

Restitution of Overpaid Tax. By STEVEN ELLIOTT, BIRKE HÄCKER, and CHARLES MITCHELL (eds.) [Oxford: Hart Publishing, 2013. 326 pp. Hardback £100.00. ISBN 978-1-84946-173-3.]

Following the recognition of the unjust enrichment principle by the House of Lords in 1991, the law relating to unjust enrichment developed rapidly during that decade prompted in particular by a spate of cases arising from void interest rate swap transactions between banks and public authorities, the most significant of which abolished the mistake of law bar. The catalyst for development of the law of unjust enrichment since the Millennium has been a spate of cases concerning recovery of overpaid tax to the Revenue. Whilst these cases might not be as significant to the general development of the law of unjust enrichment (although they have contributed to the recognition of the use value of money as enrichment, encouraged the recognition of restitution where the defendant is indirectly enriched at the claimant's expense, and clarified aspects of the defence of change of position), they are highly significant for other reasons. In particular, these restitutionary claims involve significant amounts, particularly once interest is included, sometimes amounting to billions of pounds. Further, they raise important doctrinal and theoretical issues at the intersection of public and private law, with the added complication that many of the cases involve significant issues of EU law, since often the reason why the Revenue's receipt of tax is unlawful is because of contravention of EU law. This is vividly described by the editors as creating a "perfect storm for the HMRC". Consequently, the 15 essays in this volume are to be welcomed as providing an important opportunity for private, EU, and comparative law scholars to reflect on the particular problems thrown up by cases where a claimant seeks restitution of tax which has been overpaid.

All of the essays in the collection save one were first presented at a conference in 2010. Publication was delayed pending the decision of the Supreme Court in *Test Claimants in the FII Group Litigation v Revenue and Customs Commissioners* [2012] UKSC 19, [2012] 2 A.C. 337. In the meantime, some other papers which had been delivered at the conference have been published elsewhere. This slightly skews the coverage in the book, particularly as regards comprehensive coverage of the practically important and difficult question of the availability of defences to public authorities, although these issues are considered in some of the papers. Inevitably, since this is a fast-moving area of the law, there have been significant cases decided since the book was published, especially concerning mistake, interest awards, and defences. Nevertheless, many of the essays in the book constitute a comprehensive survey of and reflection on numerous issues relating to restitutionary claims for overpaid tax and remain relevant.

After a particularly impressive opening chapter by the editors, which identifies the complexities and difficulties of the law, the book is divided into three parts, focusing on English law, European law, and comparative law perspectives.

First in the English law section is an important paper by Rebecca Williams, which engages with the nature of the claim for restitution of overpaid taxes. Williams has made a significant contribution to the analysis of such claims through her book *Unjust Enrichment and Public Law* published in 2010, which she treats as a hybrid claim involving public and private components. She defends her analysis in this paper, particularly in light of subsequent developments. There are two stages to her analysis. The first, which is wholly convincing, is that the *Woolwich* claim for restitution can only be explained as involving a public law ground of restitution, namely that a public authority received tax which was not due to it, within the private law structure of the unjust enrichment claim, requiring proof of an enrichment being at the expense of the claimant and subject to the defences available

to such claims, albeit that these defences may be interpreted differently by virtue of the defendant being a public authority. Recent developments in the law are certainly consistent with this analysis, notably the analysis of the use value of money by the Supreme Court in *Benedetti v Sawiris* [2013] UKSC 50, [2013] 3 W.L.R. 351. The second stage of her analysis is less convincing, however, namely that it should follow that the *Woolwich* claim should have priority over a claim founded on mistake. This does not represent the state of English law and, despite Williams's best efforts to argue otherwise, should not be adopted.

Other chapters in the English law section consider different aspects of the unjust enrichment claim to recover overpaid taxes, primarily from a private law perspective. Duncan Sheehan examines the mistake claim and argues convincingly that, despite the recognition of the *Woolwich* claim, there remain situations where a claim grounded on mistake should continue to operate. Nelson Enonchong considers whether, following the decision in *Woolwich*, there is any room for a claim founded on duress when seeking restitution from public authorities. He considers that there might be, although admits that this is now of very limited importance. His analysis depends on the *Woolwich* claim being confined to recovery of overpaid taxes and equivalent levies, although there is no reason of principle why it should be so restricted. Charlie Webb, in considering the reasons why the Revenue should make restitution of overpaid tax, bravely seeks to analyse the claim in purely private law terms. Ultimately, this is unconvincing. The ground of restitution identified in the *Woolwich* claim can only adequately be explained in public law terms, even though, as Webb emphasises, other potential grounds of restitution were considered, such as absence of consideration, but they did not form part of the ratio of the case. Charles Mitchell, in a technically detailed chapter, comments on the decision of Henderson J. in *Investment Trust Companies v HMRC* [2012] EWHC 458 (Ch), where a restitutionary claim brought by an indirect taxpayer was recognised. Niamh Cleary assesses the justification for recognising change of position and policy-motivated defences to protect the position of the Revenue, and in doing so emphasises the importance of protecting the claimant's right to property which should mean that any defence available to the Revenue should be interpreted restrictively and would be exceptional in its application. Finally, Monica Bhandari considers the *Hastings-Bass* principle. Although that principle has since been reconsidered by the Supreme Court in *Pitt v Holt* [2013] UKSC 26, [2013] 2 A.C. 108, that decision is not significantly different from that of the Court of Appeal, which is the focus of Bhandari's chapter. Although at first sight this principle seems to have little to do with restitution, since when it applies the effect of the principle is to vitiate a tax liability, there may be cases where tax has already been paid and a trustee will seek restitution of it because the liability arose following breach of a trustee's duty.

The second part of the book consists of two chapters which focus on EU law. Catherine Barnard and Julian Ghosh examine the approach of the English courts in interpreting domestic legislation to make it EU compliant, and argue that, in a variety of contexts including tax, the English courts have gone further than required by the CJEU. Maximilian Schlote, in a particularly insightful paper, considers the role of the principle of effectiveness in determining the operation of restitutionary remedies following payment of tax which is unlawful by EU law.

The final part considers the approaches of different countries to restitution of overpaid tax. Anne Saunders considers the role of absence of basis from a German perspective and shows that it is a much more inelegant and complex concept in that jurisdiction than is often appreciated in England. This is significant. The decision in *Woolwich* that public authorities were liable to repay what was

unlawfully received could be analysed as embodying the absence of basis principle, since, if the receipt of the tax was unlawful, there was no liability to pay the tax and therefore no basis for its receipt. But *Woolwich* has not subsequently been interpreted in this way and Saunders's paper identifies important reasons why absence of basis reasoning should not be adopted in England. Birke Häcker considers the German public law restitutionary claim and, in a model of comparative analysis, shows how such an approach bears important similarities with the English hybrid analysis, although the German restitutionary claim is more restrictive in a number of ways, most notably because the award of interest is rare. The final three chapters then consider restitution of overpaid tax in Ireland (Niamh Connolly), Canada (Robert Chambers), and Australia (Simone Degeling). The arguments of these final three authors are distinct and contradictory. Connolly argues for a public law analysis of the claim in Ireland. Chambers criticises the Canadian recognition of such a public law analysis. Degeling expresses surprise that this part of the law of restitution is relatively under-developed in Australia and supports the adoption of the *Woolwich* principle there.

As a collection of essays, there is no doubt that this book makes a significant contribution to our understanding of this technically complex but highly significant area of the law. The editors should be commended for ensuring that the papers were published. But, having read these essays, one is left wondering where the law is going. A significant part of the book focuses on description of the state of the law in this area. One consistent theme is whether the restitutionary claim should be analysed in public, private, or hybrid terms. But, from an English law perspective at least, does that really matter? In most cases, it makes no difference to the result whether the claimant founds the restitutionary claim on mistake or on the fact that the Revenue's receipt of the overpayment was unlawful. The only time it will really matter is as regards the operation of limitation periods and the defence of change of position. But with the inexorable restriction on limitation periods for claims for restitution of overpaid tax paid by mistake, despite some technical difficulties with the validity of transitional provisions, and with the recognition by the CJEU that the only defence available to the Revenue where tax has been overpaid in breach of EU law is the defence of passing on, we are fast moving towards a much simpler scheme for restitution of overpaid tax whereby the Revenue must make restitution of all overpaid taxes by virtue of a public law ground within a private law claim with little, if any, scope to plead a defence. The essays in this collection will undoubtedly assist in ensuring that we move towards that simpler structure. Whilst the law of taxation is necessarily technical and complex, there is no reason why this should be true of the law of restitution.

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Regulatory Competition in the Internal Market: Comparing Models for Corporate Law, Securities Law and Competition Law. By BARBARA GABOR [Cheltenham: Edward Elgar Publishing, 2013. xv and 331 pp. Hardback £76.50. ISBN 978-1-78100-337-4.]

The merits, and also the hazards, of competition as an organising principle for society are well traversed in the economic, political science, and legal literature. The phenomenon of regulatory competition – defined most simply as competition