TC03141

Appeal number: TC/2012/05560

VAT – preliminary issue – whether claim in respect of article 11C(1), Sixth Directive precluded by time limit in s 80(4) VATA or otherwise - assumed bonus payments made in period 1 January 1978 to 31 December 1989 giving rise to reductions in taxable amounts – VAT regulations 1995, reg 38 - jurisdiction of tribunal – s 83(1) VATA – whether claim otherwise barred under EU law by failure to make claim in reasonable time

FIRST-TIER TRIBUNAL
TAX CHAMBER

IVECO LIMITED **Appellant**

- and -

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

TRIBUNAL: JUDGE ROGER BERNER

Sitting in public at 45 Bedford Square, London WC1 on 12 and 13 November 2013

Andrew Hitchmough QC and Barbara Belgrano, instructed by PricewaterhouseCoopers Legal LLP, for the Appellant

Eleni Mitrophanous, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION on PRELIMINARY ISSUE

1. I am asked to determine as a preliminary issue the question whether the claim of the Appellant, Iveco Limited ("Iveco") to recover VAT arising from payments of certain rebates that occurred in the period 1 January 1978 to 31 December 1989 is subject to the statutory time limit prescribed by s 80(4) of the Value Added Tax Act 1994 ("VATA") or is otherwise time-barred. The issue arises in the following way.

2. Iveco is a distributor of commercial vehicles. It has appealed against a decision of HMRC on 23 January 2012, which was upheld on review on 19 April 2012, to refuse a claim for repayment of VAT, originally in the sum of £78,680,107, which related to certain bonus payments said by Iveco to have been made to customers in the period 1 April 1973 to 31 December 1989. That claim was made by letter from PricewaterhouseCoopers LLP dated 9 November 2011. On 8 February 2013, following the judgment of the Court of Justice in Case C-310/11 *Grattan plc v Revenue and Customs Commissioners* [2012] All ER (D) 246 (Dec.), Iveco withdrew that part of its appeal that related to the period 1 April 1973 to 31 December 1977. As a result, the relevant period for the purpose of this preliminary issue is 1 January 1978 to 31 December 1989 ("the relevant period") and the sum claimed is consequently reduced to £73,361,865.

3. Iveco is the representative member of a VAT group, with an effective date of registration of 31 December 1992. I understand that, subject to resolution of this preliminary issue, there is a question whether Iveco is the proper claimant in respect of the entities that carried out the various transactions. HMRC does not accept that Iveco is entitled to bring the claims at issue in the appeal; but that issue is not before me at this time.

The claim

4. The claim is that group companies carried out certain transactions whereby those companies sold commercial vehicles but, at some stage after the sales had been concluded, made certain promotional payments ("bonus payments") to their customers. The claim is based on the ground that such bonus payments amounted to reductions in the consideration for the sale of the vehicles and a repayment was therefore sought calculated by reference to the VAT proportion applicable to the claimed reductions in consideration. HMRC do not accept any of the factual and legal elements of the claim, and this preliminary issue therefore proceeds on the assumptions, not admitted, that the bonus payments were made, that they would qualify as price reductions such as to result in a reduction of the taxable amount within article 11C(1) of the Sixth Directive[1], and that Iveco is otherwise able to show an entitlement to a repayment of VAT.

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[1] Sixth Council Directive of 17 May 1977 on the Harmonisation of the Laws of the Member States relating to Turnover Taxes – Common System of Value Added Tax: Uniform Basis of Assessment (77/388/EC).

The preliminary issue in outline

5. This preliminary issue is confined to the issue of the applicability of the time limit under s 80(4) VATA and any other applicable time limit. If HMRC are right in their arguments on s 80(4), Iveco would be out of time to recover the VAT it has claimed: as will be seen, s 80(4) would preclude a claim in respect of an amount paid as output tax that was not due as output tax if the claim is not made within four years after the end of the accounting period in which the output tax that was not due was accounted for.

6. If s 80(4) does not preclude the claim, HMRC argue in the alternative that if s 80 does not apply, the right of Iveco to make a claim to directly enforce the Sixth VAT Directive expired long before Iveco sought to exercise it. That argument, to the effect that the exercise of a directly-effective right under the Sixth Directive is precluded once a reasonable period has expired, did not find favour with the Upper Tribunal in *GMAC UK plc v Revenue and Customs Commissioners; British Telecommunications plc v Revenue and Customs Commissioners* [2012] STC 2349 ("*GMAC/BT*"). However, that issue is the subject of an appeal to the Court of Appeal. It was agreed, therefore, that no argument would be addressed to me at this stage, and that this issue, to the extent it were to remain relevant following this decision, would be left to one side until the Court of Appeal judgment in *GMAC/BT*.

7. As well as the time limit issues, HMRC have also raised a question as to the Tribunal's jurisdiction. The principal case for Iveco was that s 80 VATA does not apply at all in the circumstances of this case, and that accordingly s 80(4) cannot operate to preclude the claim. In that event, HMRC argued that if Iveco was right, and it could not point to any other provision in domestic VAT legislation within which the claim could fall, the Tribunal has no jurisdiction to consider it, and that Iveco must seek to make its claim in a different forum.

8. That the claim was not made under s 80 was the position adopted by Iveco in the PwC letter of 9 November 2011. At a late stage in the hearing, responding to questions from me, Mr Hitchmough for Iveco adopted a different position: although he continued to maintain that s 80(1) did not apply, because there was no amount of output tax not due that had been accounted for, he was disposed to accept that a claim could be made under s 80(1B), which broadly speaking relates to overpayments of VAT in other circumstances. If that were right, the jurisdiction issue would fall away, as the Tribunal would have clear jurisdiction under s 83(1)(t) VATA. However, in considering this matter after the hearing, I have found it necessary to revisit the question of the application of s 80, with the result that I have also had to consider the jurisdiction question.

Is the claim barred by s 80(4) VATA?

9. To answer this question it is first necessary to trace the legislative history. The starting point is article 11C(1) of the Sixth Directive, which provided as follows:

> "In the case of cancellation, refusal or total or partial non-payment, or where the price is reduced after the supply takes place, the taxable

amount shall be reduced accordingly under conditions which shall be determined by the Member States.

However, in the case of total or partial non-payment, Member States may derogate from this rule."

10. Article 11C(1) accordingly provided for a retrospective adjustment to the taxable amount where there was a price adjustment after the time of supply. On normal principles, effect was required to be given to such retrospective adjustments under domestic law. However, in the UK, it was not until 1 January 1990 that this was done, when regulation 7 of the Value Added Tax (Accounting and Records) Regulations 1989 ("the 1989 Regulations") came into force. It is not necessary to recite the terms of regulation 7, as it was subsequently reproduced as regulation 38 of the Value Added Tax Regulations 1995 ("the 1995 Regulations"), which as it stood at the time of Iveco's claim relevantly provided as follows:

"(1) This regulation applies where—

(a) there is an increase in consideration for a supply, or

(b) there is a decrease in consideration for a supply,

which includes an amount of VAT and the increase or decrease occurs after the end of the prescribed accounting period in which the original supply took place.

...

(2) Where this regulation applies, both the taxable person who makes the supply and a taxable person who receives the supply shall adjust their respective VAT accounts in accordance with the provisions of this regulation.

(3) … the maker of the supply shall—

(a) in the case of an increase in consideration, make a positive entry; or

(b) in the case of a decrease in consideration, make a negative entry,

for the relevant amount of VAT in the VAT payable portion of his VAT account.

…

(4) The recipient of the supply, if he is a taxable person, shall—

(a) in the case of an increase in consideration, make a positive entry; or

(b) in the case of a decrease in consideration, make a negative entry,

for the relevant amount of VAT in the VAT allowable portion of his VAT account.

(5) Every entry required by this regulation shall, except where paragraph (6) below applies, be made in that part of the VAT account which relates to the prescribed accounting period in which the increase or decrease is given effect in the business accounts of the relevant taxable person.

(6) Any entry required by this regulation to be made in the VAT account of an insolvent person shall be made in that part of the VAT account which relates to the prescribed accounting period in which the supply was made or received.

(7) None of the circumstances to which this regulation applies is to be regarded as giving rise to any application of regulations 34 and 35."

11. Certain of the terms used in regulation 38 are defined by regulation 24 of the 1995 Regulations:

"In this Part—

"increase in consideration" means an increase in the consideration due on a supply made by a taxable person which is evidenced by a credit or debit note or any other document having the same effect and "decrease in consideration" is to be interpreted accordingly;

…

"negative entry" means an amount entered into the VAT account as a negative amount;

"positive entry" means an amount entered into the VAT account as a positive amount;

"VAT allowable portion", "VAT payable portion" and "VAT account" have the meanings given in regulation 32 …"

12. Regulation 32 provides as follows:

"(1) Every taxable person shall keep and maintain, in accordance with this regulation, an account to be known as the VAT account.

(2) The VAT account shall be divided into separate parts relating to the prescribed accounting periods of the taxable person and each such part shall be further divided into 2 portions to be known as "the VAT payable portion" and "the VAT allowable portion".

(3) The VAT payable portion for each prescribed accounting period shall comprise—

(a) a total of the output tax due from the taxable person for that period,

(b) a total of the output tax due on acquisitions from other member States by the taxable person for that period,

(ba) a total of the tax which the taxable person is required to account for and pay on behalf of the supplier,

(c) every correction or adjustment to the VAT payable portion which is required or allowed by regulation 34, 35, 38, or 38A, and

(d) every adjustment to the amount of VAT payable by the taxable person for that period which is required, or allowed, by or under any Regulations made under the Act.

(4) The VAT allowable portion for each prescribed period shall comprise—

(a) a total of the input tax allowable to the taxable person for that period by virtue of section 26 of the Act,

(b) a total of the input tax allowable in respect of acquisitions from other member States by the taxable person for that period by virtue of section 26 of the Act,

(c) every correction or adjustment to the VAT allowable portion which is required or allowed by regulation 34, 35 or 38, and

(d) every adjustment to the amount of input tax allowable to the taxable person for that period which is required, or allowed, by or under any Regulations made under the Act."

13. At the same time as regulation 7 of the 1989 Regulations came into effect (1 January 1990), the precursor to s 80 VATA, namely s 24 of the Finance Act 1989, came into force. That section enabled claims for VAT overpaid to be made, subject to a time limit of six years from the date of overpayment or, in the case of mistake, six years from the date on which the claimant discovered, or with reasonable diligence could have discovered, the mistake. Section 24 FA 1989 was superseded on consolidation by s 80 VATA, which, when it was enacted, contained the same time limit. However, section 47(1) FA 1997 removed this provision and introduced a three-year time limit with effect from 18 July 1996.

14. Following the judgment of the Court of Justice in *Marks and Spencer plc v Customs and Excise Commissioners* (Case C-62/00) [2002] STC 1036, and those of the House of Lords in *Fleming (trading as Bodycraft) v Revenue and Customs Commissioners; Condé Nast Publications Ltd v Revenue and Customs Commissioners* [2008] STC 324, HMRC accepted that the three-year cap could operate only from the date it had been authorised by Parliament, 4 December 1996, and introduced, by means of s 121 FA 2008, a prospective transitional period up to 31 March 2009. The effect was to disapply the three-year time limit in s 80(4) VATA in relation to claims in respect of amounts brought into account or paid for a prescribed accounting period ended before 4 December 1996, so long as the claim was made before 1 April 2009.

15. The three-year time limit in s 80(4) was extended to four years by FA 2008 with effect from 1 April 2009. That time limit is reflected in s 80 as it stood at the time of Iveco's claim. Section 80 relevantly provides:

"(1) Where a person—

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

(b) in doing so, has brought into account as output tax an amount that was not output tax due,

the Commissioners shall be liable to credit the person with that amount.

…

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

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

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

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

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

(2A) Where—

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

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

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

…

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

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

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

if the claim is made more than 4 years after the relevant date.

(4ZA) The relevant date is—

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

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

…

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

…

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

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

Commentary on the parties' submissions

16. HMRC's case is that s 80 VATA clearly applies to the circumstances of Iveco's claim. HMRC accept that the VAT accounted for at the time of the original supply, before any assumed bonus payment and any reduction in the taxable amount of that supply, was output tax due, but say that, following the price reduction, VAT accounted for in a later period (namely the period in which the bonus payment was made) was not VAT due as it did not take account of the price reduction. In those circumstances, say HMRC, when the price reduction occurred, Iveco's VAT return did not reflect it and Iveco therefore brought into account as output tax an amount (the amount of the reduction) that was not due. That falls within s 80(1).

17. The principal argument of Iveco in these proceedings is that s 80 has no application at all. As I referred to earlier, there was some movement from this case during the proceedings, but I have concluded that it must be re-examined. The basis of Iveco's submission in this respect is that, until 1 January 1990, there was no UK statutory mechanism to give effect to article 11C(1) of the Sixth Directive, and accordingly no method by which the VAT due in any accounting period could be adjusted. Iveco had the right to rely on the direct effect of article 11C(1), but exercised that right only through the November 2011 letter.

18. Iveco argues that throughout the relevant period the price reduction in relation to the making of the bonus payments after the time of supply could have effect only if the trader had elected to rely on its directly-effective right. No overpayment of VAT could arise unless and until Iveco recognised the overpayment in its VAT account. It was not open to HMRC to rely on its own failure to apply article 11C(1), and to assert that the article gave rise to an overpayment of VAT in the relevant period. Although it was not referred to, that feature of direct effect relies on cases such as *Marshall v Southampton and South West Hampshire Area Health Authority (Teaching)* (Case 152/84) [1986] 2 All ER 584, [1986] ECR 723, judgment para 48.

19. In support of Iveco's argument, Mr Hitchmough referred to the decision of the VAT and Duties Tribunal (Mr Wallace and Mr Shaw) in *General Motors Acceptance Corporation (UK) plc v Revenue and Customs Commissioners* (Decision 19989;14 February 2007) ("*GMAC*"). That case concerned, amongst other things, the question whether GMAC was entitled to make adjustments under regulation 38 of the 1995 Regulations, and whether such adjustments were not covered by s 80 VATA so that the time limit in s 80(4) had no application.

20. In *GMAC*, counsel for HMRC had argued that the reduction of the taxable amount under article 11C(1) was mandatory, rather than merely giving the taxable person the right. Similar mandatory language was contained in regulation 38. It was implicit therefore that the reduction in the taxable amount was at the time when the price was reduced rather than at a time of choice. Since GMAC did not make the adjustments at the time when the price was reduced, it was submitted that it overpaid VAT for the period when the adjustments should have been made and s 80 accordingly applied.

21. The VAT Tribunal reached different conclusions in respect, first, of the period from 1 January 1990 and secondly the period from 1 January 1978 to that date. It said (at [76] – [77]):

> "[76] Regulation 38 of the VAT Regulations 1995 clearly implements Article 11C.1 in respect of the decrease and Article 11A.1(a) in respect of an increase in consideration obtained. Without regulation 38(1)(a) any increase would not be included in the taxable amount. Both the increase and the decrease in the taxable amount are mandatory under the Directive. In our judgment regulation 38 is mandatory and does require adjustment to the VAT account in the period when the business accounts reflect the change. Although the regulation does not in terms state when the entry is to be made in the VAT account relating to the period it is implicit that it should be at the time. It would be irrational if a trader could delay indefinitely making an entry effecting an increase in consideration. We accept the submission of Dr Lasok [counsel for HMRC] that the failure to make timeous adjustments resulted in overpayments and section 80 therefore applies to the claims. The Appellant did not lose the right to adjust by doing so late; it merely had the consequence that section 80 applied.
>
> [77] Mr Cordara [counsel for GMAC] further contended that there was no overpayment in respect of reduction in price taking effect before 1 January 1990 the date on which regulation 7 of The Value Added Tax (Accounting and Records) Regulations 1989, the predecessor of regulation 38, took effect. It was common ground that the original returns based on the contractual VAT price were correct and before 1990 there was no statutory mechanism in domestic law for adjustment. The failure of the UK to implement the mandatory requirement of Article 11C.1 before 1990 had the effect that the Appellant could rely on the direct effect of Article 11C.1 from 1 January 1978 when the Sixth Directive took effect whereas Customs could not. Consequently the Appellant did not overpay VAT as a result of not making adjustments before 1990 and section 80 does not apply to those adjustments."

22. Whilst fairly acknowledging that *GMAC* provides some support for Iveco's position on this claim, Ms Mitrophanous, for HMRC, argued that I should not reach the same conclusion, for the following reasons:

(1) The decision in GMAC is not binding on this Tribunal, and furthermore the conclusion in [77] was in any event obiter, as the VAT Tribunal also decided that the time limit provision in s 80(4) fell to be disapplied because the reduction, in 1996, from 6 years to 3 years had not been accompanied by transitional relief.

(2) The decision was made prior to the enactment of s 121 FA 2008 and the grace period provided by that section for all overpaid tax to be claimed whenever it had occurred. The version of s 80 that was being considered in *GMAC* sought to limit claims to those relating to payments to HMRC only three years before the making of the claim and would have had the retrospective effect of shutting out GMAC's claim without due warning.

(3) The tribunal in *GMAC* was wrong to conclude as it did in [77]. It does not follow that the absence of a statutory mechanism for making an adjustment prior to 1 January 1990 means that there was no overpayment prior to that date. The fact that, since 1990, a taxpayer who has properly adjusted its VAT account using regulation 38 will generally not need to do so, provides no reason for narrowing the scope of s 80.

(4) Just as a failure to apply the regulation 38 method of reflecting a price reduction by a taxpayer (that is, one who has a statutory right under domestic law) is in no way fatal to the exercise of the taxpayer's rights, in that the taxpayer can still make a claim for the overpayment under s 80 (*GMAC*, at [76]), similarly a failure by domestic legislation to provide the regulation 38 mechanism prior to 1990 was in no way fatal. A claimant could (under the transitional provisions introduced by s 121 FA 2008) have made a claim under s 80 irrespective of when the reduction took place.

23. Mr Hitchmough sought to support his reliance on GMAC by reference to two further authorities, the first of which, *University of Sussex v Revenue and Customs Commissioners* [2004] STC 1, in the Court of Appeal, concerned the effect of a decision by the university, with the approval of HMRC, not to claim all the allowable input tax in its periodic returns. It was held that a subsequent claim for repayment of input tax was not a claim under s 80. The second case relied upon by Mr Hitchmough is *GMAC/BT*, to which I referred earlier. That case related to article 11C(1) as it applied to total or partial non-payment and, in part, whether GMAC was entitled to some form of bad debt relief in respect of certain amounts it did not receive. It was held in the Upper Tribunal (Warren J and Judge Hellier) that s 80 did not apply to GMAC's claims.

24. In *University of Sussex*, it was argued for the university that the scheme of the Directives and the VATA was that the taxpayer has a right, and not an obligation, to abate his output tax by input tax. The right to deduct remained such a right irrespective of the manner or lateness of the claim; it was at all times a claim for deduction of input tax, and did not become a claim for overpaid output tax within s 80. That argument was accepted by the Court of Appeal. At [147], Auld LJ, with whom Chadwick LJ and Newman J agree, said:

> "It follows from arts 22(4)(a) and (b) and 22(5) of the Sixth Directive and s 25(2) and (6) of the 1994 Act, with which reg 29(1) is also consistent, that VAT 'due' and paid to the commissioners in any accounting period under s 80 is the properly charged output for that period for which the taxpayer makes a return less what, if any, sum he claims by way of input tax in the same return. And, consistently with the nature of the right to deduct input tax granted and governed by arts 17 and 18 of the Directive, the nature of the right given to the taxpayer by those provisions of the 1994 Act and the 1995 regulations is essentially a right to a credit, which may be by way of a deduction or repayment depending on whether, in the relevant accounting period the taxpayer is a payment or repayment trader. The fact that, for whatever reason, he may not have claimed any or all the input tax to which he was entitled in that return, is no basis for asserting that the amount of

> tax accounted for and paid was pro rata 'not due' so as make the payment an overpayment within the meaning of s 80. (In this connection, it should be noted that s 73 of the 1994 Act, which gives the commissioners power to make assessments where taxpayers have failed to make returns, is clearly directed to securing payment of the tax, not to ensuring that they receive due credit for unclaimed inputs.) This conclusion does not depend on when the right to deduct accrued. The fact that there was in any accounting period an unexercised right to deduct input tax does not render part of the payment to the commissioners VAT which was not 'due' for that period for the purpose of s 80 …"

25. Lord Justice Auld went on to hold, in this respect agreeing with Neuberger J in the High Court (at [69]), that if a trader pays more tax than he need to because he has under-claimed input tax, he has not overpaid tax for that period; the amount paid is simply the result of a mechanism which sets off against what is due from him what he claims is properly due to him. The statutory provisions enabled the trader to exercise his right to the amount due to him by claiming a deduction from output tax in a later period.

26. Although concerned with a claim of a different nature, similar reasoning was adopted by the Upper Tribunal in *GMAC/BT*. The tribunal held that s 22 VATA was the appropriate mechanism for giving effect to the taxpayer's directly-effective right to claim bad debt relief, and that accordingly s 80 VATA did not apply. The tribunal gave its reasons at [181]:

> "Section 80 is concerned with cases where a taxpayer has brought into account as output tax an amount that was not output tax due. When GMAC made its supplies and accounted for the full amount of output tax, it accounted for an amount of output tax which was then due: it is only the subsequent failure of the customer to pay which has resulted in any possible claim for bad debt relief. It does not seem to us that later circumstances giving rise to a bad debt for the purposes of Article 11C(1) and which results in a reduction in the chargeable amount renders the amount which was actually paid retrospectively incorrect in the sense that it can be said that the amount actually paid was "not output tax due" within section 80. It was, when paid, output tax which was due; and remained such until a bad debt arose."

27. The tribunal went on to consider the position of GMAC's claim on the assumption that it was wrong about the applicability of s 22. It concluded, at [184], that once it had become apparent that the taxable amount should be reduced pursuant to article 11C(1), it would then have been open to the taxable person to claim the appropriate relief. But the onus was on the taxpayer to make that claim, and accordingly:

> "It follows, unless and until a claim is indicated, that it cannot be said that any relief is to be afforded and that it cannot be said that any amount has been brought into account as output tax that was not output tax due. Accordingly, s 80 does not, in our judgment, in terms apply to GMAC's claims."

28. It is clear from this latter passage that the Upper Tribunal found that there could be no reduction of the taxable amount by reference to a bad debt until a claim had been made, and that until that time there could have been no overpayment to which s 80 could apply. The reference in [181] to output tax remaining due on the original supply until the bad debt arose cannot, reading that paragraph as a whole, and having regard to [184], be understood as having the consequence that there was an overpayment of output tax at the time the bad debt arose, rather than at the time of the claim.

29. Miss Mitrophanous argued that *University of Sussex* was distinguishable from the circumstances of Iveco's claim. That case was one involving input tax which, in the terms of article 17 of the Sixth Directive, gave rise only to a right to deduct. This could be contrasted with the mandatory terms of article 11C(1), which provided that the taxable amount "shall be reduced". Furthermore, the version of s 80 at issue in *University of Sussex* referred only to a "payment" of VAT that was not due, in contrast to the wording at issue here, namely that output tax not due has been "brought into account". On this latter point, Miss Mitrophanous appears to be arguing that *University of Sussex* would have been decided differently if s 80 had at the relevant time contained the later wording. I do not accept that submission. As regards the effect of a right to deduct input tax, I can see no difference between a case where s 80 referred to payment of VAT and the reference to output tax being brought into account.

30. Miss Mitropahnous likewise sought to distinguish *GMAC/BT* on the ground that it related to a claim for bad debt relief, which gives rise only to a right to claim relief, in contrast to the case of a price reduction where the tax was due at the time of the original supply, but was not due at the time when the price reduction occurred. Miss Mitrophanous points out that nothing in the wording of article 11C(1) precludes the conditions for the claiming of an adjustment for a price reduction being those found in s 80. By contrast, domestic law does provide for a bad debt claim to be made. In the latter case there is no question of there being any overpayment of VAT at any point prior to the making of a claim. But in the case of a price reduction there is an overpayment when the price reduction occurs and is not reflected in the VAT return for that period.

31. Miss Mitrophanous referred me to two further cases in support of her arguments. The first was the 2002 judgment of the ECJ in *Marks and Spencer*, to which I referred earlier, where M&S had wrongly accounted for VAT by reference to the face value of vouchers redeemed by customers as part payment for supplies. The claim had in that case been made under s 80 VATA, which brought into question the validity of the newly-introduced three-year time limit. Miss Mitrophanous made the point that in that case no question had been raised as to the application of s 80.

32. I do not consider that *Marks and Spencer* is of any assistance to the issue before me. There was no argument as to the application of s 80 in that case. Furthermore, as Mr Hitchmough submitted, the basis of the claim in *Marks and Spencer* was on the correct value of the taxable supply at the time it was made, and not the effect of a subsequent price reduction under article 11C(1). Although Ms Mitrophanous also

sought to rely on *Marks and Spencer* in support of her argument that the effect of the Directive was that tax was over-paid on each occasion of a bonus payment giving rise to a price reduction, I do not consider that the distinction drawn in that case between the repayment of amounts in breach of Community law and the national provisions giving effect to that right or claim (see *Marks and Spencer*, advocate-general's opinion, at [51]) can mean that under the EU law there is an overpayment when the bonus payment is made. The advocate-general in *Marks and Spencer* was refuting an argument of the UK government that M&S's claim for repayment could arise only after domestic procedural requirements had been met; that cannot support an argument that article 11C(1) itself operates to create an overpayment of tax.

33. Miss Mitrophanous referred me also to the recent decision of the Upper Tribunal in *Birmingham Hippodrome Theatre Trust Ltd v Revenue and Customs Commissioners* [2013] STC 1079. In that case the trust had over a period accounted for output tax on supplies which should have been treated as exempt. It made a claim for repayment under s 80 for periods in which the claim was not barred by time limits. One question was whether HMRC could rely on s 81(3A) VATA to set-off a claim for input tax wrongly repaid against the trust's claim for overpaid output tax.

34. The effect of s 81(3A) is to enable time limits to be disregarded in respect of the setting off by HMRC of certain sums against amounts which "the Commissioners are liable to pay or repay … to any person under [VATA]", where that amount falls to be paid or repaid in consequence of a mistake about "whether or to what extent amounts were payable under [VATA] to or by that person". For the trust it was argued that overpayments of output tax for periods up to 1 June 1996 were not in consequence of a mistake about the amounts were payable under VATA, because until that time the domestic law contained no exemption; any amounts payable were only payable under the direct effect of the Directive. The tribunal rejected that argument, holding (at [127]) that because the VATA fell to be construed in accordance with the Directive, if mistakenly it was so construed to have the effect that VAT was payable under it, that was a mistake about the amount payable under the VATA.

35. Miss Mitrophanous submitted that this part of the decision of *Birmingham Hippodrome Trust* was binding, as it was part of the ratio of the tribunal's decision that s 81(3A) applied. I do not accept, however, that it can be binding as to the result of this case. This is not a case where a question of construction arises as to the correct treatment of a supply, and where an error or mistake as to that treatment leads to tax being accounted for as if the supply were standard-rated, where it should have been exempt. In such a case, as the tribunal found, it can be readily appreciated that there has been a mistake as to the amount payable under the VATA. But that is not the same as a case where the domestic rules do not provide a mechanism for giving effect to a reduction in the taxable amount; that is a question which must itself be addressed as a matter of construction of the Directive and the domestic provisions.

Is Iveco's claim barred by s 80(4) VATA?

36. If Iveco's claim is not to be barred by the time limit in s 80(4) VATA, it has to be established either (a) that the claim is not within s 80 at all, or (b) the claim is

within s 80, but the overpayment was made at such a time as will enable a timely s 80 claim to be made. The latter question is one of timing alone, namely whether there was an overpayment at the time the price reduction took effect, or later when the November 2011 claim was made. The former question is whether the right of Iveco directly to enforce article 11C(1) of the Directive gave rise to the bringing into account in any of its accounting periods of either an amount by way of output tax that was not output tax due (within s 80(1)), or the payment of an amount by way of VAT that was not VAT due (within s 80(1B)).

37. Prior to 1 January 1990 there was no domestic provision enabling a taxable person to make an adjustment to his VAT account to give effect to the directly-effective right under article 11C(1) of the Directive. Although regulation 7 of the 1989 Regulations introduced such a right from that date, it applied only prospectively, in that it did not permit an adjustment to be made other than to the VAT account which related to the accounting period in which the decrease was given effect in the business accounts of the taxable person. The same limitation applies equally to regulation 38 of the 1995 Regulations. It was not therefore possible, as a matter of domestic law, for Iveco to make an adjustment, either under regulation 7 or under regulation 38, in respect of price reductions resulting from bonus payments made before 1 January 1990.

38. Although the effect of article 11C(1) is that a price reduction after the time of the supply results in a reduction in the taxable amount, in the absence of implementation of that article so as to give it effect under domestic law, the most the Directive can give rise to is a directly-effective right in favour of the taxable person. The effect of article 11C(1) is mandatory, but only in the sense that such an effect must be provided for by member States, which may be subject to conditions, and to enable the taxable person to claim to give that article direct effect. Unless or until the taxable person exercises that right, there is no basis for saying that the VAT accounted for by the taxable person was not "due", which is the state of affairs required by s 80. Until Iveco exercised its right, its VAT account could include only those items prescribed by regulation 32 of the VAT regulations; those items could not, in Iveco's case, have included any regulation 7 or regulation 38 adjustment.

39. Even if it were possible for HMRC to rely on the Directive itself in this respect, I do not consider that article 11C(1) could operate, independently of domestic legislation implementing it, so as to have the consequence that Iveco would have overpaid output tax in the accounting period in which the bonus payments were made. Article 11C(1) provides only for a reduction in the taxable amount; it says nothing of the consequences, in terms of the amount of output tax for which the taxable person must account, of that reduction. Those consequences can only flow from the domestic legislation that gives effect to the reduction of the taxable amount in those circumstances. In any event, an argument on the part of HMRC that relies on the effect of the Directive in the absence of domestic implementation appears to me, as it did to the VAT Tribunal in *GMAC*, to be bound to fail. Such an argument is not, as Ms Mitrophanous sought to argue, merely one of construction.

40. It follows from this that I have concluded that, with reference to the bonus payments, Iveco did not, at any time prior to its November 2011 claim, bring into account as output tax any amount that was not output tax due, and furthermore that it did not pay any VAT that was not due. Section 80 does not apply to the claim.

41. This conclusion is not based on *University of Sussex* or *GMAC/BT*, but it is in my view consistent with the reasoning applied in those cases. The right directly to enforce a directive in respect of a retrospective reduction in the taxable amount of a supply is not the same as either the right to deduct input tax or the right to claim bad debt relief. However, it shares certain characteristics.

42. First, the mere existence of such a directly-effective right does not give rise to a reduction in the output tax that is due – that will be output tax calculated by reference to supplies other than the original supply – nor in the amount of VAT payable after all relevant reductions have been made. The amount of output tax, or otherwise of VAT, payable is a function of a taxable person's return for a relevant accounting period, and the VAT account prescribed by regulation 32 of the 1995 Regulations. Absent appropriate implementation of article 11C(1) in the UK, there was no domestic mechanism that could operate to reduce the amount of output tax or VAT due. That was the case both before 1 January 1990, and equally so after that date, when although a mechanism for adjustment was introduced that could operate for future prescribed accounting periods, it could not do so for cases where the price reduction had taken effect before 1990. Secondly, it requires the taxable person to exercise a right or make a claim; it does not follow simply as a result of the nature of a supply, such as whether it is standard-rated or exempt as in *Marks and Spencer* or *Birmingham Hippodrome Trust*.

43. The conclusion I have reached is likewise consistent with that reached by the VAT Tribunal in *GMAC*. It follows therefore that I do not accept Ms Mitrophanous' criticisms of that decision. In particular, the question whether s 80 applies on its terms cannot be answered by reference to the effect on a taxpayer of a particular finding. In *GMAC*, as in this case, the applicability of s 80 was one of principle. The finding in *GMAC* that s 80 did not apply to the price reductions taking effect before 1 January 1990 did not depend on the effects of the reduction in the time limit from 6 years to 3 years (the tribunal in any event found that s 80(4) fell to be disapplied). By the same token, the question of the application of s 80 must be determined before (and without regard to) any argument around the ability of Iveco to have availed itself of the transitional provisions introduced by s 121 FA 2008, had s 80 been applicable.

44. Accordingly, until Iveco made its claim in November 2011, it could not as a matter of either domestic or EU law have made any overpayment of output tax or otherwise of VAT. Section 80 VATA does not therefore apply to the claim.

Giving effect to Iveco's claim

45. Having concluded that s 80 VATA does not apply to Iveco's November 2011 claim, I now turn to consider how effect can be given to Iveco's directly-effective right under article 11C(1) of the Sixth Directive.

46. Applying normal domestic canons of construction, it would not be possible, for the reasons I have described, to interpret either s 80 or regulation 38 of the 1995 Regulations so as to provide an appropriate remedy. However, there is a powerful obligation on the courts to interpret domestic legislation in conformity with Community law if it is possible to do so, and this goes beyond what would normally be available in a domestic context; see *Test Claimants in the Franked Investment Group v Revenue and Customs Commissioners* [2010] EWCA Civ 103, at [260] and the cases there cited.

47. As Henderson J recently pointed out, in *Prudential Assurance Co Ltd and another v Revenue and Customs Commissioners* [2013] EWHC 3249, at [101], the principles which should be applied in considering whether a conforming interpretation of legislation which infringes EU law is possible are derived from the judgment of Sir Andrew Morritt C in *Vodafone 2 v Revenue and Customs Commissioners* [2009] EWCA Civ 446, and have recently been restated by Aikens LJ (with whom Etherton and Maurice Kay LJJ agreed) in *Wilkinson v Fitzgerald* [2012] EWCA Civ 1166 as follows:

> "… the obligation on the English courts to construe domestic legislation consistently with Community law obligations is both broad and far-reaching. In particular [the obligation]:
>
> [1] … is not [to be] constrained by conventional rules of construction (per Lord Oliver of Aylmerton in *Pickstone v Freemans plc* [1989] AC 66, 126B);
>
> [2] … does not require ambiguity in the legislative language (per Lord Oliver in the *Pickstone* case, at page 126B and per Lord Nicholls of Birkenhead in *Ghaidan v Godin-Mendoza* [2004] 2 AC 557, para 32);
>
> [3] … is not an exercise in semantics or linguistics (per Lord Nicholls in *Ghaidan's* case, at paras 31 and 35; per Lord Steyn, at paras 48-49; per Lord Rodger of Earlsferry, at paras 110 – 115);
>
> [4] … permits departure from the strict and literal application of the words which the legislature has elected to use (per Lord Oliver in *Litster v Forth Dry Dock & Engineering Co Ltd* [1990] 1 AC 546, 577A; per Lord Nicholls in *Ghaidan's* case, at para 31);
>
> [5] … permits the implication of words necessary to comply with Community law obligations (per Lord Templeman in the *Pickstone* case, at pp 120H-121A; per Lord Oliver in the *Litster* case, at p 577A);
>
> [6] [accepts that] the precise form of the words to be implied does not matter (per Lord Keith of Kinkel in the *Pickstone* case, at p 112D; per Lord Rodger in *Ghaidan's* case, at para 122; per Arden LJ in *R (IDT Card Services Ireland Ltd) v Customs and Excise Comrs* [2006] STC 1252, para 114);
>
> [7] [is only constrained to the extent that] the meaning should 'go with the grain of the legislation' and be compatible with the underlying thrust of the legislation being construed': see per Lord Nicholls in *Ghaidan v Godin-Mendoza* [2004] 2 AC 557, para 33; Dyson LJ in

> *Revenue and Customs Comrs v E B Central Services Ltd* [2008] STC 2209, para 81;
>
> [8] [must not lead to an interpretation being adopted] which is inconsistent with a fundamental or cardinal feature of the [national] legislation since this would cross the boundary between interpretation and amendment (see per Lord Nicholls, at para 33, Lord Rodger, at paras 110-113 in *Ghaidan's* case; per Arden LJ in *R (IDT Card Services Ireland Ltd) v Customs and Excise Comrs* [2006] STC 1252, paras 82 and 113) …
>
> [9] … cannot require the courts to make decisions for which they are not equipped or give rise to important practical repercussions which the court is not equipped to evaluate: see the *Ghaidan* case, per Lord Nicholls, at para 33; per Lord Rodger, at para 115; per Arden LJ in the *IDT Card Services* case, at para 113."

48. Having cited this passage in *Prudential*, Henderson J continued, at [102]:

> "The principle of conforming construction is often referred to as the *Marleasing* principle, named after the ECJ case in which it was first clearly enunciated (Case C-106/89, *Marleasing SA v La Comercial Internacional de Alimentación SA* [1990] ECR I-4135, [1992] 1 CMLR 305, [1993] BCC 421). In *FII (SC)*[2] Lord Sumption at para 176 described the principle, as it has been applied in England, as 'authority for a highly muscular approach to the construction of national legislation so as to bring it into conformity with the directly effective Treaty obligations of the United Kingdom'. He added that, however strained a conforming construction may be, and however unlikely it is to have occurred to a reasonable person reading the statute at the time, 'a later judicial decision to adopt a conforming construction will be deemed to declare the law retrospectively in the same way as any other judicial decision'."

49. As it was regulation 7 of the 1989 Regulations, and its successor, regulation 38 of the 1995 Regulations, that were intended domestically to give effect to article 11C(1), it is to that provision I turn first to consider whether, applying the principles I have outlined, a conforming construction can be arrived at which will give effect to Iveco's directly-effective right.

50. I consider that it clearly can. The only limitation against regulation 38 applying is the temporal restriction, in regulation 38(5), which requires (otherwise than in the case insolvency, which is nor relevant here) an entry under regulation 38 to be made in that part of the VAT account which relates to the prescribed accounting period in which the decrease in consideration (that is to say the bonus payments in this case) is given effect in the business accounts of the taxable person. Regulation 38 is intended to give effect to article 11C(1), and so it cannot go against the grain of the legislation to give it that effect for cases that are excluded only by reason of the failure of the UK to introduce the domestic legislation in a timely manner. Regulation 38 should

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[2] *Test Claimants in the FII Group Litigation v Revenue and Customs Commissioners* [2012] UKSC 19, [2012] 2 AC 337

therefore be construed so as to enable Iveco to obtain relief in order to secure compliance with EU law, which does not accordingly involve this tribunal in making any policy decisions. The policy of the EU law is clear, and it should accordingly be given effect.

51. I consider that a conforming construction is most-effectively achieved in such a case as that of Iveco by simply giving no effect to regulation 38(5). In a case where a taxable person with a directly-effective right under article 11C(1) which arose prior to 1 January 1990 is unable to exercise that right by making an adjustment to his VAT account under regulation 38 by reason of regulation 38(5), regulation 38 is to be construed, in conformity with EU law, without regard to regulation 38(5).

52. The result of such a conforming construction is that a claimant such as Iveco may adjust its VAT account at any time, without any temporal restriction. There is no requirement for it to make the adjustment, for example, in the prescribed accounting period in which it made its claim. I do not consider that it is within the scope of the power of the tribunal, in construing regulation 38, to seek to impose any temporal restrictions of its own, in place of those in regulation 38(5). That, in my view, would trespass into the territory of policy-making, and thus be outside the scope of the *Marleasing* principle.

53. For these reasons I conclude that, to the extent that it has not done so already, Iveco may make an adjustment under regulation 38 of the 1995 Regulations to give effect to its directly-effective right to a reduction in the taxable consideration of its supplies, to the extent that it is shown that such a reduction should be made in consequence of the bonus payments made before 1 January 1990.

54. In view of my conclusion that regulation 38, construed to give effect to EU law, will provide a remedy for Iveco in respect of its claim, I do not need to consider whether any conforming interpretation of s 80 VATA is possible in this case. With the application of regulation 38, no reliance will require to be placed on s 80. Ms Mitrophanous argued that s 80 could be interpreted so as to enable taxable persons to claim for the VAT to be reimbursed by virtue of article 11C(1), subject to conditions which could legitimately include a time limit. I do not consider that, given a choice between a provision introduced specifically to give effect to adjustments under article 11C(1) which can readily be construed to give effect to Iveco's directly-effective right, and a provision of more general application, it would be the proper course to construe the more general provision. But even if I had done so, I would still have concluded that the overpayment could have arisen at the earliest when Iveco made its November 2011 claim, with the result that Iveco would now be able to make a claim under s 80 within the applicable time limit.

Jurisdiction

55. The submission of HMRC that if Iveco was right that its claim did not fall within s 80 VATA then this tribunal did not have jurisdiction to consider it, was based on the absence, prior to the hearing, of any indication from Iveco as to what, if any, other provision in domestic VAT legislation it sought to rely upon to give effect to its

claim. The question of jurisdiction must now be considered in the light of my conclusion as to the application of regulation 38 of the 1995 Regulations.

56. The tribunal's jurisdiction is governed by statute; in this case it is s 83 VATA which defines its jurisdiction. Two paragraphs of s 83(1) are relevant for this purpose:

> "… an appeal shall lie to the tribunal with respect to the following matters-
>
> …
>
> (b) the VAT chargeable on the supply of any goods or services …
>
> …
>
> (t) a claim for the crediting or repayment of an amount under section 80 …"

57. It is clear that, absent a claim under s 80 or a conclusion that s 80 applies, s 83(1)(t), which confers jurisdiction on the tribunal in that respect, is not applicable. The question therefore is whether s 83(1)(b) provides the necessary jurisdiction for the tribunal. For HMRC, Ms Mitrophanous argued that s 83(1)(b) relates to the question of what is the VAT chargeable on the supply of goods or services and might typically include the question what legislative exemptions apply. There was no question in this case as to the VAT chargeable; that was common ground, namely the VAT on the supply less any price reduction that Iveco proves.

58. For Iveco, Mr Hitchmough pointed to similar arguments on the part of HMRC that had been rejected by the VAT Tribunal in *GMAC*, which had concluded, at [17], that s 83(1)(b) covered an appeal with respect to an adjustment under regulation 38.

59. In my view, s 83(1)(b) is capable of encompassing appeals on all questions relating to the chargeability of supplies of goods and services. It is wide enough to include such questions arising from the direct application of a VAT Directive, in so far as those questions bear upon the chargeability of a taxable person to VAT, which includes questions as to the manner in which the domestic provisions may be applied, or construed in applying, to the proper charge to tax as provided for under either domestic or EU law.

60. In exercise of that jurisdiction, the tribunal may consider, as I have done in this case, whether effect can be given to a directly-effective EU right by a conforming construction of the VATA. In this case, the result of that process has been to conclude that Iveco may give effect to its claim through regulation 38. Although that regulation is not specifically referred to in s 83 VATA, in common with the VAT Tribunal in *GMAC*, I have no doubt that s 83(1)(b) is apt to provide this tribunal with jurisdiction in relation to regulation 38 adjustments.

61. The position would be different if the conclusion were reached that, despite the taxable person having a directly-effective right under the Directive, no remedy was available under the VATA, even given the "highly muscular" approach to interpretation that may be adopted. In those circumstances, the jurisdiction of the

tribunal would be limited to considering the extent of the directly-effective right and the effect of the VATA. The tribunal would have no power, in those circumstances, to give effect to the right of the taxable person. A remedy in those circumstances, such as by way of restitution, would have to be sought elsewhere.

62. I conclude, in summary, that this tribunal has jurisdiction to make all necessary findings for the purpose of this preliminary application.

Expiry of Iveco's EU law right

63. In light of my conclusions so far, HMRC's alternative argument, namely that if s 80 VATA does not apply, and that the tribunal has jurisdiction to consider Iveco's directly-effective right under EU law, that EU law right expired long before Iveco sought to exercise it, will fall to be determined.

64. As I indicated earlier, that is a question which the parties have agreed would better be resolved following consideration by the Court of Appeal of *GMAC/BT*. In relation to that issue, therefore, these proceedings are adjourned until the Court of Appeal has handed down its judgment in *GMAC/BT*, or until further direction.

Summary of conclusions on the preliminary issue

65. Save in relation to the question whether Iveco's EU law right has expired, the following are my conclusions on the preliminary issue:

(1) Section 80 VATA does not apply to Iveco's claim of 9 November 2011. Accordingly, the time limit for the making of such a claim contained in s 80(4) does not apply.

(2) Regulation 38 of the 1995 Regulations is to be construed, in the circumstances of Iveco's claim, without regard to regulation 38(5). Accordingly, Iveco may make an adjustment under regulation 38 to give effect to its directly-effective right under EU law in respect of any reduction to be made pursuant to article 11C(1) of the Sixth Directive consequent upon the making of bonus payments in the period 1 January 1978 to 31 December 1989.

(3) This tribunal has jurisdiction to determine this preliminary application.

Application for permission to appeal

66. As these proceedings are adjourned in relation to the issue of the expiry of Iveco's EU law right pending the judgment of the court of appeal in *GMAC/BT*, this preliminary issue has not at this stage been determined in all respects. Accordingly, time has not started to run in respect of an application for permission to appeal under rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009.

ROGER BERNER
TRIBUNAL JUDGE

RELEASE DATE: 6 December 2013