepted, this would appear to preclude this Tribunal, or any other, from considering the exercise of HMRC's discretion in relation to applications for group registration with retrospective effect. (For convenience, we refer to the latter as "retrospective" applications.) That conclusion might not leave an applicant without a remedy, but any such remedy would not be available through the First-tier Tribunal. As these submissions for HMRC call into question the conclusion of the Tribunal in *University of Essex*, as well as the judgment of Neill J in *Save and Prosper*, we treat them with caution. Further, if HMRC's view was that the Tribunal did not have jurisdiction, the proper procedure would have been for HMRC to apply at a much earlier stage for the Third and Fourth Appeals to be struck out under Rule 8(2) of the Tribunal Rules, rather than allowing them to reach the stage of a substantive hearing. We therefore agree with the criticism implicit in Mr Southern's question.

116. We accept Mr Southern's submission as to the inherent improbability of a change of law in respect of the issues considered in *Save & Prosper* as a result of the changes made to the later consolidated version of the legislation by Schedule 2 to the Finance Act 1999. That Schedule inserted ss 43A, 43B and 43C into VATA 1994, substituted s 83(1)(k), and inserted s 84(4A)-(4D). It appears that one effect of the changes is to give HMRC a wider (or "open") form of discretion in relation to the consideration of a "retrospective" application. In various respects the former legislation precluded the Commissioners of Customs and Excise from refusing an application unless it appeared to them to be necessary to do so for the protection of the revenue. The original version of what is now s 83(1)(k) permitted an appeal with respect to any refusal of an application under s 43 VATA 1994 in its original form. If Parliament had intended to place restrictions on the Tribunal's jurisdiction in respect of the wider discretion, we would have expected this to be made clear by the changes to the legislation.

117. In *Save and Prosper* at 209, Neill J dealt with the issue of jurisdiction as follows:

> "It seems to me that a decision by the commissioners that they had no jurisdiction to entertain the application submitted to them constituted a refusal for the purpose of s 40(1)(g). That paragraph gives the right to an appellant to appeal against the tribunal's findings with respect to: 'any refusal of an application under section 21 of this Act'. I am therefore satisfied that this appeal is properly before this court."

118. Thus it was not considered necessary for the Commissioners to express their decision in terms of a "refusal" in order for that decision to be treated for jurisdiction purposes as amounting to a refusal.

119. In that context, we respectfully agree with the comments of the Tribunal in *University of Essex* at paragraph 51, referring to paragraph 50. The Tribunal commented:

> "By refusing to agree to the back-dating HMRC was refusing the application that had been made. That refusal is a refusal falling within section 83(k). It follows that the Tribunal has jurisdiction in respect of the second issue."

120. We also see some force in Mr Southern's submissions concerning the use of the words "refuse an application" in s 43B(6) VATA 1994. Section 43B(4) expresses itself to be "subject to subsection (6) below". All that s 43B(6) does is to state that if HMRC refuse an application, it shall be taken never to have been granted. Although (as examined below in relation to HMRC's discretion) there is a degree of inconsistency as between the remaining wording of s 43B(4) and the idea of "refusal" of an application, it is arguable that there would be no reason to include the reference to s 43B(6) if the proper construction of s 43B(4) was that a decision by HMRC not to exercise its discretion to grant an application with retrospective effect did not amount to the refusal of an application.

121. Additionally, we consider that a submission set out in Mr Southern's skeleton argument (and further mentioned in his opening) supports CHL's contention that the Tribunal has jurisdiction. Section 83(1)(k) VATA 1994 refers to "the refusal of an application such as is mentioned in section 43B(1) or (2)". As a matter of language, these words take in other matters mentioned in s 43B. Sub-sections 43B(1) and (2) respectively use the introductory words: "This section applies . . ." and "This section also applies". Thus these sub-sections encompass everything else contained in the section. In particular, s 43B(4) begins with the words: "Where this section applies in relation to an application . . ." If the whole of the section applies in respect of s 43B(4), s 43B(2) applies in the particular circumstances of CHL's applications in respect of C28 and C26, and consequently the Tribunal has jurisdiction pursuant to s 83(1)(k) VAT 1994. (The nature of that jurisdiction is considered below.)

122. Even if we were held to be incorrect in our above conclusions concerning the construction of the legislation in its current form, we consider that we do have jurisdiction in the present case, as a result of the terms of the two letters from HMRC (as set out at paragraph 107 above). Each is expressed in terms of a "blanket" refusal of the application, rather than being couched in terms of a decision by HMRC not to exercise their discretion to permit an application to be granted with effect from a date

earlier than that on which they received the application in question. Although the letters make reference to the refusal as being "per VAT Notice 700/2", they make no reference to the exercise of HMRC's discretion under s 43B(4)(b) VATA 1994. CHL's Third and Fourth Appeals therefore relate, in each case, to "the refusal of such an application such as is mentioned in section 43B(1) or (2)", and so fall clearly within the jurisdiction conferred by s 83(1)(k) VATA 1994.

123. In arriving at the latter conclusion, we have taken into account the argument set out in HMRC's Statements of Case relating respectively to C28 and C26 that in substance the appeals in respect of the group registration applications were not appeals in respect of the refusal of applications for group membership, but were appeals in respect of the refusal of group membership – which in each case had subsequently been granted with effect from subsequent dates – to have retrospective effect. We do not consider that the question of jurisdiction should be determined by reference to any group registration applications which may have been made after the respective dates on which HMRC made their decisions in respect of the original group registration applications.

124. We consider that there is a significant distinction between a decision by HMRC not to exercise the discretion under s 43B(4)(b) VATA 1994, and refusing the application altogether. If HMRC had said that they accepted the applications but had decided not to exercise their discretion to permit them to take effect retrospectively, the position would arguably have been markedly different. On the hypothesis that our conclusions relating to jurisdiction, including our endorsement of the views set out in *Save and Prosper* and *University of Essex*, might be held to be incorrect, a decision by HMRC expressed in that form would have left open the question of the extent to which such a decision could be questioned through the Tribunal. As the Third and Fourth Appeals do not on their facts directly raise that question, we think it better for the issue to be left to be resolved at some future stage in the context of other parties' appeals.

125. A further issue is that difficult questions are raised by the form of HMRC's refusal, because of the different appeal regime for "protection of the revenue" refusals. We consider this below in the context of the nature of our jurisdiction.

126. If HMRC argue that they are entitled to refuse an application on the basis solely of s 43B(4)(b), the inevitable consequence is that they must accept that the Tribunal has jurisdiction pursuant to s 83(k) VATA 1994 in respect of an appeal against HMRC's decision. The use of what appear to be standard form letters indicating that applications have "been refused" suggests to us that hitherto HMRC have not considered that there was any distinction between a refusal in relation to granting an application with effect from an earlier time and a refusal of an application, despite Mr Zwart's submission to the contrary effect. If HMRC themselves construe the legislation as permitting them to refuse an application, they can hardly seek to argue that the Tribunal has no jurisdiction to consider the refusal.

(c) Nature of Tribunal's jurisdiction

127. Mr Southern submitted that the powers of the Tribunal were as set out by Neill LJ in *John Dee Ltd v Customs and Excise Commrs* [1995] STC 941 at 952f-g. The powers depended on the nature of the appeal. In the case of group registrations, the Tribunal had no power to substitute its own decision. It could make a finding that powers had not been exercised lawfully by HMRC, and direct that HMRC should reconsider the matter in the light of the Tribunal's view of the law. It was possible that after reconsidering the matter HMRC might still come back with the same answer.

128. Mr Zwart argued that, if the Tribunal did have jurisdiction, it was clear from *Save & Prosper* that the role of the Tribunal was one of review only. Guidance to the jurisdiction in relation to s 43B(4)(b) VATA 1994 was given by *University of Essex*.

129. In HMRC's Statements of Case, they submitted that if the Tribunal were to take the view that it had jurisdiction to entertain the Third and Fourth Appeals, and were to consider that in refusing to allow retrospective group membership HMRC had failed to take account of all relevant considerations, the Tribunal would not be entitled to do more than remit the matter to HMRC with guidance that they should reconsider the applications in the light of the CHL VAT group's specific circumstances. They further submitted that the Tribunal's jurisdiction could be no wider than its jurisdiction pursuant to s 84(4A)(a) VATA 1994 to allow appeals against the refusal of applications for group registration. The Tribunal could only allow the appeals if it considered that HMRC could not reasonably have been satisfied that there were grounds for refusing the application. This conclusion followed from the fact that the discretion in s 43B(4) VATA 1994 was necessarily wider than that in s 43B(5), and Parliament could not be taken to have intended that the Tribunal should have wider jurisdiction in relation to a pure discretion than it had in relation to a limited discretion.

130. Our view is that the nature of the Tribunal's jurisdiction in relation to s 43B(4)(b) VATA 1994 is as set out by Neill LJ in *John Dee* in the passage cited by Mr Southern:

> "In examining whether that statutory condition is satisfied the tribunal will, to adopt the language of Lord Lane, consider whether the commissioners had acted in a way in which no reasonable panel of commissioners could have acted or whether they had taken into account some irrelevant matter or had disregarded something to which they should have given weight. The tribunal may also have to consider whether the commissioners have erred on a point of law."

131. In *University of Essex* at paragraph 54, the Tribunal described as follows the further implications of the judgment of the Court of Appeal in *John Dee*:

> "Nevertheless, even in a case where it was shown that the commissioners' decision was erroneous because of their failure to take relevant material into account, a tribunal could nevertheless dismiss an

> appeal if the decision would inevitably have been the same had account been taken of the additional material."

132. A complication in relation to the nature of the Tribunal's jurisdiction has been added by the reference in arguments to "the protection of the revenue". That appears to bring in s 43B(5)(c) VATA 1994, in relation to which specific provision is made in s 84(4A) VATA 1994:

> "(4A) Where an appeal is brought against the refusal of an application such as is mentioned in section 43B(1) or (2) on the grounds stated in section 43B(5)(c)—
>
> (a) the tribunal shall not allow the appeal unless it considers that HMRC could not reasonably have been satisfied that there were grounds for refusing the application,
>
> (b) the refusal shall have effect pending the determination of the appeal, and
>
> (c) if the appeal is allowed, the refusal shall be deemed not to have occurred."

133. If it were appropriate to treat the refusals of the applications as being on such grounds (a matter on which we comment below), the powers of the Tribunal pursuant to s 84(4A) are not identical to those in relation to s 43B(4) VATA 1994. The result of a tribunal concluding that HMRC could not reasonably have been satisfied that there were reasonable grounds under s 43(5)(c) for refusing the application is that the refusal is cancelled with retrospective effect following the successful appeal, thus in effect granting the application previously refused by HMRC.

134. In contrast, a tribunal's powers in relation to s 43B(4) are more limited; if it considers that the decision arrived at by HMRC is defective for any of the reasons specified in the above passage from Neill LJ's judgment in *John Dee*, and that it cannot be shown that the factor wrongly taken into, or left out of, account did not influence the mind of the decision maker, it may direct that HMRC should reconsider the matter in the light of the tribunal's view of the law and the relevant findings by the tribunal in respect of the facts. In other words, putting aside the "protection of the revenue" issue, it is not within the powers of this Tribunal to direct that the "retrospective" group registration applications made by CHL should be granted; the power and responsibility in respect of that decision remains with HMRC.

(d) The parties' submissions on legal issues relating to HMRC's discretion

135. Mr Southern questioned whether HMRC had exercised their discretion. (We consider below his submissions on the factual aspects of this question.) He submitted that the law gave HMRC power to allow retrospective grouping without limitation of time. HMRC could not deprive themselves of that power by imposing such severe restrictions as to its exercise as to make its existence illusory.

136. There was no time limit whatsoever in the legislation for an application for group registration with retrospective effect. This was clear from the High Court's decision in *Save & Prosper*. Mr Southern commented in relation to *University of*

Essex that HMRC had not relied in that case on the "exceptional circumstances" argument, whereas it was a centrepiece of the argument in the present case. If Parliament had seen fit to insert a time limit, it would have done so. Parliament often gave guidance in the legislation as to how a particular discretion was to be exercised. Section 43B(5) specified limited circumstances in which an application might be refused. Sub-section 43B(5)(c) did not refer to getting more tax than should be collected; the present case was not one of "the protection of the revenue". Mr Southern referred to the possibility of an adjustment under regulations 111 and 116 of the VAT Regulations. The criterion of "exceptional circumstances" could not be seen as having any basis either in the legislation or in the courts.

137. Mr Southern questioned whether the "exceptional circumstances" proviso could be introduced by official guidance. He argued that the restriction set out in paragraph 2.14 of VAT Notice 700/2 was 'self-imposed'. It did not have any legal origin. It was reasonable for HMRC to have regard to their own published guidance, provided that (a) such guidance did not fetter HMRC's discretion, and (b) that such guidance was itself reasonable.

138. In Mr Southern's submission the restriction in paragraph 2.14 was inherently unreasonable, because it meant that retrospective grouping was in practice virtually unobtainable. The possibility of late grouping was a useful commercial safeguard, allowed by law, and should not be excluded by administrative discretion. It provided a lifebelt in situations where – as here – a member of a group was "in danger of drowning". The HMRC guidance was simply an attempt to rewrite the legislation in a different form. On the basis of that guidance, it was very difficult to see how anyone could obtain grouping with retrospective effect.

139. By their guidance, HMRC were trying to establish a negative legitimate expectation. It did not follow that if an applicant's situation did not come within the guidance, he could expect that the power would not be exercised in his favour. If Parliament had given powers to a certain body, that body could not say that it would not exercise its powers in a certain way. The reason was plain; powers were given to a public body by Parliament because it thought them useful and necessary. Such powers were not to be deprived of any practical application. Mr Southern referred to various passages in ***R v Secretary of State for Home Department, ex p Fire Brigades Union*** [1995] 2 AC 513.

140. HMRC were frustrating the will of Parliament; the powers had been given to fulfil the will of Parliament, not to frustrate it.

141. Mr Southern questioned whether the outcome for which HMRC contended was consistent with the modern approach to tax legislation. That approach differed from the former one of simply looking at the rule in question. Now, it was necessary to look at the outcome or result and go back to the rule; if that outcome or result did not really appear to be in accordance with the intentions of the rule, the workings of that rule might have to be reconsidered in order to produce a sensible result. In the present case, if HMRC were right in their approach, they would collect £4 million of tax which they would not have collected if the rules had been applied sensibly; that was

not a sensible outcome. Mr Southern referred to *DCC Holdings (UK) Ltd v Revenue and Customs Commissioners* [2011] STC 326.

142. Mr Southern also questioned whether the outcome for which HMRC contended was consistent with EU law. He referred to *Marks and Spencer plc v Customs and Excise Commrs* (Case C-62/00), [2002] STC 1036, and to the Advocate General's emphasis on the result envisaged by the EC legislature being the decisive factor in determining the question whether the member State has or has not correctly implemented the directive in question. In the judgment of the ECJ at [34] the Court had set out the requirements of the principle of effectiveness.

143. Mr Southern submitted that the outcome sought by HMRC contended was incompatible with EU law for two reasons, namely the principles of effectiveness and neutrality. The grouping provisions were a derogation, importing principles of EU law. The ECJ had stated in *Marks and Spencer* that rules should not render impossible or excessively difficult the exercise of rights conferred by Community law. Mr Southern argued that grouping conferred such a right, and the "proviso" introduced by HMRC made the exercise of that right excessively difficult or impossible, thus conflicting with the principle of effectiveness.

144. He referred to the second principle, of neutrality. The CHL VAT group was making taxable supplies, being zero-rated supplies. A company or group making taxable supplies should not suffer the cost of VAT. The case of *Rompleman v Minister Van Financiën* (Case 268/83) had confirmed the principle, in the Court's judgment at [19]. The ECJ had confirmed in *Elida Gibbs Ltd v Customs and Excise Commrs* (Case 317/94), [1996] STC 1387 at [31] that the position of taxable persons must be neutral. It had given similar confirmation in *Skatterverket v AB SKF* (Case C-29/08), [2010] STC 419 at [56].

145. Accordingly, a result which left a taxable person with a large VAT bill could not be right. Having regard to the neutrality principle, a tax authority could not collect windfalls which conflicted with that principle. All unduly levied VAT must be returned to the taxable person. This was why Parliament had put in the grouping provision.

146. The case of *Schmeink & Cofreth AG & Co* (Case C-454-98), [2000] STC 810, demonstrated that a member State was not entitled to use its powers so as to obtain a VAT windfall. In his Opinion at [20] and [24], the Advocate General had referred to the principle of neutrality, despite the fictitious nature of the invoices. In its judgment at [58] and [59], the Court had stated the requirement to follow the neutrality principle. Mr Southern commented that even in cases involving fraud, tax authorities were not allowed to collect VAT which was not properly due – a "tax windfall". CHL should be allowed to put right simple errors, *a fortiori* where Parliament had provided the means of doing so.

147. In response to CHL's arguments, Mr Zwart commented that there was no requirement for a company to form a VAT group; grouping was voluntary. He referred to the grouping provisions. The consequence of forming a VAT group was

that under s 43(1)(a) VATA 1994, any supply of goods or services from one member of the group to another were disregarded, whether it would otherwise have been taxable or exempt. It was for the corporate group to regulate its VAT position.

148. Mr Zwart submitted that s 43B(4)(b) conferred on HMRC a discretion to allow membership of a VAT group earlier than the date of receipt of the application to register an entity within the particular group.

149. On examination of s 43B VATA 1994, the first discretion of HMRC arose under s 43B(5). Section 43B(4) self-executed on receipt of an application. Sub-section (4)(a) set out the default position. Sub-section (4)(b) enabled HMRC to "slide" the time earlier or later than the date on which the application was received. Mr Zwart submitted that there was no evidence as to Parliament's intention; the submissions made for CHL were generalised. The prescribed position was under sub-s (4)(a); Parliament had entrusted HMRC to consider whether an application could be permitted to take effect at an earlier or later date.

150. The consequence of sub-s (4)(b) was that Parliament had authorised HMRC to rewrite, post-transaction, VAT on supplies made by the "candidate member". Thus HMRC were permitted to "unmake" supplies.

151. Given the assumptions relating to sub-s (4)(b), it was clear that this power conferred on HMRC should be exercised with care, as the result of granting an application with retrospective effect was that the candidate member's supply history would be rewritten, not rectified.

152. The second matter raised by Mr Zwart in his legal submissions concerning the group registration applications related to the guidance published by HMRC. The version of Notice 700/2 provided to us is the one dated September 2011. This therefore post-dates both applications and also HMRC's decisions in respect of those applications. However, the paragraph quoted in the two refusal letters (ie paragraph 2.14) must have been taken from the then existing 2004 version, and the wording of the 2011 version is exactly the same. Paragraph 2.13 of the 2011 version permits an application to be backdated, but only up to 30 days prior to the application being received by HMRC and only if it corresponds to the commencement of the current account period of the existing VAT group, or of any of the companies forming, joining or leaving the VAT group. As paragraph 2.13 was not directly in point in relation to the Third or Fourth Appeals, we work on the assumption that its wording corresponds to that of the 2004 version.

153. Mr Zwart submitted that Notice 700/2 should be viewed as general background information; it expressed the care with which HMRC were to exercise their discretion under s 43B(4)(b) VATA 1994. He argued that CHL's expectation from the published guidance could only have been that the scope of HMRC's discretion would be narrowly exercised. According to the guidance, HMRC expressed not a closed mind but a discretion to consider all 'potential candidate circumstances'.

154. In their Statement of Case, HMRC submitted that it followed from the limited discretion to refuse an application for group membership on the grounds of protection of the revenue to be found in s 43B(5) VATA 1994, that the discretion conferred on them by s 43B(4) must necessarily include the discretion to refuse to allow retrospective group membership in circumstances where it appeared to them that refusing to allow retrospective group membership was necessary for the protection of the revenue. Mr Zwart did not repeat or expand on this submission; we take it into account in arriving at our conclusions on the law as set out below.

155. In reply, Mr Southern submitted that the correct position in relation to HMRC's discretion was the following;

(1) Grouping was voluntary. A company had to apply to be admitted to a VAT group.

(2) There was no automatic right to group. It depended on HMRC agreement. HMRC could refuse an application.

(3) Section 43B(4) allowed a choice of dates from when grouping was to take effect.

(4) The HMRC discretion was concerned with the application as such; it was not confined to s 43B(4) questions.

(5) The power had to be exercised reasonably.

156. It had not been disputed that there was no legislative warrant for the "exceptional circumstances" proviso. There was no legislative restriction on the ability to backdate the date from which an application to group could take effect. In *Save & Prosper* the High Court had held that the clear words of the legislation placed no temporal limit on HMRC's power to give retrospective effect to a grouping application.

157. HMRC had argued that their collection and management power gave them power to issue guidance. This was correct. However, that did not empower HMRC to rewrite legislation or to reduce drastically its potential application. Paragraph 2.14 of Notice 700/2 was not guidance. It was "pseudo-legislation". It was simply inconsistent with the law as stated in *Save & Prosper*.

158. Moreover, the importance of guidance was that it might create a legitimate expectation. Here CHL as taxpayer did not rely on legitimate expectation.

(e) Conclusions on legal issues relating to HMRC's discretion

159. We accept Mr Zwart's submission that s 43B(4)(a) VATA 1994 sets out the default position in relation to group registration applications. It follows that s 43(4)(b) deals with exceptions from that default position, and that therefore anything which falls within s 43B(4)(b) is, in that sense, less usual or possibly "exceptional".

160. Section 43B(4)(b) confers a discretion on HMRC. Unlike s 43B(5), it gives no indications of what is or is not to be taken into account in exercising that discretion.

Further, as Mr Southern submitted, s 43B(4)(b) contains no time limit for "retrospective" applications.

161. We agree that, as part of their functions of collection and management pursuant to s 5 of the Commissioners for Revenue and Customs Act 2005, HMRC are empowered to publish their guidance as to the policy which they expect to follow in relation to "retrospective" applications. It is clearly reasonable for HMRC to have a policy to stop indiscriminate "retrospective" applications, as it would be inappropriate to permit a "free-for-all" approach in relation to such applications. In that context, we regard the approach taken in paragraph 2.13 of Notice 700-2 as appropriate and reasonable. Paragraph 2.14 appears to us to be highly restrictive, as the only exceptional circumstances referred to are ones where HMRC are at fault for either of the reasons specified. We question whether the possibility of other circumstances meeting the test should also be mentioned. Subject to that comment, we see no objection to the form of the guidance.

162. However, it is one thing to state in general terms a policy approach; it is an entirely different matter to treat such policy guidance as if it were a statement of the law. We accept Mr Southern's submission that HMRC cannot limit their statutory discretion by publishing their guidance; Notice 700-2 is not a form of published guidance having the force of law. Thus whatever the terms of HMRC's guidance, "retrospective" applications in circumstances falling outside it may still require to be considered on the basis of their individual merits. The breadth of the unqualified discretion conferred by s 43B(4)(b) is such that any circumstances could lead to the exercise of HMRC's discretion in the applicant's favour, although having regard to HMRC's collection and management responsibilities, the circumstances would have to be exceptional in some way other than those described in paragraph 2.14 of Notice 700-2 if they were to qualify for consideration pursuant to the exercise of HMRC's discretion.

163. We therefore accept Mr Southern's submissions as set out in paragraph 139 above, other than in respect of the "negative legitimate expectation" which he contended that HMRC were trying to establish. (Although we consider paragraph 2.14 of Notice 700/2 to be possibly over-restrictive in the way in which it is expressed, we do not regard it as carrying a clear implication that no other circumstances will be regarded as "exceptional".) We see no objection to guidance which emphasises the need for exceptional circumstances in order to justify the exercise of HMRC's discretion to accept "retrospective" applications. However, the result of such guidance should not be to close the minds of those within HMRC responsible for taking such decisions; the statutory discretion remains unrestricted, and therefore HMRC must consider whether to exercise their discretion in circumstances which do not happen to fall within the terms of their published guidance.

164. Both Mr Southern and HMRC (in their Statement of Case) referred to the discretion under s 43B(4)(b) as extending to matters wider than merely the date from which a "retrospective" application might be permitted to take effect. In particular, such broader matters were said to include "the protection of the revenue". Before considering the matters to be taken into account in exercising the discretion, we think

it appropriate to consider the effect of s 43B(4) in the context of s 43B as a whole in order to establish the precise nature of HMRC's discretion. The language of s 43B(4)(b), taken with that of the introductory words of s 43B(4), appears to be confined to the time with effect from which the application is to be taken to be granted. The words of the sub-section itself do not appear to contemplate refusal, and appear to be mandatory in nature. The possibilities envisaged are:

(1) the effective date is that on which the application is received;

(2) the effective date is some earlier date allowed by HMRC;

(3) the effective date is some later date allowed by HMRC.

165. However (as indicated above in relation to the jurisdiction question) s 43B(4) expresses itself to be subject to s 43B(6), which does refer to the refusal of an application. One way of construing the reference to sub-s (6) is that it incorporates by reference the concept of "refusal" into s 43B(4). Another construction, taking into account the whole of s 43B, is that the only references to "refusal" within the section are those in sub-ss (5) and (6), and that the mandatory approach in sub-s (4) needs to be qualified to ensure that any refusal pursuant to sub-s (5) is not denied effect by that mandatory approach. Putting to one side for the moment the words "subject to subsection (6) below", the initial words are [with our emphasis]:

> "Where this section applies in relation to an application, *it shall . . . be taken to be granted* with effect from—
>
> (a) the day on which the application is received by the Commissioners, or
>
> (b) such earlier or later time as the Commissioners allow."

166. On its face, based on the mandatory language which s 43B(4)(b) uses, it does not confer on HMRC a discretion to refuse an application for group registration; their discretion would appear to be limited to deciding on the effective date from which the group registration is permitted to run, in circumstances where the applicant company requests some date other than that in s 43B(4)(a).

167. As a matter of language, we regard the second construction set out above as the preferable one. A significant problem with the first construction is that it would appear to introduce, by means of the indirect reference to sub-s (6), a further discretion for HMRC to refuse *any* application, whether falling within the "default" category under s 43B(4)(a), or within either of the categories contemplated by s 43B(4)(b). If that had been the intention of Parliament in 1999 when the "grouping" provisions were amended, we would have expected it to be clearly and expressly stated in s 43B(4), rather than being implied.

168. We therefore conclude that it is not open to HMRC, on the basis of s 43B(4)(b) alone, to refuse outright a "retrospective" application which in all relevant respects meets the necessary statutory qualifications; the sub-section requires them to take a decision as to the effective date of the candidate company's registration, rather than to reject the application.

169. Thus in our view, the discretion in s 43B(4)(b) is limited to the time with effect from which a valid application is to be treated as granted, and does not extend to consideration of *whether* it should be granted.

170. We consider that the construction which we place on s 43B(4) is consistent with the construction of the whole of s 43B. Section 43B(4)(b) does not concern refusals, but merely the exercise of a discretion as to the effective date of group registration. (We have referred above to the questions concerning the appeal rights and jurisdiction in respect of the exercise of that discretion.) Section 43B(5) and (6) are concerned with refusals. Sub-section (5) places a 90 day time limit for any refusal by HMRC for any of the reasons set out in s 43B(5), and s 43B(6) states that if HMRC refuse an application, it shall be taken never to have been granted; in our view, this is intended to confirm the effect of the refusal and to disapply the normal mandatory rules set out in s 43B(4).

171. That construction also explains the reason for the specific and different appeal provisions contained in s 84(4A) VATA 1994 relating to a refusal of a group registration application on the grounds set out in s 43B(5)(c) VATA 1994. An appeal against a decision by HMRC to "refuse" an application on these grounds requires a different approach. The appeal is not to be allowed unless the tribunal considers that the "unreasonableness" test has been met. While the appeal continues, the refusal remains in force. If the appeal is allowed, the effect of the refusal is cancelled, leaving the applicant in the position of any other applicant pursuant to s 43B(4).

172. We find this construction of s 43B to be logical:

(1) HMRC must register a qualifying group or candidate group member;

(2) The normal timing for the effective date of registration is the date of receipt of the application;

(3) HMRC has a discretion to permit group registration to take effect from an earlier or later date, but may decide that the effective date should be some date other than that requested by the applicant. There is no statutory time limit for "retrospective" applications, the question of timing being a matter for HMRC's discretion;

(4) If an applicant wishes to challenge HMRC's decision to grant the application with effect from a date other than that requested, the applicant may appeal on the basis of the principles set out in *John Dee*;

(5) HMRC may (within the 90 day period) refuse the application for any of the reasons in s 43B(5);

(6) There is a separate appeal regime for an appeal against a refusal pursuant to s 43B(5)(c) (the other reasons set out in s 43B(5) being based on lack of eligibility, against which it would not be appropriate to permit any appeal).

173. We consider this construction of the relevant provisions to be consistent with the general scheme of the legislative changes made to the "grouping" provisions by s 16 of and Schedule 2 to the Finance Act 1999.

174. It follows from our views as to the language of s 43B(4) VATA 1994 that it is not a proper exercise of HMRC's discretion under s 43B(4)(b) simply to refuse the application. If, on the basis of the information available to them, HMRC take the view in respect of a "retrospective" application that they should not permit it to be granted with effect from the date requested, they must determine what alternative date should be the effective date, and grant the application with effect from that date instead. If the applicant group disagrees with HMRC's decision as to the date, it may seek to challenge that decision on the basis considered above.

175. If, for "protection of the revenue" reasons, HMRC wishes to *refuse* an application, we consider it necessary for them to state expressly in their decision letter both that the application is being refused, and that the refusal is pursuant to s 43B(5)(c) VATA 1994. (The 90 day time limit for refusals under s 43B(5) will apply.) The applicant will then be aware that the appeal rights in respect of the refusal are governed by s 84(4A) VATA 1994, rather than being in respect of the exercise of the discretion under s 43B(4)(b).

176. We now consider what factors should be taken into account by HMRC in exercising their discretion under s 43B(4) VATA 1994 in order to arrive at their decision as to the effective date of group registration. As we have already mentioned, s 43B(4)(b) VATA 1994 does not set out any indication of what these may be (in contrast to the very specific criteria set out in s 43B(5) in relation to refusal). Although s 43B(5)(c) is specifically set out as grounds for refusal of any form of group registration application, with the appropriate appeal mechanism as described above, we do not think that this in any way precludes HMRC from taking into account the protection of the revenue in deciding whether to exercise their discretion under s 43B(4)(b). As we have concluded in relation to the latter, the appeal rights of the applicant and the powers of the Tribunal are different.

177. Mr Zwart summarised his submissions by means of the shorthand expression that CHL was seeking to rewrite history by its "retrospective" applications for C28 and C26 to join the CHL VAT group. In closing his submissions, he expressed the hope that he had "blown away the smoke". In his reply for CHL, Mr Southern argued that the neutrality argument had simply not been addressed. We do not think that this is entirely accurate. Mr Zwart did seek to distinguish certain of the cases cited by Mr Southern. However, we do consider that Mr Zwart could have assisted us further by specifically drawing our attention to the inherent circularity of CHL's arguments based on protection of the revenue, the neutrality principle, and the modern approach to tax legislation. These arguments were fundamental to CHL's contentions that the discretions to accept "retrospective" applications should have been exercised in its favour both in respect of C28 and C26. We think it appropriate to test the assumptions on which those arguments were based.

178. Although we consider the facts separately below, certain facts are relevant to the question of principle. CHL submits that the VAT group has been disadvantaged as a result of the inadvertent error in assuming that C28 and C26 were members of the VAT group at the material dates. It argues that VAT liabilities have been incurred which would not have been incurred if those companies had been members of the

CHL VAT group at those dates. It claims that being made subject to those liabilities breaches the principle of neutrality, as the VAT group is fully taxable (or virtually so). It also seeks to rely on broader principles of statutory interpretation.

179. Putting Mr Zwart's submissions in a different way, C28 and C26 have done what they have done, with the result that particular VAT liabilities have been incurred. If the picture is "frozen" at the point just before the "retrospective" applications in each case, there is no basis for interfering with their VAT treatment either on the grounds of the neutrality principle or by reason of any interpretation of the relevant statutory provisions. By its own argument, CHL acknowledges that the VAT liabilities have been incurred; it also acknowledges that inadvertent errors were made within its corporate group, and that those errors led to the liabilities being incurred.

180. The effect which CHL seeks by means of the "retrospective" applications is to eliminate the VAT liabilities which have been incurred within the corporate group. The applications amount to requests to HMRC to "write off" substantial amounts of VAT which, as a result of the inadvertent administrative errors acknowledged by CHL, have become due. CHL is asking HMRC to cancel out the effects of those errors. This raises the question whether it is appropriate for HMRC to use their statutory discretion to rescue a taxable trader from the consequences of its own actions or omissions.

181. Thus (viewing the position in relation solely to the Third and Fourth Appeals) it is only if the "retrospective" applications are granted that these liabilities would not be due. We regard this as a factor of major significance for HMRC in reaching the decision whether to exercise their discretion to permit registration with effect from an earlier date, particularly given the length of the periods between the effective dates sought and the dates of the two applications.

182. In the context of protection of the revenue, Mr Southern referred to HMRC collecting more tax than was due; we do not construe the position, measured immediately before the applications, as being that unwarranted liabilities to VAT had been incurred. Instead, through inadvertence, liabilities had been triggered, and in consequence were properly due. The question for HMRC in deciding whether to exercise their discretion is therefore whether they are prepared, given their collection and management responsibilities, to favour members of a corporate group by granting "retrospective" VAT group registration applications.

183. In this context, we note Ms Colegrave's comment in the C26 application letter dated 23 February 2011 that CHL's advisers had experience of retrospective applications being accepted for entities operating in other industry sectors including those where "sticking" VAT would occur if retrospective treatment were not applied. We accept that this may well be the case, but we have no specific evidence to demonstrate this to us. In any event, it is for HMRC to consider equity as between taxable persons as a factor when they exercise their discretion; they are the only party with full information as to what has been taken into account in other cases involving "retrospective" applications.

184. We examine below, in considering the factual issues, whether HMRC did exercise their discretion under s 43B(4)(b) VATA 1994 in arriving at their conclusion that the applications should be refused.

185. Apart from the matters to which we have referred, we accept that there may well be a range of further considerations which are relevant to the exercise by HMRC of their discretion under s 43B(4)(b). As Mr Zwart submitted, the discretion is completely open, and it is therefore impossible (and inappropriate) for us to seek to give an exhaustive list of the factors to be taken into account. The discretion is a statutory one, and as we have already indicated, it cannot be constrained by HMRC's published guidance.

(f) Factual issues relevant to the group registration applications

186. Although Ms Colegrave referred in her evidence to the erroneous assumptions made at the time of the relevant transactions that C28 and C26 respectively were part of the CHL VAT group, it was not until after the inadvertent error in respect of C28 had been discovered that any suggestion of a possible "retrospective" application was discussed with HMRC, at the meeting on 26 February 2010. The application was eventually submitted to HMRC on 24 November 2010. The first mention of the CHL VAT group's intention to make a "retrospective" application for C26 was in Mr Sharp's letter to Mr Gradwell dated 12 October 2010. That application was subsequently submitted on 23 February 2011. It appears to us that the applications were a matter of last resort for the CHL corporate group, after the attempts to reach agreed solutions with HMRC for the problems arising as consequences of the transactions involving those companies had proved unsuccessful.

187. In relation to C28, the application made in November 2010 sought group registration with effect from 30 July 2007, over three years before. In relation to C26, the effective date requested was 18 April 2008, approximately two years and ten months before the date of the application.

188. Ms Colegrave's letter accompanying the application in respect of C28 set out a summarised list of the factors forming the basis for that application. Her later letter enclosing the application relating to C26 set out much more detailed arguments in support of that application. In substance, these arguments have been considered above.

189. In the final section of that letter, headed "Conclusion", Ms Colegrave stated:

> "I fully accept that we have made an error in failing to submit an application to include C26 in the Copthorn VAT group and as such we find ourselves in the hands of HMRC to mitigate the consequences of this error."

190. It is clear from HMRC's decision letters relating to both C28 and C26 (see paragraph 107 above) that the two HMRC officers concerned did not consider it appropriate to respond to any of the points set out in Ms Colegrave's covering letters. As a result, there is no evidence to show whether or not they took any of the matters

raised by her into account in arriving at their respective decisions. As we have indicated above, the letters appear to us to be in standard form. This is emphasised by the failure of either officer to substitute the appropriate details for the options in square brackets in the "review" paragraph. (That may explain why no review was sought, and may also answer Mr Zwart's suggestion that failure to seek a review somehow confirmed acceptance by CHL of the position as set out by HMRC in the decision letters.)

191. Whether or not the letters were in standard form, they do not appear to be consistent with the terms of s 43B(4) VATA 1994. They make no reference to HMRC having decided not to exercise their discretion to permit the application to have retrospective effect. Nor do they state that instead the application is to have effect from the date of receipt by them, or any other date. Instead, they refuse the application, and state that under s 43B(6) the application is to be treated as if it had never been made.

192. As we have concluded, it is not open to HMRC simply to refuse an application on the basis of s 43B(4)(b) VATA 1994. All they are permitted to do is to decide whether they should exercise their discretion under that provision, and if they decide not to do so, the position defaults (as Mr Zwart submitted) to s 43B(4)(a), under which the effective date is the date on which they receive the application.

193. It follows that, by issuing in each case a decision letter in the form of a refusal, HMRC have failed to provide any evidence to show that they have exercised their discretion under s 43B(4)(b). Further, the reference in the letters to the effect of s 43B(6) is inappropriate, as s 43B(4) makes no provision for the outright refusal of an application.

194. The position would be different if the letters had stated in terms that the applications had been refused on the grounds set out in s 43B(5)(c) VATA 1994, as s 43B(5) permits a refusal. We re-emphasise that decision letters which communicate refusals based on such grounds must indicate clearly that the refusal is made under that sub-section, so that the applicant can be made aware of the relevance of the particular appeal provisions provided in such circumstances by s 84(4A) VATA 1994.

195. There is no evidence that the letters amounted to refusals based on "protection of the revenue" grounds under s 43B(5)(c) VATA 1994. There was no suggestion in subsequent correspondence, or in the arguments put to us by HMRC, that the "refusal" of the applications was based on this provision rather than s 43B(4). Further, HMRC did not choose to present evidence from the officers who took the decisions relation to C28 and C26. Mr Zwart's arguments were directed at s 43B(4) rather than s 43B(5)(c). Although in many respects it would have made somewhat easier our task of dealing with the Third and Fourth Appeals if the decisions had been based on s 43B(5)(c), we find that the decisions were not decisions under that provision.

196. We must therefore regard the two decisions as purported refusal decisions under s 43B(4) VATA 1994. As concluded above, HMRC do not have the authority under s 43B(4) to refuse an application outright. It follows that they have not acted within the

terms of that sub-section. In our view, they should have approached matters differently. If they did not consider that the inclusion, respectively, of C28 and C26 within the overall CHL VAT group registration should take effect from the dates requested by CHL, they should have stated the dates from which those companies were permitted to be included. Whether this would have been the dates on which the applications were received, or different dates, would have been a matter entirely within their discretion under s 43B(4)(b).

197. In its Grounds of Appeal for the Third Appeal, CHL stated that the decision was both wrong in law and, in the circumstances of the application, both unreasonable and unfair. Its Grounds of Appeal for the Fourth Appeal were virtually identical. We are satisfied that the decisions made by HMRC to refuse the applications outright, rather than granting them from such dates as HMRC considered appropriate, were wrong in law. In the light of this, we do not consider that we are in a position to make findings on the other issues raised by CHL in these Grounds of Appeal. However, as the parties made submissions concerning the basis on which HMRC arrived at their decisions, we set out our comments on those submissions.

198. Mr Southern submitted that the decision letters were absolutely standard computer-produced letters having the same format. The respective letters from Ms Colegrave seeking group registration for C28 and C26 had been very full accounts of the particular circumstances relating to those companies, and no account appeared to have been taken of the matters raised in those letters. It was therefore plain from this correspondence that HMRC had not merely fettered their discretion by applying a departmental policy; they had not given any consideration at all to the matters raised in those letters. CHL therefore submitted that the discretion vested in HMRC had simply not been exercised at all.

199. Mr Zwart submitted that the matters raised in CHL's appeals were a considerable distance outside the 'candidate circumstances' set out in HMRC's Notice 700/2 and, premised as they ultimately were on the commercial expediency of corporate tax and account processes as against VAT processes, were manifestly outside the guidance criteria.

200. He argued that HMRC had exercised their discretion under s 43B(4)(b), as shown by their letters dated 9 December 2010 relating to C28 and 8 March 2011 relating to C26. Those decisions were not unfair by an application of the statutory scheme. Nor had the decisions been unreasonable, because they had been based on evidence available to HMRC.

201. In the absence of evidence from the officers responsible for the decisions, we are unable to arrive at any conclusions as to the basis on which they arrived at those decisions, or as to whether they exercised their discretion but declined to move away from the default position of granting the applications with effect from the date of receipt. Nor do we have any evidence concerning their reasons for expressing their decisions in terms of outright refusals rather than adopting that default position. Accordingly, there is no evidence to show whether or not their decisions were, to use a shorthand expression, "unreasonable" within the test applicable under *John Dee*.

202. Mr Southern argued that the officers had not taken into account the detailed information set out by CHL in the application letters written by Ms Colegrave. There is no evidence to show that they did, as the letters made no specific response to any of the points put by Ms Colegrave. However, without evidence from the officers, it must equally be said that there was no evidence to establish that they had not taken that information into account. The position could be that they did so, but then chose to use standard form decision letters in order to communicate the results of their decisions.

203. We have found that HMRC did not deal with the applications in accordance with the terms of s 43B(4) VATA 1994. As a result, Mr Southern's submission as to the process falls away. Even if it had been open to us to accept this submission, that would not have resolved the position; we would have been required to review (in accordance with the decision in *John Dee*) whether the decisions taken by their officers would inevitably have been the same had account been taken of the additional material supplied by CHL when submitting the applications. In the circumstances, it is inappropriate for us to make any findings in respect of the latter issue.

204. Nor do we consider it appropriate to make any findings as to the potential effects of C26 being permitted to become part of the CHL VAT group registration with effect from 18 April 2008. We comment that we were not provided with an explanation of those potential effects. Although the information does not constitute evidence, we are aware from the skeleton arguments of both Mr Southern and Mr Zwart that on 22 March 2011, an application was made by CHL for C26 to become a member of the CHL VAT group, and that this was accepted on 31 March 2011. Mr Zwart's skeleton argument states that on 3 June 2011, CHL rendered a VAT return for the period 1 May 2011 to 31 May 2011 for a net repayment of £1,938,772.46 which included the recovery of the previously assessed and paid sum of £1,150,096. Whether CHL seeks by means of the Fourth Appeal to recover further sums, or to achieve other objectives by means of the "retrospective" group registration application for C26 to be included in the CHL VAT group with effect from 18 April 2008, is not clear to us. Ms Colegrave's evidence was that the £1,150,096 assessed on LL had been paid by CHL. (Mr Zwart's skeleton argument stated that this payment was made on 27 January 2011, but no documentary evidence of this was provided to us.) In any event, we do not consider it appropriate for the subsequent history to be taken into account by HMRC in considering the original "retrospective" application.

205. The only course open to us is to allow the Third and Fourth Appeals and to remit both original applications to HMRC for them to consider afresh, in the light of our findings in this decision, whether they should take effect from the dates on which they were received by HMRC, on the dates requested by CHL, or on other dates determined by HMRC pursuant to their "open" discretion under s 43B(4)(b) VATA 1994. We do not consider that the exercise of that discretion by HMRC should take into account any subsequent applications relating to C28 or C26. As in both cases the 90 day period has expired, it is not now open to HMRC to refuse the applications for "protection of the revenue" reasons under s 43B(5)(c) VATA 1994.

206. If it is HMRC's practice to use standard form "refusal" letters for "retrospective" group registration applications, we recommend that they should reconsider the form of such letters in the light of the matters considered above.

The First Appeal

207. In its Notice of Appeal, the background to CHL's grounds of appeal was expressed in the following terms:

> "This appeal is being made against the refusal of HMRC to accept a belated notification of an option to tax in respect of a property at Unity Mill, Heywood Lancs. As a result of that refusal HMRC have maintained an assessment for £2,187,500, being input tax incorrectly deducted by [CHL] in respect of an exempt supply. [CHL is] appealing against the refusal to accept a belated notification of the option to tax and consequently against the assessment for input tax incorrectly recovered."

208. Thus CHL has appealed against the Preferred Assessment. No mention was made of the Alternative Assessment. Although CHL's Notice of Appeal does not refer specifically to the Alternative Assessment, a copy of the letter dated 22 July 2010 from Mrs Howes was submitted with the Notice of Appeal. This referred both to the Preferred Assessment and the Alternative Assessment. We therefore treat CHL's First Appeal as extending also to the Alternative Assessment.

209. The transactions in respect of Unity Mill took place in July 2007. The legislation applicable at that time was paragraph 3(6)(b) of Schedule 10 to VATA 1994, before substitution by article 2 of The Value Added Tax (Buildings and Land) Order 2008 (SI 2008/1146). Paragraph 3 of Schedule 2 to that Order provides that anything done under a superseded provision of Schedule 10 as it stood before being rewritten has effect after commencement of the corresponding rewritten provision as if done under or for the purposes of that corresponding rewritten provision. As a result, we consider the position under Schedule 10 as rewritten, rather than under the original version of Schedule 10.

210. Paragraph 2 of Schedule 10 to VATA 1994 ("Sch 10") is as follows:

> "**Effect of the option to tax: exempt supplies become taxable**
>
> **2**—
>
> (1) This paragraph applies if—
>
> (a) a person exercises the option to tax any land under this Part of this Schedule, and
>
> (b) a grant is made in relation to the land at any time when the option to tax it has effect.
>
> (2) If the grant is made—
>
> (a) by the person exercising that option, or
>
> (b) by a relevant associate (if that person is a body corporate),

the grant does not fall within Group 1 of Schedule 9 (exemptions for land).

(3) For the meaning of "relevant associate", see paragraph 3."

(We do not need to consider the definition of "relevant associate".)

211. Paragraph 20 of Sch 10 provides:

"**Requirement to notify the option**

20—

(1) An option to tax has effect only if—

(a) notification of the option is given to the Commissioners within the allowed time, and

(b) that notification is given together with such information as the Commissioners may require.

(2) Notification of an option is given within the allowed time if (and only if) it is given—

(a) before the end of the period of 30 days beginning with the day on which the option was exercised, or

(b) before the end of such longer period beginning with that day as the Commissioners may in any particular case allow.

(3) The Commissioners may publish a notice for the purposes of this paragraph specifying—

(a) the form in which a notification under this paragraph must be made, and

(b) the information which a notification under this paragraph must contain.

(4) . . ."

212. Thus in order to disapply the normal exemption provisions in Schedule 9 to VATA 1994, there are two requirements. The first is that the option must be exercised. The second is that the option must be notified to HMRC within the allowed time. Paragraph 20(2)(b) of Sch 10 makes clear that notification can be given later than the expiry of the normal 30 day period, but only if HMRC exercise their discretion to allow this in the particular case.

213. In *Marlow Gardner & Cooke*, Mann J held that an election to waive exemption (under the previous legislation) could take effect after the landowner had disposed of the land.

214. In relation to the first requirement, CHL contends that the option was exercised by CPUKL. HMRC's argument is that the option was not exercised; all that happened was an expression of intention to exercise the option, with no action to fulfil that intention. In the light of these opposing contentions, we review the relevant issues of fact.

215. We have set out above the extract from the Board Minutes relating to Unity Mill. The first issue to consider is the status of those Board Minutes.

216. On their face, they appear to be minutes relating to Countryside Properties (Northern) Ltd ("CPN"). However, in her witness statement Ms Colegrave described the meeting as a meeting of the Northern Divisional Board. In oral evidence she explained that this was a "high powered meeting", with senior executives present. Mr Graham Cherry, described in the Minutes as Chairman, was the Chief Executive of CHL and of several other companies within the CHL corporate group. The divisional Boards met on a monthly basis. All persons employed within the CHL group were employed by CPUKL, which was the main operating company.

217. The Divisions were agencies for that main company. She stated that the properties within the corporate group were beneficially owned by CPUKL. As a result of the de-listing of CPUKL from the Stock Exchange, there was a requirement for the legal interest in its properties to be held by nominees, which was the reason for using the Nominees. There was no specific recharging; a single general ledger was maintained for the whole group. In the present case, everything had been accounted for together. Exceptions from this were made for special purpose vehicle ("SPV") companies. At the statutory accounts stage, balances from the Northern ledger were separately identified.

218. Any one of the four directors of CPUKL present at the 27 July Board meeting (including Ms Colegrave herself) would have been authorised to sign a VAT election [ie what is now described as an option to tax].

219. The decision taken at the Board meeting was to put the Unity Mill project into a new SPV, C28, to allow for the possibility that a subsequent joint venture might be formed.

220. In the course of the hearing, after Ms Colegrave had finished giving her evidence, we concluded that there were various matters in respect of which further evidence from her was necessary in order to clarify the position. (We had previously indicated, after hearing her evidence, that this might prove necessary.) At the beginning of the third day of the hearing, we requested that she should be recalled. Ms Colegrave was able to attend later that morning, and we put our questions to her.

221. Ms Colegrave provided us with full copies of the Board Minutes, as the document previously in evidence was merely an extract. She stated that the only directors of CPN were Mr Simpson and Mr Kelly. She was a director of CPUKL, but not of CPN. CPN was a dormant company, and had no beneficial interest in any land.

222. She explained that before the management buyout in 2005, what was now CPUKL (company number 00614864) had been named Countryside Properties PLC. Following the refinancing, it was not permitted to use the term "PLC" for that company. When persons within the CHL corporate group referred to "CPPLC", they were referring to what had become CPUKL. A new company with the former PLC name had acquired the shares in CPUKL. That "new" PLC was there for nominal and

marketing purposes; it owned no assets other than shares of other companies in the group.

223. In response to further cross-examination by Mr Zwart, Ms Colegrave stated that there was a committee of the main CPUKL Board, known as the corporate management committee. The members were the three Cherry brothers, and Ms Colegrave. All decisions within the CHL corporate group were made with reference to this committee, which met weekly and kept minutes of its meetings.

224. It is clear from the information on the corporate structure diagram as at 27 July 2010 included in the evidence that each of the three Cherry brothers holds one third of 50 per cent of the CHL shares; the other 50 per cent was held at that time by Bank of Scotland plc.

225. We accept Ms Colegrave's evidence as to the status and nature of the meeting on 26 July 2007. Although in form the Board Minutes recorded the meeting as being a Board meeting of CPN, we find on the balance of probabilities that the decisions taken did not relate to CPN, given its status as a dormant company. We are satisfied that the decisions were decisions of CPUKL, taken through the medium of its "Northern Division", even though this was not itself a legal entity.

226. Mr Zwart submitted that in agreeing that an election would be made, CPUKL was merely planning to make an election (ie to opt to tax); there was a difference between planning to do something and positively doing it. There had to be an actual making of an election as opposed to a plan to make an election. CHL had had considerable time to find evidence of the actual making of an election; it had not disclosed any such evidence. The threshold requirement remained an actual decision, taken informally or otherwise. He submitted that there had been no actual decision.

227. We are satisfied, on the basis of Ms Colegrave's evidence as to the seniority of the relevant persons present at the Board meeting on 26 July 2007, that the decision was taken by and for the main operating company, described informally as "CPPLC", to elect to waive VAT exemption in respect of Unity Mill. The reference to "CPPLC" should have been to CPUKL. We accept Ms Colegrave's evidence as to the continuing reference, by employees and directors within the CHL corporate group, to CPUKL under its further abbreviated name of "CPPLC". We regard it as significant, as brought out by Mr Southern in his further re-examination of Ms Colegrave after our questions, that no further Board action was deemed necessary following the decision to waive exemption. It is clear from other matters recorded in the full Board Minutes, concerning different projects, that any item requiring further Board action would always be annotated to that effect. The fact that there is no such annotation relating to waiver of VAT exemption in respect of Unity Mill therefore supports the conclusion that, as far as the Board of CPUKL was concerned, nothing more needed to be done, any further steps being a matter of implementation by others.

228. We are unable to access a copy of the version of HMRC's Notice 742A, "Opting to tax land and buildings", which was current at 27 July 2007. We note,

however, that the June 2010 version contains the following statement at paragraph 1.3:

> "However, you can opt to tax land. For the purposes of VAT, the term 'land' includes any buildings or structures permanently affixed to it. You do not need to own the land in order to opt to tax."

229. We have no reason to assume that there has been any change in HMRC's view as expressed in the third sentence of that extract. It confirms that it was open to CPUKL on 27 July 2007 to exercise the option in respect of Unity Mill, even though completion of its acquisition of that property did not take place until three days later.

230. The difficulties of identifying which company in a group has taken a decision and establishing the scope and effects of that decision, were highlighted in the direct tax case of *Purolite International Limited* [2012] UKFTT (475) TC (TC02152). In the present case, it has proved necessary to request additional evidence to establish the position. On the basis of all the evidence, we are satisfied that CPUKL took a decision at the 26 July 2007 meeting in relation to the exercise of the option. Ms Colegrave informed us that a stricter approach had now been adopted within the CHL corporate group with a view to avoiding difficulties of the nature experienced in the context of these appeals. This change in approach to corporate governance seems to us an essential step in seeking to protect the group against the consequences of errors and omissions in its operations.

231. Thus we consider that the CHL VAT group has satisfied the first requirement; it has exercised the option to tax. Whether the option is effective therefore depends on the second requirement, as to notice within the "allowed time". Notice was not given within the 30 day normal time limit. Instead, belated notification of the option to tax was given to HMRC by Ms Colegrave on behalf on CPUKL; the date of the form VAT1614A was 13 May 2010, and the effective date of the option was 30 July 2007 (ie the date of completion of the purchase by CPUKL).

232. In her letter dated 24 August 2010 notifying CHL of HMRC's refusal to accept belated notification, Eleanor Thompson of HMRC's Option to Tax National Unit appears to have adopted a working assumption that the option to tax had been exercised. Her letter did not suggest anything to the contrary. She referred to the second stage required for a valid option, namely to notify HMRC. She then referred to HMRC's discretion under paragraph 20(2)(b) of Sch 10 to accept belated notification, and stated that HMRC had decided not to exercise their discretion in CPUKL's case. She continued:

> "This is on the basis that as well as [HMRC] not having been notified of the option to tax, it appears that an exempt supply was made of the property following the requested effective date of the option to tax.
>
> This is confirmed in your letter of 2 August 2010 where you state 'the land was sold to [C28], which was erroneously assumed also to be a member of the Group VAT Registration. On this basis no VAT invoice was raised, on what was, erroneously, treated as an intra-VAT group

> transaction.' Furthermore, you stated that 'the transfer was not treated by us as a taxable supply'.
>
> Therefore, you have failed to meet the conditions for belated notification of option to tax as per Business Brief 13/05 . . ."

233. In her reply dated 7 September 2010, Ms Colegrave stated:

> "We remain of the view that it is not correct to say that we made an exempt supply. In our letter of 2 August we confirm that we were aware that having made the option to tax, our supplies of the property would, as a result, be taxable supplies. However, as we also explained our failure to charge VAT resulted from our mistaken belief that [C28] was in the same VAT group as [CPUKL].
>
> On that basis, notwithstanding the fact that we failed to notify HMRC of our option, we treated the supply as an intra group supply, which, strictly and pedantically was a taxable supply. With the benefit of pedantic hindsight, what we should have stated in our letter to you dated 2 August was that 'the transfer was not treated by us as a supply liable to the standard rate of VAT'."

She contended later in her letter that the failure to charge and account for output tax was consistent with the requirement that the taxpayer must be seen to have acted, after exercising an option but failing to notify it within the 30 day period, on the basis that an option had been validly exercised. She argued that, on the basis of the view that C28 had been part of the CHL VAT group, that group had acted consistently with the requirement that output tax must have been properly charged and accounted for.

234. In Mr Braeger's review letter dated 29 September 2010, he implicitly accepted the working assumption made by Ms Thompson that the option had been exercised. His conclusions relating to the option to tax related only to the question whether HMRC's decision not to exercise their discretion to accept belated notification should be upheld.

235. The question whether the option was in fact exercised appears not to have been raised until CHL's Notice of Appeal was lodged. As no decision on that question was made by HMRC in arriving at their decision not to accept belated notification of the option, and as we have found that the option was exercised, we examine the exercise of HMRC's discretion without further reference to the fulfilment of that first requirement.

236. Mr Zwart argued that in arriving at their decision not to accept belated notification, HMRC had properly exercised their discretion under paragraph 20(2)(b) of Sch 10.

237. Mr Southern argued that, given that there was no tax at issue, and no exempt supplies by C28, there were no grounds for HMRC not accepting late notification of the option to tax.

238. The Tribunal's jurisdiction in relation to CHL's appeal against HMRC's decision is made clear by s 83(1)(wb) VATA 1994, under which an appeal lies with respect to:

> "any refusal of the Commissioners to grant any permission under, or otherwise to exercise in favour of a particular person any power conferred by, any provision of Part 1 of Schedule 10."

239. Section 84(7ZA) VATA 1994 sets out the Tribunal's powers in respect of such an appeal:

> "(7ZA) Where there is an appeal against such a refusal as is mentioned in section 83(1)(wb)—
>
> (a) the tribunal shall not allow the appeal unless it considers that HMRC could not reasonably have been satisfied that there were grounds for the refusal, and
>
> (b) the refusal shall have effect pending the determination of the appeal."

240. Thus it is not for the Tribunal to express its views as to the decision arrived at by HMRC in refusing to exercise their discretion to accept belated notification; the only question that the Tribunal can consider is whether HMRC could not reasonably have been satisfied that there were grounds for the refusal.

241. In relation to the discretion, HMRC published their guidance in Business Brief 13/05. (An incomplete copy of this was included in the evidence, but we have been able to access this guidance through other sources.) The relevant passage states:

> "**Exercising the discretion**
>
> HMRC will usually accept a belated notification if a trader provides evidence, such as the minutes of a Board or management meeting, or correspondence referring to the decision. However, we accept that this is sometimes not available, so in its absence we would normally accept a statement from the responsible person, plus evidence that—
>
> — all the relevant facts have been given;
>
> — output tax has been properly charged and accounted for from the date of the supposed election; and
>
> — input tax recovery in respect of the land or building is consistent with the trader having made taxable supplies of it.
>
> There may be other circumstances where we would accept a belated notification, but this would depend on the individual circumstances of the case."

242. We consider this guidance to be perfectly reasonable, in particular because it allows for "other circumstances", and do not consider that it fetters the discretion under paragraph 20(1)(b) of Sch 10. In the light of that guidance, it is clear that Ms Thompson took into account all the information provided to her by Ms Colegrave in her application letter dated 13 May 2010 and her subsequent letter dated 2 August

2010 in response to Ms Thompson's letter dated 29 June. We do not consider that Ms Thompson took into account any irrelevant matters in arriving at her conclusion.

243. Ms Colegrave's letter dated 2 August 2010 (set out at paragraph 29 above) referred to the reasons why CPUKL had not acted in accordance with the option to tax. The acknowledgment that CPUKL had not done so amounted to an indication that CPUKL did not fall within the terms of HMRC's normal approach as set out in the Business Brief. This left HMRC to consider the position in the light of CPUKL's "individual circumstances".

244. Whatever CPUKL thought the position to be, or intended it to be, it had as a matter of fact made a supply of the land to C28 before notifying the option to HMRC. As it had not completed both the requirements for a valid option, that supply could not be a taxable supply and was therefore by default an exempt supply.

245. In its Grounds of Appeal, CHL contended that HMRC's failure to exercise their discretion to accept the belated notification led directly to a breach of fiscal neutrality. Our views on this issue are the same as set out above in the context of the group registration issue. Whether or not CHL intended it to be the case, the actions and omissions of CPUKL have resulted in the cost of the VAT charge falling on the CHL VAT group despite that group's position as a fully taxable (or almost fully taxable) VAT group. Mr Southern argued that a company or group making wholly taxable supplies should not suffer the cost of VAT; this begs the question. In these circumstances, what is "the correct amount of tax"? If a group which is otherwise fully taxable makes an exempt supply, it cannot expect to avoid a VAT cost falling on it as a result of that supply. That VAT is not a "windfall" for HMRC as the tax authority concerned. If we have recorded his argument correctly, Mr Southern referred to C28 making an exempt supply. We do not think that the First Appeal requires consideration of the status of supplies made by C28; the question is whether CPUKL made an exempt supply.

246. A further issue raised by CHL was that as the right to opt for taxation was derived from the Principal VAT Directive, the UK as a member State should not lay down rules governing the exercise of that right in such a way as to make it impossible or excessively difficult for a taxpayer to exercise that right. CHL argued that in its case, where there was no tax avoidance motive, the refusal of its application to correct an administrative oversight in a situation where the decision to opt to tax was made and evidenced went beyond what would be reasonable in terms of protecting the integrity of the VAT system, and had made it unreasonably difficult for CHL to exercise its Community right.

247. In our view, as indicated above, HMRC's guidance is perfectly reasonable. It allows for the consideration of "other circumstances". The requirement that the taxable person should act consistently with its own decision to exercise the option is not unreasonable; if that person has chosen to opt to tax, it is justifiable for that choice to have the effect of restricting the future choices of action available in respect of the property concerned. A discretion has been conferred on HMRC under paragraph 20(2)(b) of Sch 10. The effect of doing so is that HMRC are able to choose, on the

basis of the particular circumstances of the case, whether or not they should exercise their discretion in favour of the taxable person concerned. As already stated above, the only basis for questioning any such decision is where it can be shown that HMRC could not reasonably have been satisfied that there were grounds for the refusal. In this context, we do not consider that HMRC's policy, or their approach to CPUKL's submission of its belated notification, made it difficult or impossible for CPUKL in seeking to exercise its Community rights.

248. In his review letter (see paragraph 34 above), Mr Braeger considered the basis for the assumption that output tax did not need to be charged or accounted for in respect of the supply of the land to C28 because that company was thought to be within the same VAT group as CPUKL. We consider that the second paragraph of the above extract from that letter is a conclusion justified on the basis of the information provided to HMRC as to the position of the CHL VAT group at that time. We do not consider the third paragraph to be justified, as we accept that a member of a VAT group may well have other reasons for exercising an option to tax even though it intends to transfer a property to another company in the VAT group. Although the issue raised in that paragraph was an inappropriate matter for Mr Braeger to take into account, we do not consider that it affected the overall conclusion. The erroneous nature of the assumption that C28 was a member of the CHL VAT group at the time of the transfer of Unity Mill was the reason for that transfer being regarded by HMRC as an exempt supply.

249. Thus, viewed at the time of the exchange of correspondence concerning the application for belated notification, HMRC's decision not to exercise their discretion to accept belated notification is not, in our view, open to challenge on the basis of s 84(7ZA)(a) VATA 1994.

250. In putting CHC's case on the First Appeal, Mr Southern indicated that there were four possible analyses of the conveyancing position. These were:

(1) That there was a direct acquisition by C28 of the legal and beneficial interest in the land through CPUKL as a "conduit".

(2) That the land had been beneficially acquired by CPUKL, and transferred on to C28, CPUKL having exercised the option to tax.

(3) That the land had been beneficially acquired by CPUKL, and transferred on to C28, CPUKL *not* having exercised the option to tax.

(4) That the land had been beneficially acquired by CPUKL, and then there had been an onward sale to C28 which had never been completed, so that C28 held on a resulting trust for CPUKL.

251. As to (1), there was no evidence to suggest that this is what had happened. He submitted that (2) and (3) were impossible as the transfers had never been completed, so it had been impossible for C28 to obtain a beneficial interest. Both these analyses would only be possible if a loan could be implied between CPUKL and C28. Leaving purchase money outstanding did not create a loan. Ms Colegrave had stated in evidence that all beneficial interests were held in CPUKL. Mr Southern argued that it

would only be if a joint venture partner could be found that the beneficial interest in the land would pass to C28. Thus the evidence was only consistent with analysis (4).

252. He invited the Tribunal to find that analysis (4) was, on the evidence before it, the correct analysis. He submitted that the significance of this was that the First, Second and Third Appeals would all have to be allowed.

253. Our view in respect of these analyses is that they would raise difficult questions. We are not convinced by Mr Southern's argument concerning the policy on joint venture companies. Our interpretation of Ms Colegrave's evidence and the Board Minute is that a decision was taken on 26 July 2007 that Unity Mill should be acquired by C28 to allow for the possibility that at some future stage the property might be developed through a joint venture arrangement, given the size of the project. This would appear to imply the need for the beneficial and legal interest to be held by C28 itself, in order to be ready for a third party to acquire part of the shareholding in C28 pursuant to some form of joint venture arrangement. Moving the beneficial interest at the "last minute" from CPUKL (if that was where it resided) might give rise to tax and SDLT problems. At the meeting with HMRC on 26 February 2010, Ms Colegrave explained that the reason for transferring the property into a stand-alone entity (ie C28) was ". . . that this would mean that there would be less stamp duty to pay".

254. In any event, the argument as to conveyancing analyses misses the point. Materials were put in front of HMRC to enable them to decide whether they would exercise their discretion to accept belated notification of the option to tax. They decided not to do so. The only course open to CHL is to test on appeal whether HMRC's decision on the basis of the materials before them should be reversed on the basis of a finding that HMRC could not reasonably have been satisfied that there were grounds for the refusal. The information as to the various possible conveyancing analyses did not form part of the materials submitted to HMRC for them to consider in the context of their discretion. In the absence of the great deal of additional evidence which would be required to support these analyses, we do not consider it to be open to us to take account of what amounts merely to speculation. Our limited comment, based on the evidence which we do have, is that the transactions in respect of Unity Mill have been presented in the correspondence with HMRC on the basis of a simple analysis; this was that the land was transferred from Tetrosyl to CPUKL, the legal interest being held by the Nominees, and then immediately from CPUKL to C28 (with the Nominees transferring the legal title).

255. There is one other matter which was raised in the context of the First Appeal. This is the assessment against CHL in respect of the disallowance of VAT claimed against development costs in respect of Unity Mill. This assessment was mentioned in Mrs Howes' letter to Mr Sharp dated 22 July 2010; Mr Gradwell's letter dated 22 October 2010 indicated that the review of other matters had not covered this assessment. No reference to this assessment was made in CHL's Notice of Appeal relating to the First Appeal.

256. Nothing was put to us in argument to suggest that CHL had accepted this assessment. Further, HMRC saw fit to raise the possibility of reviewing the decision to make the further assessment on the basis that the review in respect of the Preferred and Alternative Assessments and the decision not to accept the belated notification of the option to tax had not extended to the additional assessment. The reason given by Mr Gradwell was that HMRC's Appeal and Review team did not consider that CHL's letter dated 19 August 2010 had contained a request for review of the further assessment. It appears to us that this further assessment would stand or fall together with the Preferred Assessment or the Alternative Assessment, depending on the outcome of the First Appeal. Although no application was made to us to this effect, we determine that it is appropriate for the First Appeal to be treated as extending to this further assessment.

257. In the light of our above conclusions, our decision in principle is to dismiss CHL's First Appeal. However, for the reasons set out in the "Outcome and disposition" section of this decision, this may be affected by the outcome of the Third Appeal, which will not be finally resolved until HMRC have decided on the effective date of C28's group registration application. We therefore consider in that section how to deal with the outcome of the appeals.

The Second Appeal

258. Mr Southern submitted that this appeal was "parasitic" on the First and Third Appeals. We accept that submission. Everything that we decide under the present heading is therefore subject to the matters considered in the "Outcome and disposition" section of this decision. Our following comments are based on the working assumption that there is a liability to VAT in respect of which a misdeclaration penalty can be assessed.

259. In the misdeclaration penalty notice dated 15 October 2010, HMRC stated that the assessment of that penalty carried no implication of dishonesty. However, on the basis of the factual information available to HMRC, a penalty was considered appropriate. The factors leading to the mitigation by the percentage of 65 per cent were staff problems, co-operation given, previous compliance history, and steps taken by CHL to correct its systems.

260. In her letter of the same date to Ms Colegrave concerning period 12/07, Mrs Howes referred to HMRC Notice 700/42. Genuine mistakes, honesty and acting in good faith were not in themselves accepted as reasonable excuse. Ms Colegrave, in her letter dated 19 August 2010, had asked for mitigation on the basis of CHL's full co-operation with HMRC on discovery of the error, and of the original error having occurred during a state of flux in CHL's tax department. The Reviewing Officer who had considered Ms Colegrave's representations concerning the assessment had concluded, on the facts as presented, that there had been no reasonable excuse for the error. Ms Howes and Mr Harcourt had concluded that a penalty was due, but should be mitigated by 65 per cent.

261. Mrs Howes indicated that a misdeclaration penalty in respect of period 07/07 was under consideration. As there is no evidence of any such penalty having been assessed, we confine our consideration to the misdeclaration penalty assessment in respect of period 12/07.

262. As that assessment related to period 12/07, and the Alternative Assessment (in the full sum of £2,187,500) was for period 07/07, the misdeclaration penalty can only apply if the Preferred Assessment (£1,050,000 for period 07/07 and, in particular, £1,137,500 for period 12/07) is found to be correctly made.

263. The legislation relevant to misdeclaration penalties is no longer current. As there was no dispute between the parties as to its effects, we do not think it necessary to set any out any parts of that legislation in this decision.

264. The first question raised by the Second Appeal is whether CHL had a reasonable excuse for the matters leading to the imposition of the penalty. For the following reasons, we do not think so. Although information as to those companies which were, and those which were not, members of the CHL VAT group may not have been available to particular individuals working within the CHL corporate group, CHL as a corporate entity was aware of that information. A document entitled "Group Registration Record" was included in the evidence; it was attached to a letter dated 17 June 2010 from HMRC's VAT Registration service. It appears from the reference to be an acknowledgment of a variation in the details of the overall CHL VAT group registration. This sets out information concerning companies which are, or have been, members of the CHL VAT group, including dates on which the group registration of companies began and (where applicable) ceased.

265. Although this document is dated June 2010, it covers the whole period since the beginning of May 1984. It is clear from this document (and would therefore be apparent from any similar earlier documents which might have been issued by HMRC following other changes in the group registration) that C28 was not part of the CHL VAT group registration.

266. As the conduct giving rise to the penalty is that of the CHL VAT group as a whole, through CHL as representative member, the individual staffing difficulties referred to in correspondence and discussions with HMRC did not in our view constitute a reasonable excuse for that conduct. CHL in that capacity was aware (or should have been aware) that C28 was not part of the group registration. On the same basis, CHL was aware of the need to give notification of the option to tax in respect of Unity Mill "within the allowed time".

267. As we do not consider that CHL had a reasonable excuse, the remaining question is whether the level of mitigation of the penalty allowed by HMRC should be varied. The amount of the Preferred Assessment attributable to period 12/07 is £1,137,500. 15 per cent of that amount is £170,625. After mitigation by 65 per cent by reference to the factors mentioned above, the penalty is £59,718.

268. The amount of VAT assessed is substantial. It relates to transactions taking place approximately three years beforehand. The inadvertent errors giving rise to the VAT assessed remained undiscovered from the end of July 2007 until an investigation was prompted by Mrs Howes' letter sent to Mr Sharp in February 2010. We accept that, by their very nature, inadvertent errors are likely to remain undiscovered until something alerts the relevant person to the need to look into what has happened. In CHL's case, no individual working within the CHL corporate group looked at the position, nor was any question raised by external advisers. Thus it was not until HMRC had raised questions that anything was done by CHL to discover the position.

269. We think it material that the process was started by HMRC, rather than by CHL. Although the position as it has turned out to be is that HMRC became aware of the circumstances, this is only because of the actions which they chose to take. If they had not taken the step of making an enquiry, the potential liabilities of the CHL VAT group to additional VAT might not have been discovered.

270. For those reasons, we consider that the 65 per cent level of mitigation as determined by HMRC is appropriate, and we see no reason to vary it. The penalty therefore remains 35 per cent of the part of the Preferred Assessment applicable to period 12/07. Our decision is, in principle, to dismiss CHL's Second Appeal, subject, as already indicated, to the questions considered below.

Outcome and disposition of all four appeals

271. Our decisions in relation to the Third and Fourth Appeals are to allow them and to remit the respective group registration applications to HMRC for them to consider from what dates C28 and C26 should be treated as members of the CHL VAT group as a consequence of those applications. In deciding that question, HMRC are required to consider whether to exercise their discretion under s 43B(4)(b) VATA 1994. We have found that such discretion is an open discretion, and that as a result of the Third and Fourth Appeals, it is to be exercised on the basis that it should take into account our findings as set out in this decision. As a result, we cannot predict the outcome of those remitted applications.

272. This leads to uncertainty as to the outcome of the First and Second Appeals. We set out below our conclusions in respect of these on the basis of two alternative assumptions. The first is that HMRC decide not to exercise their discretion to register C28 as a member of the CHL VAT group with effect from 30 July 2007. The second is that they decide to exercise their discretion to do so.

(a) The First Appeal

273. We consider the First Appeal on the basis of the first assumption. Our conclusion is that the supply by CPUKL to C28 was an exempt supply because the option was not notified to HMRC within the "permitted time" under paragraph 20 of Sch 10. The Preferred Assessment was therefore correctly made, as CHL had claimed input tax on the basis that it had made a standard-rated supply of the Unity Mill land to C28. As a consequence, we find that the Alternative Assessment, made on the basis

that the supply by CPUKL to C28 was a taxable supply, was inappropriate on the basis of the facts as we have found them, and accordingly it should be cancelled on the same basis as Mr Braeger cancelled the original Alternative Assessment.

274. Our decision by reference to the first assumption is that the First Appeal should be dismissed.

275. Applying the second assumption raises difficult issues. Mr Southern's submission was that the effect of allowing the Third Appeal would be that the First Appeal would automatically have to be allowed. The basis for his submission needs to be tested.

276. Under s 43(1) VATA 1994, any supply of goods or services by one member of a VAT group to another member of that VAT group is to be disregarded. A decision by HMRC to grant CHL's application for C28 to be included as a member of the CHL VAT group with retrospective effect (ie from 30 July 2007) would mean that CPUKL's supply made when it transferred the Unity Mill land to C28 would be disregarded. As the basis for the Preferred Assessment was that CPUKL had made an exempt supply of the land to C28 but had claimed input tax in respect of that land, it would follow that the Preferred Assessment would have to be discharged. The additional assessment in respect of VAT on development costs would also have to be cancelled. (HMRC have subsequently submitted that a part of this additional assessment would need to be preserved in order to deal with a disallowance made in respect of input tax claimed in error as a result of the SDLT being treated as a taxable supply; we consider this below.) In the same way, the Alternative Assessment, based on the making by CPUKL of a taxable supply of the land to C28 at a time when C28 was not a member of the CHL VAT group, would also fall away and would have to be cancelled.

277. However, there were three elements of CHL's First Appeal (and we have extended this to a fourth). Although we have set out the results of three of these in the preceding paragraph, a major component of the First Appeal was the appeal against HMRC's refusal to accept belated notification of the option. We do not think that our conclusion on this issue, that there was no effective option to tax, would be affected in any way by a decision to permit registration of C28 as part of the CHL VAT group with effect from 30 July 2007. Thus any further dealings by C28 in respect of Unity Mill would still fall to be treated on the basis that there was no effective option to tax in respect of that property. Unity Mill was acquired by C28 as exempt land, and a further option would need to be exercised and notified within the "allowed time" in order to render taxable any supplies by C28 relating to that property.

278. Our decision by reference to the second assumption is that the First Appeal should be allowed in respect of the Preferred Assessment, the Alternative Assessment and the additional assessment relating to VAT on development costs, but should be dismissed in respect of the option to tax relating to Unity Mill.

(b) The Second Appeal

279. On the basis of the first assumption, our conclusion is that the Preferred Assessment was correctly made. In consequence, there was a liability to VAT, and for the reasons set out above, we confirm the misdeclaration penalty in the amount assessed.

280. If the second assumption were to prove correct, the effect would be that no supply would be regarded as having taken place as a result of the transfer of Unity Mill by CPUKL to C28. Thus no liability to VAT in respect of that transfer would have been incurred by the CHL VAT group. As a result, CHL would not have made a misdeclaration in its return for VAT period 12/07, and the misdeclaration penalty notified to CHL by HMRC on 15 October 2010 would have to be cancelled. CHL's Second Appeal would have to be allowed.

(c) Costs

281. On CHL's behalf, Mr Southern applied for costs in the event that CHL's appeals were successful. In the same way, Mr Zwart applied on HMRC's behalf for costs in the event that CHL's appeals were dismissed. Having considered the position on the basis both of the first and the second assumptions referred to above, we consider that in the circumstances, whatever the outcome of CHL's appeals, the appropriate course is to make no order as to costs.

Comments from the parties on the draft decision and our views on the points raised

282. Due to the interaction between the results of the Third Appeal and the First and Second Appeals, we concluded that we should seek the comments of the parties on our decision in draft form before it was released, to ensure that it dealt in full with the implications of all four appeals. CHL confirmed that it was satisfied that this was the case, and did not consider that any modification or clarification of the terms of the decision was needed. However, HMRC did raise further points for us to consider. In a letter dated 15 February 2013 from HMRC's Solicitor's Office, comments were made on the following matters:

(1) Paragraph 276 of the decision needed to be amended to deal with that part of the assessment which had been made to recover an amount of input tax credit claimed in respect of an amount consisting of SDLT rather than VAT.

(2) HMRC expressed concern that, because of the time which would elapse until the outcome of their consideration of the "retrospective" group registration applications was known and CHL became aware of all relevant considerations to take into account in deciding whether or not to appeal against the decision on other issues, CHL might consider it necessary to seek permission to appeal against the decision even before HMRC had communicated to CHL their decision in respect of the remitted applications. HMRC were concerned that the parties and the Tribunal might incur costs which could potentially have been avoided if CHL had had the opportunity to consider HMRC's decision on the remitted applications.

(3) HMRC were concerned that if they were to allow the "retrospective" group registration application in respect of C28, a potential consequence would be that a new point would be created where tax was due, but not covered in HMRC's alternative assessments, and any new assessment would be out of time. If HMRC did not know before considering the application that such risk did not exist, they would be obliged to take that risk into account when making their decision. They suggested that the Tribunal should include in its decision some mechanism to avoid the problem of circularity.

(4) To deal with the problems referred to at (2) and (3) above, they suggested that one solution would be for the appeal to be adjourned pending HMRC notifying CHL of their decisions in respect of the "retrospective" group registration applications, or at least until the potential consequences of allowing those applications could be agreed or determined.

283. As we were about to issue this decision in its final form, an email message from CHL's solicitors dated 5 March 2013 was forwarded to us on 11 March 2013. The attachment was a letter setting out their comments, as agreed with Mr Southern, on the matters raised in HMRC's letter dated 15 February 2013. In their view the difficulties raised in HMRC's letter might be more apparent than real. Allen & Overy continued:

> "1. Either side could appeal against the decision in the normal way, if they so wished.
>
> 2. If HMRC, after reconsideration of the applications to group with retrospective effect, were again to decline to accept such application, [CHL] would have aright of appeal against the fresh decision. We do not see how [CHL] could appeal against a decision before it is made.
>
> 3. We cannot envisage circumstances in which, if the grouping application were allowed to take retrospective effect, there might be an absolute loss of revenue. If the grouping election were in force, there would be no VAT due on intra-group supplies.
>
> 4. If there were any problem with appeal time-limits the FTT and UT have power to extend time limits under their case management powers.
>
> 5. As regards para 276 we do not think that the proposed amendment is required. If [CHL] did not in fact pay input tax (because the £587,500 was SDLT not a VAT-inclusive taxable supply) there was no input tax to recover.
>
> It follows that we do not agree with the suggestion at the close of the HMRC letter that the appeal should be adjourned pending a new HMRC decision on the grouping applications."

284. Although we had already considered a number of these points before receiving the Allen & Overy letter, we decided that we should reconsider our proposed conclusions in the light of the views expressed on CHL's behalf.

(a) Comments on paragraph 276 above

285. We deal first with HMRC's request to preserve the part of the additional assessment in respect of VAT on development costs relating to the disallowance of the input tax claim on the basis that the amount concerned was SDLT and not VAT.

286. In his letter to Mrs Howes dated 27 May 2010 Mr Sharp included the following information:

> "*Stamp Duty Land Tax*
>
> Stamp Duty Land Tax of £587,500 was paid by [C28] in August 2007 following the transfer of the land from [CPUKL]. The SDLT was determined on the VAT inclusive amount of £14,687,500.
>
> *VAT claimed on expenditure*
>
> Following acquisition, additional development expenditure has been incurred on the land, of which £158,763 of input tax has been claimed. The attached appendix, details the value for each claim to date. Included within this amount, VAT amounting to £87,500 has been claimed in error which is the result of the SDLT being treated as a taxable supply."

287. In her letter dated 22 July 2010, Mrs Howes stated:

> "There is also the matter of the VAT claimed against development costs. These were listed in the schedule attached to your e-mail of 9 June 2010 which was not enclosed with your letter of 27 May 2010. You have informed me that included in the amount of £158,763 is £87,500 which was input tax incorrectly claimed and calculated against SDLT. I calculated the total to be £158,766.00.
>
> I am writing to let you know I will be disallowing the claims. I have not enclosed a Notice of Assessment for £158,766.00 but a Notice of Assessment will follow . . . I am disallowing the VAT on the basis that it is either attributable to an exempt supply of the land or attributable to the development costs of [C28], which is not in the VAT Group. In the case of the £87,500 this is non deductible because it is not VAT."

288. Ms Colegrave, in her letter dated 19 August 2010 requesting reconsideration, stated:

> "Further, regarding the proposed assessment of development costs recovered by the VAT group, it is our view that these costs do relate to the onward supply of the property or the onward supply of development services which will be made by the VAT group to [C28], therefore, it is our view that any assessment against this amount would not be appropriate save for the £87,500 which relates to incorrectly claimed in relation to VAT [*sic*]."

289. On the basis of this exchange of correspondence, we are satisfied that CHL erroneously made this part of its input tax recovery claim, and that it acknowledged its liability in respect of this error. The quantification of the amount incorrectly claimed is not clear to us, as £87,500 is just under 15 per cent of the SDLT concerned

(£587,500). We do not have specific evidence as to the date of CHL's input tax claim, and so are not in a position to make any finding as to the applicable rate.

290. Despite CHL's comments in its submission to us dated 5 March 2013, our conclusion is that if the alternative assessment in respect of development costs were to be cancelled in its entirety, as referred to in paragraph 276 above, the result would be that CHL's excessive recovery of input tax incorrectly claimed on the basis of treating the SDLT as a taxable supply would escape assessment. In our view, this would be an inappropriate consequence of the First Appeal being allowed.

291. We therefore accept HMRC's submission that, if the First Appeal were to be allowed, the additional assessment in respect of development costs would also have to be cancelled, except to the extent that it was issued to recover the amount of input tax disallowed in respect of the erroneous claim based on treatment of the SDLT as a taxable supply. Our conclusion at paragraph 276 above is therefore to be read as subject to the final part of the previous sentence of this paragraph.

(b) Issues concerning dispositions of the appeals

292. Having considered HMRC's comments, as well as the responses made on CHL's behalf, we do not think that the solution set out at sub-paragraph (4) of paragraph 282 above would be effective. To give the appropriate force to the directions to HMRC to consider afresh whether the "retrospective" group registration applications should take effect from: (a) the dates on which they were received by HMRC, (b) on the dates requested by CHL, or (c) on other dates, it is necessary to have final decisions from this Tribunal on the Third and Fourth Appeals. If these two appeals were to be adjourned, no final decisions would have been made. Our view is that the Third and Fourth Appeals must be finally determined by this decision, and that the period for either party to apply for permission to appeal in respect of those appeals should be the normal period of 56 days from the date on which this final version of this decision is sent to that party.

293. We agree with CHL that if, after reconsideration, HMRC were to decline to accept either or both of CHL's "retrospective" group registration applications, CHL would have a right of appeal against the fresh decision. This would be an entirely new appeal, and not part of the present proceedings.

294. As the Third and Fourth Appeals have been determined in CHL's favour, even though the practical outcome is dependent on the results of HMRC's reconsiderations of the respective group registration applications, it appears to us unlikely that CHL would be seeking to appeal against our decisions (or any part of them) in respect of those two appeals. Whether HMRC might seek to apply for permission to appeal against those decisions is a matter for them, but if so this would have the effect of calling into question the outcome of all four appeals.

295. In relation to HMRC's point (3) set out above, the circumstances in which a new charge to tax would arise are not clear to us (nor are they clear to CHL and its advisers). However, we do not find it necessary either to investigate the position or to

speculate on it. As we have indicated, one of the factors which is relevant to HMRC's decision whether to exercise their discretion to permit late registration is the protection of the revenue. As HMRC will be considering afresh the applications originally made in November 2010 and February 2011, it appears to us inevitable that they will have to take into account the potential risks of tax being lost as a result of the time limit for any replacement assessments having passed.

296. As the outcome of the First and Second Appeals is largely dependent on HMRC's decision in relation to the group registration application for C28, we accept that a difficulty arises as set out in HMRC's point (2) above. We consider it inappropriate for any possible appeal against our decisions in respect of these two appeals to be pursued until their actual outcome is known. As the event which will establish their outcome is notification by HMRC of the date from which the group registration of C28 is to take effect, we consider that the appropriate course is for the period for either party to apply for permission to appeal in respect of those appeals to be amended to 56 days from the date on which notification of the effective date of such group registration is received by the Tribunal from HMRC. (This should correspond to the date on which such notification is received by CHL.)

297. In arriving at that view, we have considered rules 39 and 5 of the Tribunal Rules. Rule 39(2) provides for the normal time limit of 56 days from the date on which full written reasons for the decision are sent to the person making the application for permission to appeal. However, rule 39(4)(b) makes clear that the Tribunal's power to extend time under rule 5(3)(a) applies to applications for permission to appeal. Further, in the present case, our decisions in respect of the First and Second Appeals have been produced in advance of the time required by rule 35(2), as those decisions fall outside the terms of rule 35(2):

> "(2) The Tribunal must provide to each party within 28 days after making a decision *which finally disposes of all issues in proceedings* . . . , or as soon as possible thereafter, a decision notice . . ." [our italics]

298. Clearly, our decision does not finally dispose of all issues in proceedings concerning the First and Second Appeals, and cannot do so until HMRC's decision in respect of the effective date of the group registration of C28 is known. Any application made within 56 days of the release of this decision and before HMRC's decision in respect of the date of such group registration would therefore be premature. As HMRC stated in their letter referred to above, if the normal 56 day period under rule 39(2) were to apply in respect of the part of our decision relating to the First and Second Appeals, there would be a risk of costs being incurred in circumstances where they could have been avoided if CHL had had the opportunity to await the outcome of the group registration application. Having regard to the overriding objective in rule 2 of the Tribunal Rules that the Tribunal is to be enabled to deal with cases fairly and justly, and given the circumstances relating to the First and Second Appeals, we are satisfied that the appropriate course is to vary the time limit under rule 39(2) by amending the time from which the 56 day period is to run.

299. In the light of such circumstances, we direct that the time limit for either party to apply for permission to appeal in respect of the First and Second Appeals is 56 days

from the date on which notification from HMRC of their decision on the reconsidered group registration application relating to C28 is received by the Tribunal.

Right to apply for permission to appeal

300. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. In the case of the Third and Fourth Appeals, the application must be received by this Tribunal not later than 56 days after this decision is sent to that party. In the case of the First and Second Appeals, the application must be received by this Tribunal not later than 56 days after the date on which notification of the result of the group registration application as reconsidered by HMRC is received by the Tribunal. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

JOHN CLARK
TRIBUNAL JUDGE

RELEASE DATE: 18 March 2013