TC07712

VALUE ADDED TAX – claims for repayment of overpaid output tax – motor traders – application to amend grounds of appeal – whether amendment to existing claims or new claims which would be out of time – application refused

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2011/02041
TC/2011/04118
TC/2011/04120

BETWEEN

KENDRICK KAR SALES LIMITED
MOUNT MOTORS LIMITED
BIRMINGHAM ROAD MOTORS LIMITED **Appellants**

-and-

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

TRIBUNAL: JUDGE JONATHAN CANNAN

The hearing was an audio hearing by telephone with the consent of the parties and took place on 20 March 2020. It was not practicable to hold a face to face hearing. The parties provided further written submissions on 11 May 2020 at the request of the Tribunal

Mr Timothy Brown (instructed by Grant Thornton UK LLP) for the Appellants

Mr James Puzey (instructed by HM Revenue and Customs' Solicitor's Office and Legal Services) for the Respondents

DECISION

INTRODUCTION

1. This is a decision on an application by the appellants dated 12 September 2019 to amend their grounds of appeal ("the Application"). It was not clear from the Application whether it was intended to be made only by Birmingham Road Motors Limited ("BRM"), or whether it was also intended to be made by Kendrick Kar Sales Limited ("Kendrick") and Mount Motors Limited ("Mount"). Mr Brown on behalf of the appellants indicated that it was intended to cover all three appellants. The evidence and submissions before me addressed the position in relation to all three appellants and I am satisfied that there is no prejudice to the respondents in my treating the application as covering all three appellants.

2. The appellants have all traded as motor traders and have made claims to HMRC for repayment of overpaid output tax pursuant to section 80 Value Added Tax Act 1994 ("VATA 1994"). The claims for repayment include sums said to have been overpaid in the period 1 April 1973 to 4 December 1996. I shall set out below the history of those claims in so far as relevant for present purposes. At this stage it is sufficient to say that the claims relate to output tax accounted for by the appellants on bonus payments paid by manufacturers on the purchase of demonstrator and courtesy vehicles, and output tax accounted for by the appellants on the sale of demonstrator and courtesy vehicles. For the sake of convenience, I shall refer to these vehicles simply as demonstrators.

3. In the light of decisions of the European Court of Justice ("ECJ") in *Elida Gibbs Ltd v Customs & Excise Commissioners* C-317/94 ("Elida Gibbs") and *Commission v Italy* C-45/95 ("Italian Republic") it became apparent that motor traders had been incorrectly accounting for VAT on manufacturer bonuses and sales of demonstrators respectively. The effect of Elida Gibbs was that output tax was not due in relation to manufacturer bonuses paid in respect of demonstrators, whereas in some cases HM Customs & Excise ("HMCE") policy had required motor traders to account for output tax. The effect of Italian Republic was that sales of demonstrators should have been treated as exempt, whereas UK domestic law had required output tax to be accounted for on the profit margin.

4. Following those decisions, it became possible for motor traders to make claims for repayment of VAT going back many years. I shall refer to these as "Elida Claims" and "Italian Republic Claims". I am using those terms for convenience and I am not pre-judging an issue which arises in the Application as to whether, when such claims are made, they amount to a single claim or separate claims.

5. HMCE as it then was recognised that due to the passage of time it was unlikely that evidence to support such claims would still be held. It worked with trade bodies, industry representatives, manufacturers, and dealerships and prepared what are known as the "Elida Tables" and the "Italian Tables" ("the Tables").

6. The Tables were based on industry-wide averages relating to the level of manufacturer bonuses and the number of sales of demonstrators to be expected by motor traders operating various types of franchises. The Tables provided a template pursuant to which traders who wished to make claims for overpaid VAT were able to lodge what HMCE and latterly HMRC would consider to be fair and reasonable claims. Claims could therefore be made without much of the supporting documentary material which would otherwise be expected to establish such claims. Where a trader considered that it had a higher claim than the Tables would suggest it was open to the trader to make a higher claim and to support it by reference to specific evidence justifying the higher claim. In such cases, the burden is on the trader to establish whether and

to what extent VAT has been overpaid (see *Why Pay More For Cars Limited v HM Revenue & Customs* [2015] UKUT 468 (TCC)).

7. Subsequently, following a decision of the ECJ in *Nordania Finans A/S v Skatteministeriet* [2008] STC 3314, HMRC formed the view that it was necessary to restrict traders' input tax credit where an Italian Republic Claim was paid, arising from an adjustment to the trader's partial exemption calculation ("the Nordania Adjustment").

8. The three appellants were all part of a VAT group registration for part of the period under consideration, between 1993 and 1999. BRM was the representative member. There was a fourth group member, Warren Garages Limited ("Warren") which was subsequently dissolved. At various stages other group members were also dissolved and later restored to the register. The group registration has led to a certain amount of complication in terms of identifying the relevant claimant and the extent of the various claims. Grant Thornton have acted for each of the appellants throughout. I set out below the procedural history of each claim.

9. The question which arises in relation to the Application is essentially whether there is an ongoing claim which can be amended, or whether the proposed amendments arise out of new claims for repayment of output tax and are therefore out of time. I do not need to consider the time limits for the purposes of dealing with the Application. It is common ground that new claims would be out of time.

KENDRICK'S CLAIM

10. By letter dated 24 February 2009, Kendrick made a claim for repayment of overpaid VAT in the period 1 April 1973 to 4 December 1996. The claim totalled £356,655 and related in part to claims for the BRM VAT group. The letter included two schedules setting out how that sum had been calculated which I refer to in more detail below. It was alleged that the benefit of the claims for the VAT group had been transferred to Kendrick. At the same time the other appellants made separate claims as set out below.

11. By letter dated 25 October 2010, HMRC rejected Kendrick's claim in relation to the other businesses in the absence of any evidence that there had been a transfer of the right to make a claim. In the same letter HMRC stated that the claims of the other companies would be dealt with separately.

12. Kendrick's own claim was an Elida Claim covering the period 1 January 1983 to 30 September 1996. HMRC accepted that claim for the period 1983 to 1988 and a repayment of £5,352 was made. The claim for 1989 to 1996 was rejected on the basis that there was no evidence output tax had been incorrectly accounted for in that period.

13. The decision in relation to Kendrick's group claim was confirmed on a review dated 8 February 2011 and Kendrick submitted a notice of appeal to the Tribunal on 3 March 2011. The sum in dispute was said to be £328,000 relating to four decisions, which appears to be a reference to four reasons given for refusing the claim of each group member. The grounds of appeal may be summarised as follows:

(1) There should be no Nordania Adjustment to the Italian Republic Claim.

(2) The claim could not be refused where the companies had been restored to the register after 31 March 2009.

(3) HMRC wrongly rejected the claim on the grounds of lack of evidence.

(4) HMRC wrongly rejected the claim by Kendrick on behalf of other companies. There was sufficient evidence that the right to make any claims had been transferred to Kendrick.

14. The only ground of appeal which could apply to Kendrick's claim to repayment of overpaid VAT, which was an Elida Claim in connection with output tax on manufacturer bonus payments, was ground (3).

BRM'S CLAIM

15. As mentioned above, Kendrick's claim also encompassed amounts said to have been overpaid by the other group members, including BRM. On 4 March 2009, BRM also made its own claim for repayment of VAT which was said to be in the alternative to that of Kendrick. That claim was also apparently made in connection with the other businesses on the basis that BRM was the representative member of the VAT group when it was in existence. It covered the period 1973 to 1996 and totalled £379,030. The reason for the difference between that figure and the total figure claimed by Kendrick is not clear but does not appear to me material. The letter did not apparently include any schedules but referred to Kendrick's letter dated 24 February 2009 and stated: "we are claiming the same VAT in the alternative on behalf of [BRM]".

16. BRM's claim was refused in a letter from HMRC dated 21 October 2010. HMRC contended that once a VAT group was de-grouped, any claims for repayment vested in the individual companies. The decision letter went on to consider BRM's individual claim which comprised an Elida Claim and an Italian Republic Claim. The Elida Claim was accepted in relation to the period 1979 to 1988 but refused in relation to the periods 1973 to 1979 and 1989 to 1996. The Italian Republic Claim was accepted for the whole period, 1973 to 1996 subject to a Nordania Adjustment. I was not taken to any review of this decision, but a notice of appeal was lodged with the Tribunal on 3 March 2011 containing the same grounds of appeal as set out by Kendrick.

17. On 3 April 2012 HMRC wrote to say that their calculation of the Nordania Adjustment had been incorrect. A further repayment of £3,899 was therefore made to BRM.

18. In 2014, BRM submitted a revised Italian Republic Claim for periods between 1973 and 1992. In 2016, HMRC accepted this revised claim but on the basis that the Italian Republic Claim was only open in respect of those periods where the Nordania Adjustment was under appeal, which was 1973 to 1977 and 1982 to 1986. Otherwise the revised claim was refused. A further £19,114 was repaid. In October 2018, HMRC further amended the Nordania Adjustment and an additional £2,287 was repaid to the BRM.

MOUNT'S CLAIM

19. Mount did not make any individual claim for repayment of VAT in February or March 2009 because at that time it had been dissolved and was not in a position to do so. HMRC treated the claims made by Kendrick and BRM as including a claim by Mount, and on 21 October 2010 they wrote to Mount to say that the claim was refused because it had been dissolved.

20. In fact, I understand that Mount was restored to the register on 13 October 2010. It is not clear how Mount's claim was dealt with at that stage, but in any event Mount lodged a notice of appeal with the Tribunal on 3 March 2011, with the same grounds as Kendrick and BRM. Revised versions of that claim were put forward by Mount in 2012 and 2013. The final version of the claim covered the period 1 April 1973 to 31 December 1995 and included an Elida Claim and an Italian Republic Claim.

21. By letter dated 10 January 2013, HMRC issued a decision on the final version of Mount's claims. The Elida Claim was allowed in part, and restricted to the period 1987 to 1995. A sum of £16,981 was repaid. The Italian Republic Claim was allowed in full, but subject to a Nordania Adjustment. A sum of £28,810 was repaid.

22. Mount then lodged notices of appeal with the Tribunal. A notice of appeal dated 22 January 2013 (TC/2013/00700) contained an appeal against the Nordania Adjustment. A separate notice of appeal dated 22 January 2013 (TC/2013/00693) contained an appeal against the decision refusing the Elida Claim for periods prior to 1987.

23. In 2014, Mount submitted a revised Italian Republic claim for periods 1973 to 1992. HMRC accepted this revised claim but on the basis that the claim was only open in respect of those periods where the Nordania Adjustment was under appeal, which was 1973 to 1977, 1982 to 1984 and 1985 to 1987. Otherwise the revised claim was refused. A further £4,884 was repaid. An error in HMRC's calculation was subsequently identified and a further £1,850 was repaid in October 2016. In 2018 a further revision to the calculation was made and a further £759 was repaid.

THE APPLICATION TO AMEND

24. There was email correspondence between the parties in relation to the appeals in 2018 and 2019. On 11 October 2018, Mr Jarvis of HMRC emailed Mr Montgomery of Grant Thornton enclosing the revised Nordania calculations for BRM and Mount referred to above. Mr Montgomery replied on 24 October 2018 to say that he was happy with the Nordania calculations but considered that BRM, Mount and Kendrick (and Warren, although its appeal has since been struck out) had outstanding Elida Claims so that the Italian Republic Claims were still open and could be amended. The implication was that the appellants wanted to amend and increase their Italian Republic Claims. Reliance was placed on a decision of the FTT in *Ballards of Finchley Plc v HM Revenue & Customs [2018] UKFTT 604 (TC)*, which had been released on 15 October 2018 where Grant Thornton represented the appellant. I return to that decision in detail below.

25. The correspondence continued, with HMRC contending that all claims had been finally determined and were closed, and the appellants contending that the claims remained open and could be amended. This correspondence led to the Application being made on 12 September 2019. The Application was headed in the name of BRM but it contained various appeal references, including those for Kendrick, Mount and Warren. Matters were not made much clearer when the appellants served a document stating: "for clarity therefore, the application related to [BRM] (TC/2011/04120) and its claim made on 4 March 2009 for £379,030". As I have said, each appellant pursues the Application and the evidence and submissions before me address the position of each appellant. I have therefore treated the Application as relating to each appellant.

26. The Application seeks to amend the appellants' claims as follows:

> "…[T]he Appellant asserts that the amount repaid by HMRC in respect of the 'Italian Republic' claim is less than it should have been and it cites a similarity between its case and that of the Appellant in Bristol Street Motors (MAN/2007/0052). The Appellant is aware that Bristol Street's case was settled before a decision was released and it is therefore its wish for a similar settlement to be reached in respect of this element of the appeal."

27. The appellants have subsequently clarified that they are seeking repayment of an additional amount of £31,460 pursuant to their Italian Republic Claims and that this amount was overpaid in the period 1987 to1992. In short, the appellants contend that their Italian Republic Claims are still open for that period and may be amended.

28. I am not specifically aware of the basis on which the appellants claim additional sums in relation to their Italian Republic Claims. It may concern the effect of changes to car tax on the Italian Tables. In any event, the arguments before me have been restricted to the question of

whether the appellants have open claims which can now be amended. The only objection to permission being granted for the amendments is that the claims are no longer open and cannot be amended. In short, they would be new claims which would be out of time.

THE LAW

29. Claims for overpaid output tax are made pursuant to section 80 VATA 1994. In the present appeals the claims are made pursuant to section 80(1) VATA 1994 which provides as follows:

> "(1) Where a person—
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> (a) has accounted to the Commissioners for VAT for a prescribed accounting period (whenever ended), and
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> (b) in doing so, has brought into account as output tax an amount that was not output tax due,
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> the Commissioners shall be liable to credit the person with that amount."

30. Section 80(6) makes provision for claims to be made in such form and manner as regulations may provide. The relevant regulation is regulation 37 Value Added Tax Regulations 1995 which provides as follows:

> "37. A claim under section 80 of the Act shall be made in writing to the Commissioners and shall, by reference to such documentary evidence as is in the possession of the claimant, state the amount of the claim and the method by which that amount was calculated."

31. The decision of Mr David Demack sitting in the VAT Tribunal in *University of Liverpool v HM Customs & Excise* (2000) Decision 16769 is generally recognised as describing when a claim is treated as completed or closed. Essentially, a claim is completed where it has been paid in full. If it has not been paid in full then it is treated as completed where the appeal process against a decision refusing the claim in whole or in part has been exhausted, including time limits for making an appeal, or if there has been some compromise during the appeal process.

32. The issue as to what amounts to a claim and when it may be amended was considered by Roth J in the Upper Tribunal in *Reed Employment Limited v HM Revenue & Customs* [2013] UKUT 0109 (TCC) where he stated as follows:

> "30. There is no statutory definition of "claim" for the purpose of s. 80 that would provide a basis for distinguishing an amendment to an existing claim from a new claim. Nor is there any authority on this question, save for two VAT Tribunal decisions holding that once a claim has been paid, any further demand cannot constitute an amendment to that claim. This was accepted by Reed in this case, and thus the 2009 Claim cannot be regarded as an amendment to the first or second repayment claims.
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> 31. In those circumstances, I consider that "claim" should here be given its ordinary meaning. In this context, it means a demand for repayment of overpaid tax. It may relate to one accounting period or many, to one particular supply or many, and to a part of the taxpayer's business or the whole of its business. There is no reason, in my view, why any of these cannot constitute a self-standing claim.
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> 32. The FTT approached the question of whether a further demand is an amendment to an existing claim by adopting the test of whether it was shown to be "in essence as one with an earlier claim": para 110. In my judgment, there is nothing wrong with this test, but I am not sure it advances the matter significantly, and I do not think it is appropriate to add a gloss to the statutory wording. The FTT proceeded to hold as follows:
>
>> '111. That test, in our view, will be satisfied only if the later claim arises out of the same subject matter as the original claim, without extension to facts and circumstances that fall outside the contemplation of the earlier claim. Without deciding matters

outside of this appeal, we consider, for example, that this would generally include cases where a particular computation was not made at the time of the original claim, but the subject matter of the claim was sufficiently identified for such a calculation made subsequently to be related back to the original claim. Simple calculation errors would similarly be included. It should also cover, we think, cases where particular items within the category of the subject matter of the original claim are unknown or not fully identified at the time of the original claim, and would but for that fact have been included in the original claim, but only subsequently come to light.'

33. If subsequent to the submission of a claim, the taxpayer sends in the correction of a mistake, whether that be an arithmetical error or through the omission of some supplies that were clearly intended to be included, then I consider that would clearly not be a new claim but an amendment. Further, if the taxpayer making a claim says that he is not yet able to calculate the full figures and gather all the documentation as required by reg 37, but is in the course of doing so and will provide such further details as soon as possible, such further submission would not constitute a new claim but fall within the scope of the existing claim. Thus I consider that what is an amendment is very much a question of fact and degree, judged by the particular circumstances. I therefore respectfully agree with the test set out by the FTT in the first sentence of para 111. However, of the examples given in that paragraph, I would not wish to approve in the abstract the final example: that would be for consideration on the particular facts of the case should it arise."

33. Further consideration to this issue was given by Warren J and Judge Bishopp in *HM Revenue & Customs v Vodafone Group Services Limited* [2016] UKUT 89 (TCC) where they stated:

"47. In our view it is necessary to begin by identifying what are the elements of a claim. It is, as Roth J said in *Reed Employment* at [31] "a demand for repayment of overpaid tax". This is a succinct description of what s 80(1) and (2) provide. As we see it, the focus of s 80(1) is on an amount of output tax which has been brought into account but which was not due, and thus the focus is also on the supplies relevant to that amount. Where a taxpayer has brought into account an amount which was not due as output tax, HMRC are liable to credit him with that amount, that is to say the amount of output tax. When a taxpayer brings into account an amount of output tax, he clearly does so in relation to particular identified supplies. To take a very simple example, suppose he makes two supplies, supply A for a consideration giving rise to VAT of £X and supply B for a consideration giving rise to VAT of £Y. He then accounts for VAT of £(X+Y). He has brought into account £X as output tax in relation to supply A and £Y as output tax in relation to supply B. If it transpires that the £X was not output tax due, that is because it was not output tax due in relation to supply A.

…

51. In our view, the claim is not simply for a sum of money in abstract. Rather, it is for the amount which the taxpayer asserts has been brought into account as output tax that was not output tax due. HMRC's liability is not simply for a sum of money; rather, it is for a sum of money equal to the amount of output tax accounted for which was not output tax due. The taxpayer's claim under section 80(2) is likewise not, we consider, simply for a sum of money, but is for a sum or money related to particular transactions in respect of which output tax has been accounted for. In the example, the taxpayer might make a claim for £X but that claim would need to relate to the transactions in relation to which the taxpayer contends output tax was not in fact due. It is not possible, in our view, for the taxpayer to rely on that claim as including a claim in relation to the £Y (albeit that the claim might be restricted in value to the equivalent of £X) which was accounted for as output tax in relation to entirely different transactions."

34. It is clear from the decision of the Court of Appeal in *Bratt Auto Services Limited v HM Revenue & Customs* [2018] EWCA Civ 1106 that a claim in a single document relating to

different accounting periods are properly treated as several claims in relation to each accounting period rather than a single claim. Floyd LJ stated as follows at [27]:

> "27. I agree with Roth J that the formal requirements of a claim are those contained in regulation 37. However, as I have explained, regulation 37 and section 80 have to be read together so as to give "claim" and "amount" a consistent meaning throughout. A claim under section 80 is not any demand for repayment of overpaid tax, but is a demand for repayment of overpaid output tax for a prescribed accounting period which is not output tax due. Thus I would not agree that a claim under section 80 "may relate to one accounting period or many". A taxpayer may, in the same letter, raise a number of different claims, each by reference to an accounting period, but multiple such claims in the same letter are not, in my judgment, correctly referred to as a single claim under section 80."

35. Most recently, the FTT (Judge Hellier) has considered the question in Ballards of Finchley (see above), which may have prompted the appellants to raise the issue in the email correspondence referred to above. That case also concerned Elida Claims and Italian Republic Claims for repayment of output tax by a motor trader.

36. The first issue in Ballards was whether there was one claim for repayment, or many. The trader had made "claims" pursuant to Elida Gibbs and Italian Republic for the period 1973 to 1999. The facts bear considerable similarity to the present facts, and involved an application by Ballards to amend to increase the Italian Republic claim, over and above that which had been originally claimed and refunded. HMRC contended that Ballards had made multiple claims in the form of Elida Claims and Italian Republic Claims for each accounting period. Applying Bratt Auto Services, the FTT held that there was a separate claim for each accounting period encompassing the amount of repayment sought pursuant to both Elida Gibbs and Italian Republic. It addressed the issue as follows:

> "19. That leaves the question as to whether the letter should be treated as conveying separate claims for the margin and bonus element in each period.
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> 20. Floyd LJ's remarks do not address this question. There is some help in the legislation, which calls attention to the amount of a claim. Section 80(2) provides that HMRC shall be liable to credit or repay "an amount under the section on a claim being made for that purpose"; subsection (6) requires a claim to be in writing and to comply with regulations, and regulation 37 of the VAT regulations requires the claim to state "the amount of the claim and the method by which that amount was calculated.
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> 21. It seems to me that whether a document comprises one or more than one claim in relation to a VAT period is a matter of the construction of that document in the light of the requirement that any claim must state its amount."

37. I respectfully agree with the FTT's analysis of the question. In particular, whether there is a single claim or multiple claims in relation to an accounting period is a matter of construing the document(s) said to make up the claim.

38. The FTT went on to consider the question of whether the claims had been met, settled or compromised. It stated as follows:

> "33. So far as concerns payment in full this approach derives from the acceptance in *Liverpool* that a "claim" is for an amount due or (per Roth J in *Reed* at [31]) that it is a "demand for repayment of overpaid tax" Those definitions of "claim" mean that if the amount claimed is paid, there is no longer a claim. Now, the tribunal's jurisdiction to hear an appeal against the refusal of a claim is given by section 83(1)(t) VATA which speaks of any "claim to the repayment of any amount under section 80". Thus the jurisdiction of the tribunal vanishes with the disappearance of the claim. As a result, when a claim has been paid in full the tribunal has no jurisdiction to address an application to amend the grounds of appeal since it no longer has any jurisdiction to hear the appeal.

> 34. In the quoted words in paragraph 31(3) above, Judge Demack speaks of a claim being "compromised". It seems to me that this word must be construed as limited to the situation where there is agreement not to pursue a claim - for only then can it fairly be said that nothing is demanded or said to be due. However, when there is such a compromise it seems to me that the reasons and conclusions in the preceding paragraph apply."

39. The FTT went on to find on the facts that certain of the claims for certain periods had been met in full and could not be amended, whilst claims for other periods remained outstanding and could be amended. In the event, however, permission to amend was not granted because the FTT considered that the amended grounds would have no prospect of success. That is not a matter which was argued before me.

DISCUSSION

40. HMRC's objection to the Application is put on the basis that BRM's claims have been met in full, or met in part and the time for appealing has expired. Those claims are therefore now closed and cannot be amended.

41. Mr Puzey on behalf of HMRC submitted as follows in relation to BRM:

(1) HMRC had clearly accepted BRM's Italian Republic Claim in their decision letter dated 21 October 2010, subject only to a Nordania Adjustment. The claim was accepted for the whole period, 1973 to 1996. The only ground of appeal in BRM's appeal relevant to the Italian Republic Claim was in relation to the Nordania Adjustment. The other grounds either related to the other appellants (grounds 2 and 4), or related to the Elida Gibbs Claim (ground 3).

(2) There had been no Nordania Adjustment in relation to BRM for the period 1987 to 1992 because any adjustment would have fallen within the de minimis exception. In any event, the appellants had agreed the Nordania Adjustments in Mr Montgomery's email dated 24 October 2018.

(3) Mount is in the same position as BRM.

(4) Kendrick never made an Italian Republic Claim on its own behalf. It made an Elida Claim for the period 1 January 1983 to 30 September 1996. HMRC accepted that claim for the period 1983 to 1988 and a repayment of £5,352 was made. The claim for 1989 to 1996 was rejected. The only claims which could be open therefore are from 1988 to 1992.

42. The appellants do not dispute this analysis, and I accept Mr Puzey's submissions.

43. The issues which arise on the Application were debated in email correspondence between Mr Jarvis and Mr Montgomery in 2018 and 2019. Mr Jarvis gave evidence during the course of the Application. It is fair to say that the issues debated and the parties' positions have varied over time. During the course of the hearing Mr Brown helpfully confirmed that the appellants' case on the Application is simply that because the appellants' Elida Claims are still open, amendments can be made to the Italian Republic Claims, or as I understand it in the case of Kendrick to introduce an Italian Republic Claim. As previously stated, the appellants seek to amend those claims for the period 1987 to 1992.

44. The issue I must resolve, therefore is whether the appellants' claims for accounting periods between 1987 to 1992 comprised single claims covering both Elida Gibbs and Italian Republic, or whether there were separate claims for Elida Gibbs and Italian Republic. In Ballards of Finchley, Judge Hellier held that the appellant in that case had made single claims, but that was on the particular facts of that case. I was not invited to read across his conclusion into the present application.

45. Mr Brown in support of the appellants' case submitted as follows:

(1) The Elida Claims and the Italian Republic Claims are both claims for repayment of output tax and in each accounting period should be treated as a single claim.

(2) In the alternative, the Elida Claims and Italian Republic Claims both arise out of the same supply chain and should be treated as different aspects of the same issue.

46. As I have said above, the question of whether there is a single claim for repayment of output tax for each accounting period, or multiple claims for each accounting period is a matter of construction. Kendrick's claim on behalf of all the appellants dated 24 February 2009 stated as follows:

> "We are submitting a claim for the VAT overpaid for the period 1 April 1973 to 4 December 1996 based on the decision in Michael Fleming [a case relating to time limits]…
>
> This claim covers the years 1973 - 1996 totals £356,655.38 ...
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> …
>
> Please treat this letter as a claim for the VAT overpaid (the principal amount)…"

47. There were four schedules annexed to the letter. The first contained a table headed "Margin claim per period". It identified a figure claimed for each accounting period covered by the claim and a total of £125,612.34. The second contained a table headed "Bonus claim per period". Again, it identified a figure claimed for each accounting period covered by the claim and a total of £231,043.03. The first schedule also included a summary of claim as follows:

"Summary of claim	
Italian Margin Claim	125,612.34
Elida Bonus Claim	231,043.03
Total	356,655.38"

48. The other two schedules gave breakdowns of the "margin claim" of £147,987 and the "bonus claim" of £231,043 by reference to each business for each year, as opposed to each accounting period.

49. Mr Brown points out that the letter and the accompanying schedules refer to a "claim" in the singular. However, that cannot be right because the letter covered a large number of separate accounting periods. The letter therefore comprised a number of separate claims. The question is whether, for each period there were separate claims comprising the Elida Claim and the Italian Republic Claim, or a single claim covering both.

50. It seems to me that the fact the two types of claim are separately identified in each accounting period is an indicator that separate claims were being made. A separate figure is given for each type of claim and each accounting period on separate pages. Further, the two types of claim are very different and based on different errors and supplies. One sought to recover output tax accounted for on supplies by the appellants to manufacturers in relation to bonuses paid on demonstrators purchased by the appellants. The other sought to recover output tax accounted for on supplies by the appellants to customers purchasing demonstrators. I acknowledge that the first schedule provides a summary of the claim and identifies a total

amount. However, the schedules and indeed the summary clearly separate the "Italian Margin Claim" and the "Elida Bonus Claim".

51. I am satisfied that Kendrick's original letter of claim dated 24 February 2009 comprised two separate claims for each accounting period. BRM's letter of claim dated 4 March 2009 simply incorporated Kendrick's letter of claim and for the same reasons it comprised two separate claims for each accounting period.

52. The appellants' alternative argument is that the Elida Claims and the Italian Republic Claims are linked and part of the same issue and therefore the same claim. As I understand it, the appellants say that there would have been no Elida Claim but for the Italian Republic decision. That is because the transaction which gives rise to the Elida Claim is the sale of a demonstrator by a manufacturer to the dealer, either directly or through a finance house. That transaction is a necessary precursor to a subsequent sale of the same vehicle by the dealer to the final consumer, which gives rise to the Italian Republic Claim. On the sale to the final consumer the dealer incorrectly accounted for output tax on the margin, which under HMRC's original practice did not give credit for the bonus payment received from the manufacturer. If the Italian Republic case had never happened, the VAT overpaid on the bonus payment would have been cancelled out by an additional VAT liability under the margin scheme. In other words, the VAT overpayment all arises from the decision in Italian Republic. The point is illustrated by the annexes to this decision which were in evidence before me. Using the figures in the annexes it can be seen that the overpayment of £440 is the same even if there had been no Elida Gibbs error.

53. I accept that overall there would have been no VAT overpayment if there was a correction for the Elida Gibbs error but no correction for the Italian Republic error. However, I do not accept that affects the analysis as to whether there is one claim or two. The purchase transaction from the manufacturer is a completely separate supply to the sale transaction to the final consumer. VAT is applied to each transaction independently of the other. It is likely that the transactions will occur in separate accounting periods and there could be a long period of time between the two transactions. Further, there is no evidence before me from which I can be satisfied that every purchase transaction involving an Elida Claim has an associated sale transaction involving an Italian Republic Claim, or vice versa. Mr Jarvis did not accept that was the case.

54. Overall, I am satisfied therefore that the appellants' Italian Republic Claims were separate from their Elida Claims. That is consistent with the focus being on the supplies relevant to the amount be reclaimed, as set out by the Upper Tribunal in Vodafone Group Services Limited. The Italian Republic Claims have previously been accepted by the appellants and it is common ground that in those circumstances the appellants cannot amend their Italian Republic Claims.

CONCLUSION

55. For the reasons given above, I consider that the appellants' Italian Republic Claims for the period 1987 to 1992 are no longer open and they are not entitled to amend those claims. In the circumstances the Application is refused.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

56. 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. The

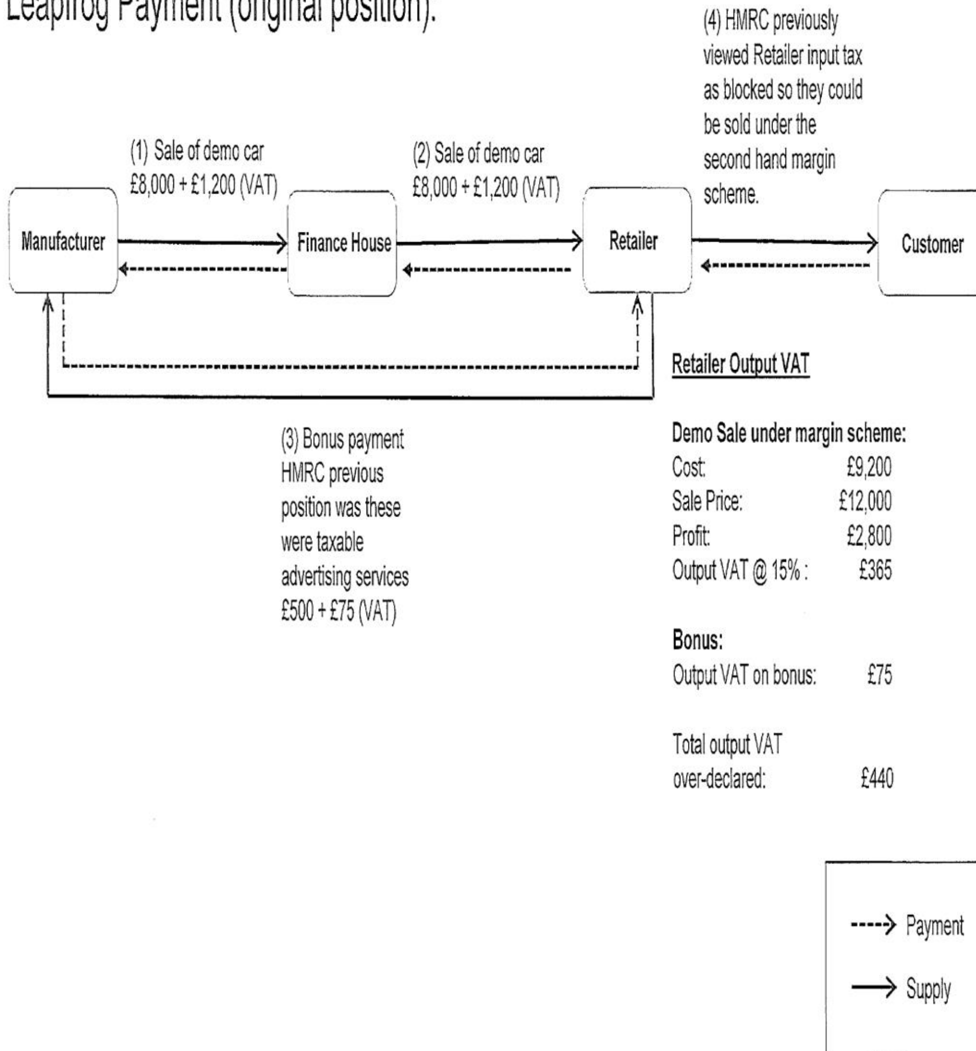
application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to “Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)” which accompanies and forms part of this decision notice.

JONATHAN CANNAN
TRIBUNAL JUDGE

Release date: 15 May 2020

Annex 1

Elida Gibbs and Italian Republic error



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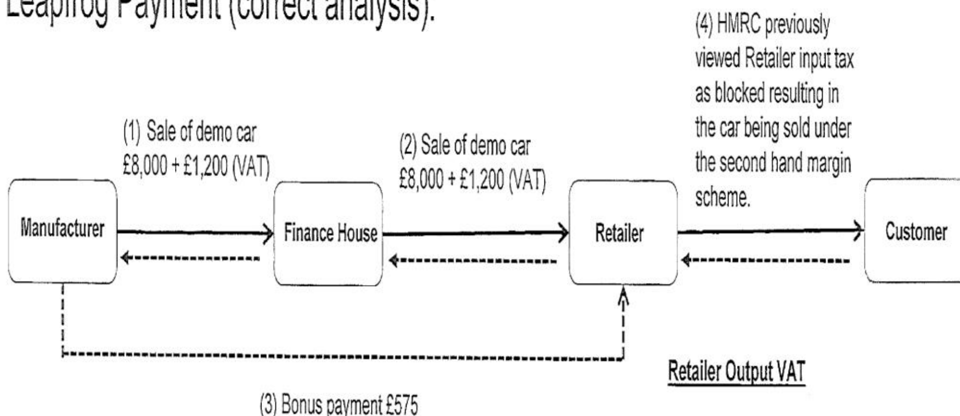
Elida Gibbs and Italian Republic error

Leapfrog Payment (correct analysis):

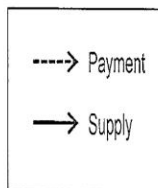
(4) HMRC previously viewed Retailer input tax as blocked resulting in the car being sold under the second hand margin scheme.



Retailer Output VAT

Sale under margin scheme:

Cost:	£8,625
(£9,200 less £575 bonus payment)	
Sale Price:	£12,000
Profit:	£3,375
Output VAT @ 15% :	£440
Total output VAT over-declared:	£440



Summary

No VAT overpayment arises solely due to the Elida Gibbs decision. Any potential overpayment as a result of Elida Gibbs creates an equal and opposite liability under what was formerly known as the 'input tax' margin scheme. It is only as a result of the Italian Republic decision that this liability creates a claim for overpaid VAT under s80. If the Italian Republic decision had not occurred, the £75 reclaimed from HMRC as a result of an Elida Gibbs adjustment would be cancelled out by a liability to HMRC under the margin scheme in circumstances where the car is sold at a profit.

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