Appeal number: TC/2016/06518
TC/2017/05660

VALUE ADDED TAX – claim for overpaid VAT - whether claim made within time limit - whether conditions for valid claim met - alternative bad debt relief claim - whether claim made within time limit - whether debt was owed - whether debt written off

FIRST-TIER TRIBUNAL
TAX CHAMBER

FIRST AGENCY LIMITED **Appellant**

- and -

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

TRIBUNAL: JUDGE MARILYN MCKEEVER

Sitting in public at Taylor House, 88 Rosebery Avenue, London EC1R 4QU on 21 to 23 November 2017 and 6 March 2018

Mr Beyzade Beyzade, Counsel for the Appellant

Mr Ben Elliott, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

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DECISION

Introduction

1. This consolidated appeal concerns two alternative claims for relief by First Agency Limited ("FAL") in respect of VAT it says was overpaid by it in error on invoices submitted to its associated company, PPP Web Limited ("PPP"). FAL made an overpayment claim under section 80 Value Added Tax Act 1994 ("VATA") in the sum of £109,853. The original decision to refuse the claim was made on 5 July 2016 and, on review, the decision was upheld by a letter dated 21 October 2016. The Appellant appeals against the decision of 21 October 2016. The second element of this appeal relates to a refusal of a claim for bad debt relief in the sum of £38,655 in VAT made in period 05/17 and rejected by a letter dated 22 June 2017.

2. In each case, HMRC rejected the claims on the basis that they were out of time and, in any event, did not satisfy the conditions for the repayment to be made or the bad debt relief to be given.

3. I had before me several bundles of documents relating to the consolidated appeal, the bundles prepared for the earlier appeal on the section 80 VATA claim only (before consolidation) and a number of versions of a letter of 19 February 2016 and its enclosures, which, as we shall see, is a critical document. I also heard oral evidence, on behalf of HMRC, from Mr McDonnell, the officer who worked with the maker of the initial decision and from Mr Greenhough, the review officer. Oral evidence for the Appellant was given by Mr Obez who was the shareholder of PPP and at different times the director of PPP and FAL and Mr Gbotta, who was accountant to both companies. At the request of HMRC, Mr Obez's evidence was heard in the absence of Mr Gbotta and vice versa. Mr Obez is Belgian and his English was limited. He therefore participated in the proceedings via a French interpreter.

4. HMRC initially proposed to argue that the section 80 claim should be denied on the basis that the Appellant would be unjustly enriched, but it did not proceed with this argument.

The Law

5. The law is not in dispute and it will be convenient to discuss at this point how the VAT regime works in the present context and relevant provisions of the VATA and the Value Added Tax Regulations 1995 ("the Regulations").

6. Value Added Tax, as its name indicates, taxes the value added at each stage in the supply chain of a service or goods, with the tax ultimately being borne by the consumer. A supplier of services, such as FAL pays VAT (input tax) on the goods and services it buys and charges its customers, in this case PPP, the fee for the service plus VAT (output tax). The VAT paid by PPP is its input tax. When PPP invoices its customers (the "partners" referred to below), it charges its fees for its

services, plus VAT on that value. The VAT charged by PPP is its output tax. A VAT registered trader must account to HMRC for VAT. If its output tax is more than its input tax, it pays money to HMRC. If its input tax is more than its output tax, HMRC pays money to the trader. There is a symmetry to VAT transactions which must be maintained for the system to work.

7. If a trader claims a credit for input tax paid put does not actually pay the consideration within sixth months, the credit is disallowed, so it will have to pay more VAT (Section 26A VATA). In this situation, the supplier will already have paid over to HMRC the output VAT charged, corresponding to the customer's input VAT even though it has not received payment.

8. The supplier is entitled to claim Bad Debt Relief under section 36 VATA in order to obtain a refund of the VAT it has overpaid. There are conditions, and in particular, the supplier must have written off the debt in its accounts. Section 36, so far as relevant, provides as follows:

> **"36 Bad debts**
> (1) Subsection (2) below applies where—
> (a) a person has supplied goods or services . . . and has accounted for and paid VAT on the supply,
> (b) the whole or any part of the consideration for the supply has been written off in his accounts as a bad debt, and
> (c) a period of 6 months (beginning with the date of the supply) has elapsed.
> (2) Subject to the following provisions of this section and to regulations under it the person shall be entitled, on making a claim to the Commissioners, to a refund of the amount of VAT chargeable by reference to the outstanding amount. "

9. The time limits for a claim are dealt with in the Regulation 165A which provides:

> **"Time within which a claim must be made]**
>
> **[165A]**
> [(1) Subject to paragraph (3) [and (4)] below, a claim shall be made within the period of [4 years and 6 months] following the later of—
> (a) the date on which the consideration (or part) which has been written off as a bad debt becomes due and payable to or to the order of the person who made the relevant supply; and
> (b) the date of the supply.
> (2) A person who is entitled to a refund by virtue of section 36 of the Act, but has not made a claim within the period specified in paragraph (1) shall be regarded for the purposes of this Part as having ceased to be entitled to a refund accordingly."

10. Regulation 166 provides for the claim to be made in the VAT return

> "…save as the Commissioners may otherwise allow or direct, the claimant shall make a claim to the Commissioners by including the correct amount of the refund in the box opposite the legend "VAT reclaimed in this period on purchases and other inputs" on his return [for the prescribed accounting period in which he becomes entitled to make the claim or, … any later return]"

11. Regulation 167 sets out the evidence required.

> **"167**
> Save as the Commissioners may otherwise allow, the claimant, before he makes a claim, shall hold in respect of each relevant supply—
> (a) either—
> (i) a copy of any VAT invoice which was provided in accordance with Part III of these Regulations, or
> (ii) where there was no obligation to provide a VAT invoice, a document which shows the time, nature and purchaser of the relevant goods and services, and the consideration therefor,
> (b) records or any other documents showing that he has accounted for and paid the VAT thereon, and
> (c) records or any other documents showing that the consideration has been written off in his accounts as a bad debt"

12. Section 80 VATA ("Section 80") provides for the repayment of overpaid VAT and is supplemented by the Regulations.

13. Section 80, so far as relevant, provides:

> **"80 Credit for, or repayment of, overstated or overpaid VAT]**
> [(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….
>
> (2) The Commissioners shall only be liable to credit or repay an amount under this section on a claim being made for the purpose.
>
> (3) It shall be a defence, in relation to a claim [under this section by virtue of subsection (1) or (1A) above, that the crediting] of an amount would unjustly enrich the claimant.
> …
> [(4) The Commissioners shall not be liable on a claim under this section—
> (a) to credit an amount to a person under subsection (1) or (1A) 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;
> (c) in the case of a claim by virtue of subsection (1A) above in respect of an assessment issued on the basis of an erroneous voluntary disclosure, the end of the prescribed accounting period in which the disclosure was made;
> (d) in the case of a claim by virtue of subsection (1A) above in any other case, the end of the prescribed accounting period in which the assessment was made;

(e) in the case of a claim by virtue of subsection (1B) above, the date on which the payment was made.
In the case of a person who has ceased to be registered under this Act, any reference in paragraphs (b) to (d) above to a prescribed accounting period includes a reference to a period that would have been a prescribed accounting period had the person continued to be registered under this Act.

…
(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 [(and paragraph 16I of Schedule 3B and paragraph 29 of Schedule 3BA)], 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.]"

14. Regulation 37 sets out how a claim under section 80 is to be made:

"37
Any 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."

15. Regulation 25 requires a VAT registered trader to submit VAT returns each quarter. Regulation 31 lays down the records which a trader must keep in order to account for VAT, and in particular:

"31
(1) Every taxable person shall, for the purpose of accounting for VAT, keep the following records—
(a) his business and accounting records,
(b) his VAT account,
(c) copies of all VAT invoices issued by him,
(d) all VAT invoices received by him,…
and
(i) all credit notes, debit notes, or other documents which evidence an increase or decrease in consideration that are received, and copies of all such documents that are issued by him,"

16. The point to note is that the business and accounting records are something different from the VAT account. The form of the VAT account is prescribed by Regulation 32:

"32
(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."

17. The VAT account must include corrections made under Regulation 38.

18. Regulation 39 prescribes the link between the VAT account and the VAT return: the VAT return is completed using the specified figures from the VAT account.

"Calculation of returns

39
(1) Where a person is required by regulations made under the Act to make a return to the Controller, the amounts to be entered on that return shall be determined in accordance with this regulation.
(2) In the box opposite the legend "VAT due in this period on sales and other outputs" shall be entered the aggregate of all the entries in the VAT payable portion of that part of the VAT account which relates to the prescribed accounting period for which the return is made, except that the total of the output tax due in that period on acquisitions from other member States shall be entered instead in the box opposite the legend "VAT due in this period on acquisitions from other EC member States".
(3) In the box opposite the legend "VAT reclaimed in this period on purchases and other inputs" (including acquisitions from other member States) shall be entered the aggregate of all the entries in the VAT allowable portion of that part of the VAT account which relates to the prescribed accounting period for which the return is made.
(4) Where any correction has been made and a return calculated in accordance with these Regulations then any such return shall be regarded as correcting any earlier returns to which regulations 34 and 35 apply."

19. The final piece of the puzzle is Regulation 38 which sets out what must happen if there is an increase or decrease in the consideration for a supply which in either case includes VAT. The Regulation provides that *both* parties must make adjustments to their VAT account.

“Adjustments in the course of business

38

(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.

[(1A) . . .

(1B) . . .]

[(1C) Where an increase or decrease in consideration relates to a supply in respect of which it is for the recipient, on the supplier's behalf, to account for and pay the tax, the prescribed accounting period referred to in paragraph (1) is that of the recipient, and not the maker, of the supply.

But this paragraph does not apply to the circumstances referred to in regulation 38A.]

[(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) [Subject to paragraph (3A) below,] 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.

[(3A) Where an increase or decrease in consideration relates to a supply on which the VAT has been accounted for and paid by the recipient of the supply, any entry required to be made under paragraph (3) shall be made in the recipient's VAT account and not that of the supplier.]

(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.”

20. The adjustments under Regulation 38 must be made in period in which the decrease in consideration is given effect in the business accounts, not in the periods to which the original supply relates. “Decrease in consideration” is defined in Regulation 24 as follows:

> “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;”

21. This indicates that there must actually be a decrease in the amount paid, ie a repayment or credit against a debt owed to the supplier and a credit note is merely evidence of the payment or set off.

22. So the system should work as follows. FAL charges PPP £100 for its services and adds £20 VAT. FAL pays the £20 to HMRC. PPP deducts £20 against its output tax and pays only the net amount to HMRC. In a later period, FAL reduces the

consideration to £80 so the VAT should have been £16. FAL adjusts its business accounts/records, issues a credit note and repays £20 plus £4 VAT to PPP. Both companies make corresponding adjustments in their VAT accounts as required by Regulation 32. FAL reduces its output tax by £4 and PPP reduces its input tax by £4. These adjustments feed through to the VAT returns and FAL pays £4 less in VAT to HMRC in that quarter and PPP pays £4 more. The symmetry is maintained. If FAL reduced its output tax, but PPP did not increase its input tax, FAL would get the £4 back from HMRC and HMRC would be out of pocket.

23. In the ordinary course, there should be no need for a section 80 VATA claim because the adjustments in consideration are reflected in the VAT return for the quarter in which they are made.

24. In the present case, FAL states that following the discovery of an error, it and PPP agreed a decrease in the consideration for FAL's supplies in February 2012, they adjusted their VAT accounts in accordance with Regulation 38, but the adjustments were not carried through to the VAT returns in accordance with Regulation 39. Therefore, FAL paid too much VAT in the 02/12 quarter. Despite having discovered the error, it was perpetuated in the VAT return for the 05/12 quarter and VAT was overpaid then also. FAL subsequently made a claim under section 80 VATA for repayment of the VAT overpaid.

The Appellant and PPP: how the claim arose

25. Mr Obez was the sole shareholder of PPP. He was also director of the company from 24 September 2004 to 28 July 2008 and again from 22 February 2012 until PPP's dissolution in November 2012. Mr Obez's business partner and friend, Mr David Lieven was the sole shareholder of FAL. Mr Lieven had also been a director of FAL, but Mr Obez became the sole director of FAL on 11 March 2011 because of Mr Lieven's ill health.

26. FAL provided payment handling services to PPP which was in the adult entertainment industry. PPP worked with "partners"; performers who posted live and recorded performances on the internet. Customers would access the website through premium telephone numbers. FAL collected payments from the telecommunications companies for onward payment to PPP and charged PPP a commission for this service which was subject to the standard rate of VAT. The payments collected were passed to the partners, subject to PPP's commission.

27. PPP and FAL entered into a Service Agreement on 15 October 2010 ("the Agreement"). The payment terms were set out in the "Service Level Schedule" to the Agreement. Commission was to be reviewed every accounting period and for each of 2010 and 2011 was stated to be simply "20% Commission". The Schedule also provided "First Agency Limited will collect money on behalf of PPP Web Limited. First Agency Limited will withhold an amount equivalent to its commission from PPP Web Limited's funds and will invoice PPP Web Limited for this commission." There was no mention of PPP's commission which was payable by the partners. On the face of the Agreement, FAL was to retain for

itself 20% of the payments received from the telecommunications companies by way of commission and pay the rest to PPP.

28. In fact, FAL paid the whole of the payments received to PPP without deducting any commission. Mr Obez was asked repeatedly why the Appellant failed to deduct its commission as it was entitled to do and he repeatedly evaded the question.

29. The Appellant invoiced PPP for the commission and accounted for VAT on it at the standard rate. FAL paid VAT to HMRC on the basis of the invoices. PPP accounted for VAT on the basis that it was paying the commission but the Appellant's case is that PPP did not in fact pay the commission it owed. If this was the case, PPP was in breach of section 26A VATA.

30. PPP got into financial difficulties. PPP did not charge the partners VAT on its commissions when it should have been accounting for VAT at the standard rate. It therefore chose to treat the commissions as a VAT inclusive amount which meant the actual charge was insufficient to cover costs. Mr Obez's witness statement indicated that had PPP charged VAT in addition, its charges would have been uncompetitive.

31. HMRC began an investigation into PPP's VAT affairs in 2010.

32. The Appellant's case is that around 20 February 2012, Mr Gbotta discovered that FAL had made a mistake in the amount of commission it had charged PPP. He said that it was discovered that FAL had been charging 20% of the total receipts, when it should have been charging 20% of PPP's commission which was itself a percentage of the receipts. PPP's commission from the partners was 28.5%. So, if the Appellant collected £100 from the telecommunications companies, it said it should have charged 20% of the commission, ie £5.70, not 20% of the total, ie £20, which it had been charging.

33. There was correspondence between FAL and Mr Gbotta dated 28 February 2012 referring to an agreement to reduce the "overstated commission" and stating that it included revised invoices and credit notes.

34. On 17 April 2012, Mr Obez, as owner of PPP, sent an email to Mr Lieven, as owner of FAL, stating that PPP was unable to continue to pay the commissions owing to a shortage of money and that "I will certainly be obliged to close down PPP very soon". On 9 July 2012, Mr Obez applied for PPP to be struck off the companies register and the company was dissolved on 6 November 2012.

35. By a letter dated 23 August 2012 Mr Gbotta informed Mr Leonard, the HMRC officer dealing with the VAT investigation into PPP at the time, that owing to an error by the bookkeeper, the commissions had been wrongly calculated and, as a result, FAL had, for several years, been overpaying VAT. Mr Gbotta said that PPP's commission (from the partners) was 35% (not 28.5% as stated by Mr Obez in his witness statement) and FAL should have been receiving 20% of this ie 7%

of the total receipts, not 20 % of the total receipts, resulting in VAT overdeclarations by FAL and under-declarations by PPP.

36. By a letter dated 19 August 2013, Mr Gbotta made a VAT repayment claim on behalf of FAL in the sum of £109,856.92.

37. There were significant delays in pursuing the investigation. In August 2013 and October 2014 FAL made formal complaints about the delays. That HMRC had been responsible for delay was acknowledged in the letter from HMRC's complaints team dated 10 March 2016.

38. The Appellant argues that further delays had also resulted from HMRC initially taking the view that FAL was acting as principal and had not accepted the VAT treatment of the payments between the companies. It was not until July 2015 that HMRC accepted that FAL was a disclosed agent for PPP.

39. The claim for overpaid VAT was ultimately rejected by Mr O'Neill, who had taken over from Mr Leonard, by a letter dated 28 October 2015. Mr O'Neill's decision was based on the following matters

- No credit notes had been issued by FAL to PPP.
- There was no evidence that PPP had reduced its VAT account to adjust for the overcharge
- There was no evidence that FAL had actually repaid the overpaid VAT to PPP.

40. FAL appealed the decision and requested a review on 27 November 2015.

41. Mr Bird issued his review decision on 11 January 2016. He allowed part of the claim for £9,000 which related to VAT incorrectly charged under the reverse charge scheme and upheld the decision to refuse the rest of the claim. The £9,000 had not been included in the above figure, so the reclaim remained at £109,856.92. Mr Bird mentioned the possibility of making a further claim and raised the possibility of making a bad debt relief claim.

42. Mr Obez accepted that decision on 21 January 2016. His email stated "…I write to tell you that I am satisfied and agree with your decision on the use of the ECN [Error Correction Notice]".

43. In an email of 26 January 2016, Mr Bird referred to the time limits for an error correction notice and again mentioned the possibility of a bad debt relief claim. Mr O'Neill emailed Mr Obez on 12 February 2016 referring to the time limits, the evidence that was needed and providing a link to information about making a bad debt relief claim.

44. On 19 February Mr Obez sent a letter to HMRC sending certain documents. I discuss below the issue of exactly what was sent and I will refer to this letter as “the February Letter” or “the Letter”. It is acknowledged that this letter was received or deemed to be receive by HMRC before 29 February 2016.

45. On 23 February 2016, Mr Obez emailed Mr O’Neill stating that he wished “to submit an Error Correction Notification in respect of the Regulation 38 adjustment for the overcharged VAT”. Mr O’Neill acknowledged receipt of the “credit notes and other documents” on 1 March and asked “could you also advise as to when you intend to to submit the Error Correction Notification as I have not as yet received this form”. Mr Obez responded that he was not aware of any specific form and thought “my email, the documentations submitted together with summary of the claim could be taken as submission of the Error Correction Notification”. Mr O’Neill sent a link to the form on 4 March 2016.

46. The Error Correction Notice (“ECN”), form VAT 652, claiming £109,853 was submitted under cover of a letter from Mr Gbotta dated 13 March 2016 which was received by HMRC on 11 April 2016. Mr O’Neill refused the claim on 5 July 2016 on the grounds that the requirements of Regulation 38 had not been complied with and, in relation to the bulk of the claim which related to VAT periods up to that ending 02/12, it was out of time. Mr Gbotta on 12 July 2016 and Mr Obez on 15 July 2016 appealed this decision and requested a review. Mr O’Neill’s decision was upheld by Mr Greenough on 21 October 2016 and on 24 November 2016 FAL’s appeal was received by the Tribunal.

47. In April 2017, FAL sent HMRC its list of documents which included an unaddressed and unsigned letter dated 1 March claiming bad debt relief of £38,665.60. FAL also claimed a repayment in respect of the bad debt relief of £38,655 in its VAT return for the period ended 05/17. The relief was refused on 22 June 2017 on the grounds it was out of time. HMRC did not consider the substantive claim in detail, but commented that there was no evidence to show that the debt had been written off in FAL’s day to day accounts. FAL appealed this decision to the Tribunal on 8 July 2017.

48. The appeals have been consolidated and I have considered both the claim for overpaid VAT and the alternative bad debt relief claim.

The Strike out application

49. Mr Bayzade’s skeleton argument was dated 8 November 2017, two weeks before the hearing commenced. It contained a number of new grounds of appeal. The Respondent objected to the introduction of the new grounds and applied to have those new grounds struck out on the basis that they had no reasonable prospect of success. The new grounds relate to the question of time limit. As set out in paragraphs 46 and 47 above, both the overpayment claim and the bad debt relief claim were rejected as being out of time.

50. The Appellant maintains that the respective claims were made in time, but if the Tribunal finds that they were not:

- The Appellant acknowledged that the Tribunal did not have jurisdiction to extend the statutory time limits, but
- The Tribunal should find that in the circumstances of this case, time did not begin to run until July 2015; or
- That there is a common law remedy outside section 80 VATA enabling the Appellant to recover the overpaid amount; or
- Section 80 VATA breaches the EU Principle of Effectiveness in the circumstances of this case providing scope for extending the time limit.

51. HMRC did not accept any of these contentions and to the extent that the Appellant may have an alternative claim, eg in restitution, argues that the Tribunal does not have jurisdiction to consider it.

52. The Tribunal has discretion to strike out the whole or part of a party's case under Rule 8(3)(c) if the Tribunal considers that there is no reasonable prospect of the appellant's case or part of it succeeding. So the appellant has to persuade the Tribunal that it has an arguable case. In this case, the strike out application relates only to the additional grounds of appeal set out above. I heard argument on this point on the first day of the hearing as a preliminary issue as, if the grounds were to be allowed, it would have had a significant impact on the amount of evidence to be presented.

53. These alternative grounds are only relevant if either or both of the substantive claims are indeed out of time.

54. I begin by noting that section 80 (7) VATA provides that *"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."* So the starting point is that a section 80 overpayment claim is the Appellant's only remedy. Of course, section 80 must be compatible with EU law.

55. The Principle of Effectiveness is described in the EU case of *Marks & Spencer plc v Customs and Excise Commissioners* (Case C-62/00 [2003] QB 866).

> "It should be recalled at the outset that in the absence of Community rules on the repayment of national charges wrongly levied it is for the domestic legal system of each member state to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from Community law, provided, first, that such rules are not less favourable than those governing similar domestic actions (the principle of equivalence) and, secondly, that they do not render virtually impossible or excessively difficult the exercise of rights conferred by Community law (the principle of effectiveness): see, inter

alia, *Aprile Srl v Amministrazione delle Finanze dello Stato (No 2) (Case C-228/96) [2000] 1 WLR 126, 148* , para 18; ***890** Dilexport [1999] ECR I-579, 611* , para 25 and *Metallgesellschaft [2001] Ch 620, 663* , para 85.
35 As regards the latter principle, the court has held that in the interests of legal certainty, which protects both the taxpayer and the administration, it is compatible with Community law to lay down reasonable time limits for bringing proceedings: *Aprile* , paragraph 19, and the case law cited therein. Such time limits are not liable to render virtually impossible or excessively difficult the exercise of the rights conferred by Community law."

56. Each member state can determine its own rules for safeguarding the rights granted by EU law. A member state may impose time limits within which such rights must be exercised, but it will be a breach of the principle of effectiveness if such time limits render it "impossible or excessively difficult" to exercise the rights conferred by EU law.

57. Mr Bayzade agrees that a four year time limit is not, of itself, a breach of the principle. Indeed, the *Marks & Spencer* case confirmed that a three year period was acceptable and other cases have held that a two year or even a 90 day time limit is consistent with the principle of effectiveness. See *Banca Antoniana Popolare Veneta SpA* (Case C-427/10 [2012] STC 526 and *Recheio Cash and Carry SA v Fazenda Publica/Registro Nacional de Pessoas Collectivas* (Case C-30/02 [2006] 3 CMLR 32) (the "Italian bank case"). He submitted however that the length of the time limit is not the end of the matter and that the principle of effectiveness can override the need for legal certainty (achieved by the imposition of time limits) as indicated by this Tribunal in *Vodaphone Group Services Ltd v HMRC* [2014] UKFTT 701 (TC).

58. Mr Bayzade submits that the Italian bank case establishes that conditions imposed by a member state for a taxpayer to reclaim VAT must be consistent with the principle of effectiveness, that any time limits must not make it "impossible or excessively difficult" for the claim to be made so that the time limits must not prevent the taxpayer from reclaiming overpaid VAT from HMRC.

59. In that case, a supplier (the Bank) had made supplies to its customers on the basis that they were subject to VAT The Italian revenue authority subsequently changed its mind about the VAT treatment of the supplies and the customers obtained a refund from the Bank of the amounts paid which were not due under Italian civil law. The Bank was out of time to reclaim the overpaid VAT from the Italian tax authority. The European Court held that the mismatch between the civil law limitation period and the tax reclaim period did not breach the principle of effectiveness. The Court held that there was a breach where the VAT rules had the effect of "totally depriving the taxable person of the right to obtain from the tax authority a refund of the VAT paid but not due, which the taxable person had himself had to pay back to the recipient of his services".

60. It is important to note that this was in the context of the tax authority having changed its view with retrospective effect. That is to say, when the circular which announced the change of view was issued, payments made more than two years

before that date were already out of time, which, immediately before the issue of the circular would have been in time. In these circumstances, the Bank clearly had been totally deprived of its right to reclaim the VAT. The Court set out the consequences of this. At paragraph 31 of its. Judgement it said:

> "31. Likewise, the court has held that a national authority may not rely on the expiry of a reasonable time limit if the conduct of the national authorities, combined with the existence of a time limit, means that a person is totally deprived of any possibility of enforcing his rights before the national courts (see, by analogy, *Q-Beef and Bosschaert* (para 51))."

61. Mr Bayzade submits that this indicates that the *conduct* of the tax authority is relevant to the application of the time limits. He further argues that this case is analogous with the Italian Bank case in that HMRC failed to accept the correct position of the Appellant until 2015 and that these delays hampered the Appellant's efforts to bring the section 80 claim. This mistake and the delays which were acknowledged by HMRC should enable the question of the reclaim to be re-opened retrospectively and it followed that time should run from 2015 when HMRC acknowledged their mistake.

62. The EU Court went on to say at paragraphs 40 and 41:

> "40. However, it should be observed that it was not until the circular of 26 February 1999 that it became clear that the tax authority, which is the administrative authority responsible for ensuring that the relevant legislation is applied, expressly stated that the consortium contributions were fiscal in nature
> *[2012] STC 526 at 543*
> and that, accordingly, the payments owed by the consortia should be regarded as exempt from VAT for the purposes of art 10(5) of DPR No 633/72. As a consequence, such a circular retroactively reopened the question whether transactions consisting in the collection of those contributions were subject to VAT.
> 41. In such a situation, the tax authority must take account of the particular situations of the economic operators and, where appropriate, provide for adjustments to the way in which its new legal assessments of those transactions are applied (see, to that effect, *Plantanol GmbH & Co KG v Hauptzollamt Darmstadt* (Case C-201/08) [2009] ECR I-8343, para 49)."

63. Mr Beyzade submits that this means that HMRC should have made adjustments to the way in which it applied its new view. Whilst accepting that the provision of Regulation 38(2) are mandatory, HMRC could have made allowance for the fact that this was an insolvency situation, for example by taking steps to obtain the accounts of PPP as FAL could not seek the accounts from the company as it no longer existed. He argues that HMRC's failure to make such adjustments meant that FAL's claim could not reasonably have been made any earlier than it was and to start time running any earlier than July 2015 was to breach the principle of effectiveness.

64. Mr Beyzade referred to the case of *Investment Trust Companies v Revenue and Customs Commissioners* [2017] 2 WLR 1200 as a case where the Supreme Court had held that an insolvency situation could make it "impossible or excessively difficult" to reclaim VAT from HMRC. There would accordingly, breach the

principle of effectiveness and that there must therefore be an alternative remedy to enable the reclaim. Lord Reed said, at paragraph 91:

> "**[91]** The court has accepted that, in principle, a system under which only the supplier is entitled to seek reimbursement of VAT from the tax authorities, and the consumer can seek restitution from the supplier, meets the requirements of EU law: *Reemtsma,* para 39. The court added one caveat:
> "[I]f reimbursement of the VAT becomes impossible or excessively difficult, in particular in the case of the insolvency of the supplier, those principles may require that the recipient of the services to be able to address his application for reimbursement to the tax authorities directly." (*Reemtsma,* para 41).
> **[92]** This approach has been applied and restated in later cases. In the *Danfoss* case, the Court of Justice put the matter in this way:
> "27. It follows that a member state may, in principle, oppose a claim for the reimbursement of a duty unduly paid made by the final consumer to whom that duty has been passed on, on the ground that it is not that consumer who has paid the duty to the tax authorities, provided that the consumer - who, in the final analysis, bears the burden of that duty - is able, on the basis of national law, to bring a civil action against the taxable person for recovery of the sums unduly paid.
> 28. However, if reimbursement by the taxable person were to prove impossible or excessively difficult - in particular, in the case of the insolvency of that person - the principle of effectiveness requires that the purchaser be able to bring his claim for reimbursement against the tax authorities directly and that, to that end, the member state must provide the necessary instruments and detailed procedural rules."
> In these passages, the insolvency of the taxable person is given as an example of circumstances where reimbursement by that person might prove impossible or excessively difficult, and where the principle of effectiveness would therefore be infringed. It is the most likely example to arise in practice, but it cannot be treated as necessarily exhaustive. The governing principle of effectiveness means that the purchaser must, in principle (and subject to procedural rules which are compatible with the principle of effectiveness, such as reasonable limitation periods), be able to recover from the member state where reimbursement by the taxable person would be impossible or excessively difficult."

65. Mr Beyzade argues that this case supports the proposition that if FAL cannot make a claim against PPP because PPP is insolvent, then the principle of effectiveness requires that it must have a remedy against HMRC. Whilst he recognised that section 80 itself says that there is no remedy outside section 80, the principle of effectiveness has direct effect in UK law and so the tribunal has jurisdiction to apply it.

66. In summary, the Appellant argues that in the circumstances of this case, the insolvency of PPP and the delays by HMRC and their refusal to acknowledge the correct relationship between FAL and PPP until July 2015 means that the tribunal should relax the statutory requirements in order to give effect to the principle of effectiveness. In particular, the time limit should be extended, or the tribunal should find that time did not start to run until HMRC agreed the position in July 2015. Further, HMRC should have made procedural adjustments in relation to the entries in PPP's accounts and in failing to do so, and in delaying dealing with the matter, it prevented the claim being made any earlier than it was and to start time at the statutory point would breach the principle.

67. HMRC start from the position that a four year time limit is clearly compatible with the principle of effectiveness as confirmed in *Marks & Spencer* and the Italian Bank case.

68. Mr Elliott went on to argue that to the extent that the Tribunal was being asked to apply some other remedy, such as restitution or to find that time did not start to run until a later date, it had no jurisdiction to do so.

69. The Italian Bank case and *Marks & Spencer* were cases dealing with retrospective changes in the time limits and the courts took a different view in relation to prospective changes.

70. FAL knew all the facts in 2012. They had the relevant evidence and figures at all times and did in fact make a claim. The claim was refused because FAL had failed to provide evidence that it satisfied the conditions under Regulation 38.

71. The fact that the Appellant and HMRC took different views of the position did not make it "impossible or excessively difficult" for the Appellant to make a claim. It could have appealed to the Tribunal at any time. The case of *Leeds City Council v Revenue and Customs Commissioners* [2015] EWCA Civ 1293 concerned an EU Directive which had been wrongly implemented in UK law. HMRC. The Council had paid output VAT on certain supplies in accordance with HMRC's view at the time. HMRC changed its view and was prepared to repay the VAT which had been wrongly paid by a time limit. The Council were not aware of this and made a late claim arguing that the principle of effectiveness had been breached. The Court of Appeal rejected the challenge to the time limits. Lord Justice Lewison said:

> "40. I can return, then, to the points on which Mr Ghosh relies as necessitating a relaxation of the limitation period in Leeds' particular case.
>
> 41. So far as the first point is concerned, it is clear as a matter of EU law that the fact that a member state has not properly transposed a Directive does not preclude the taxing authorities of that state from relying on a limitation period against a person asserting a directly effective EU right: (Case C-188/95) *Fantask A/S v Industriministeriet (Erhverministeriet)* [1997] ECR 1-6783 at [52]. That case concerned a provision in a Directive that had been wrongly transposed, rather than a case in which a provision had not been transposed at all. Mr Ghosh says that in principle there can be no difference between the two cases. Mr Macnab agrees, and so do I. There is nothing in this point.
>
> 42. So far as the second point is concerned, article 4.5 may indeed be difficult to understand or to apply. I express no view one way or the other. But the fact that a piece of European legislation is difficult to understand or apply cannot justify an extension of the limitation period. If the meaning of a piece of European legislation is unclear it can be referred to the CJEU which sometimes manages to clarify its meaning. If and in so far as there was a perceived problem it arose because of uncertainties about the law, and had nothing to do with any shortcomings in domestic procedure for claims for repayment of VAT.

43. So far as the third point is concerned, there is no rule of EU law requiring the running of a limitation period to be deferred until the existence of a right to recover the payment has been judicially established. It is not uncommon for a claim to repayment to have become time-barred in national law while proceedings are still in progress to determine whether the member state was in breach of EU law: *FII* at [151] (Lord Sumption). Thus the fact that HMRC advanced a view of the law which is now conceded to be wrong does not preclude reliance on the limitation period. If a taxpayer is dissatisfied with HMRC's view of the law, the proper course is to appeal to the appropriate tribunal. That course has always been open to Leeds. Mr Ghosh accepted that not every contested case would justify an extension of the limitation period. Ignorance of one's legal rights is not a ground for disapplying a limitation period: *British Telecommunications plc v HMRC* [2014] EWCA Civ 433, [2014] STC 1926 at [106] and [123]. But Mr Ghosh argued that he was complaining not merely that HMRC were wrong, but that they had thrown Leeds off the scent by failing to mention article 4.5 at all and focussing on what turned out to be legally irrelevant arguments. I cannot see that this makes any difference. The provisions of the Sixth Directive were readily available and were (and were known to be) directly effective. If (as was the case) HMRC were barking up the wrong tree, Leeds could readily have identified the right tree: *British Telecommunications plc v HMRC* at [123]. Mr Ghosh suggested that there was a difference between a case in which HMRC's erroneous view of the law was rejected by a tax tribunal, and a case in which HMRC acknowledged the error of their ways without such a ruling. In the former case there would be no warrant for any extension of the limitation period, but in the latter case there would. I reject that submission, which would have the consequence that HMRC would be compelled to defend what they knew to be their own erroneous interpretations in the tax tribunals, merely for the sake of not having to concede an extension of the limitation period….

46. If a limitation period were held to apply only to ill-founded claims it would serve very little purpose. It must follow that it is permissible for claims that are well-founded in law to be barred for limitation reasons alone. Moreover the principle of effectiveness means not that it must be easy to obtain a remedy, but that it must not be "excessively difficult" to do so. Where, as in the UK, there is a specialist tax tribunal system whose principal purpose is to allow the taxpayer to challenge decisions by HMRC I cannot see that it is "excessively difficult" to obtain a remedy"

72. The most important point here are that the fact that the right to repayment has not been judicially established does not prevent time from running. If the Council disagreed with HMRC's interpretation of the law the proper course is to appeal to the Tribunal. The time limit was not to be disapplied because the Council was ignorant of its legal rights.

73. The Court emphasised that the principle of effectiveness did not require it to be easy to pursue a remedy; but that it must not be "excessively difficult" to do so. Where the taxpayer has recourse to the tribunal to challenge HMRC's decisions, it is not excessively difficult to obtain a remedy.

74. The Upper Tribunal case of *Bratt Auto Contracts Limited v Revenue and Customs Commissioners* [2016] UKUT 90 (TCC) is of critical importance in the substantive matters in this case and I will return to it below. That case also concerned whether the Appellant had made an effective claim under section 80 VATA within the time limit. The Appellant argued that the fact that they could not obtain the information required to make the claim in the proper form breached the principle of effectiveness. The tribunal rejected this, saying:

> "We do not think there is anything in Mr Bridge's argument about effectiveness and purposive interpretation which changes that conclusion. We can accept that BAS and BAC were, in the particular circumstances of their case, unable to assemble the requisite information necessary for them to make a fully compliant claim before the expiry of the time limit but, as Mr Hill rightly said, the position in which they found themselves thereafter is no more than the ordinary consequence of its expiry. In other words, an effective remedy was available to the taxpayers but they failed to exercise it in time."

75. Mr Elliott pointed out that in this case, the Appellant *did* have the information to enable it to make a compliant claim. Indeed they ultimately did do so.

76. In relation to the argument that HMRC should have made "adjustments" to deal with PPP's insolvency by obtaining the information from PPP to support FAL's claim, Mr Elliott submits that it is not for HMRC to prove the taxpayer's claim. PPP and FAL were under related ownership and control and had the same accountant and the information would have been available to the Appellant in any event. Further, as PPP became insolvent in 2012 and FAL did not make the first claim until 2013, it would have required HMRC to make enquiries at the time in connection with a claim that had not yet been made.

77. As regards the comments in *Investment Trust Companies,* Mr Elliott pointed out that the Supreme Court found there was no breach of the principle of effectiveness as the claimants in that case had a right of restitution against their suppliers. The fact they did not have a direct remedy against HMRC did not therefore breach the principle of effectiveness.

78. In summary, HMRC argue that the time limit of four years does not, of itself, nor in the context of this case, breach the principle of effectiveness. The case law referred to above shows that the fact that the fact a taxpayer does not know they have a claim, or disagrees with HMRC about the law does not prevent the time limit applying. To the extent that HMRC might have caused delays or disagreed with FAL about the position, it did not make it "excessively difficult or impossible" for FAL to pursue an effective remedy. The tribunal has no jurisdiction to consider an alternative claim such as restitution or any other common law remedy, nor does it have jurisdiction to extend the time limit or defer the point at which time starts to run.

Discussion of the strike out application

79. It is clear that the Tribunal has no jurisdiction to consider any alternative common law remedies which might be available to the Appellant.

80. It is also clear that the tribunal has no jurisdiction to extend the time limit for a section 80 claim or to defer the starting point for time to run.

81. Equally, section 80 itself, with its four year time limit, provides an effective remedy by which FAL can exercise its right to repayment of overpaid VAT conferred by EU law.

82. The question therefore is whether there is any scope for an argument that on the facts of this case it is "impossible or excessively difficult" for FAL to pursue its remedy.

83. I am unable to find any analogy between the cases which Mr Bayzade took me to and the present case. In *Marks & Spencer* and the Italian bank case, the revenue authorities changes the law with retrospective effect. That is to say, at the time when the law/the view of the law changed, claims which would have been in time under the old rules automatically became time barred under the new rules. Such action clearly makes it "impossible" to enforce the claims and breaches EU law. Those cases, also make it clear that a prospective change in time limits is compatible with EU law. In *Leeds City Council*, HMRC changed their view of the law but included transitional rules to allow time for affected taxpayers to reclaim the VAT they had wrongly paid in the past.

84. The reference in the Italian bank case to the proposition that the "conduct" of a revenue authority must not make it impossible or excessively difficult to enforce a right within the time limit is referring to the retrospective nature of their actions. The conduct must totally deprive the taxpayer of the ability to enforce their rights. That is not the situation here. HMRC's delays and their refusal to acknowledge the basis of FAL's claim until 2015 cannot be equated with the Italian authority's retrospective change of view. FAL at all times had the ability to take its case to the tribunal.

85. The reference to the need to make "adjustments" is referring to the need to introduce transitional rules to give additional time for taxpayers to make claims which arose before the retrospective change in rules. It cannot require HMRC in this case to take account of the fact that PPP is insolvent by providing the accounts of one taxpayer (PPP) to another (FAL). Nor can it be said that FAL could not reasonably have brought its case before it did.

86. Mr Bayzade also sought to argue, on the basis of *Investment Trust Companies* that as FAL could not make a claim against PPP as it was insolvent, the principle of effectiveness required that it had an alternative remedy against HMRC.

87. The situation in *Investment Trust Companies* was very different from FAL's. In that case, the claimants were the *customers* of the taxable person-their supplier.

They had been overcharged VAT and sought to recover the excess VAT paid from HMRC. The section 80 mechanism deals with reclaims by a supplier of excess VAT charged to a customer and there is no mechanism in the VATA for the customer to reclaim the overpaid VAT from HMRC. The Supreme Court held that there was no breach of he principle of effectiveness because the claimants had an effective remedy against the supplier, namely restitution. The court did contemplate the possibility of an exceptional right of recovery against HMRC in circumstances where the insolvency of the supplier might make it "impossible or excessively difficult" for the customer to recover the VAT from the supplier. That is the opposite of this case. The fact that PPP was insolvent does not prevent FAL having an effective remedy by making a claim against HMRC under section 80. The VATA provides a further, alternative, remedy by way of bad debt relief where a customer is insolvent or in financial difficulties. So a supplier has two possible remedies for recovering overpaid VAT from HMRC, one of which specifically relates to a customer in financial difficulties.

88. *Bratt* indicates that even if the taxpayer cannot produce the information necessary to make a valid claim within the time limit, it does not breach EU law. In this case, it is clear that FAL did have the information as it did in fact make a claim, initially in 2013 and subsequently in 2016.

89. *Leeds City Council* makes clear that there is no breach of the principle of effectiveness where there is a remedy but the the taxpayer does not know about the time limits or disagrees with HMRC's view of the law. In this case, the Appellant knew of the time limit. The suggestion by the Appellant that they could not put in a claim until the the position had been agreed with HMRC cannot be sustained. The fact they disagree with HMRC does not prevent them from exercising their EU right to reclaim overpaid VAT based on their own view of the position. The purpose of the tribunal system is to resolve disagreements between taxpayers and HMRC. As *Leeds City Council* confirms, there is an effective remedy.

Decision on the strike out application

90. The provisions of section 80 VATA and the bad debt relief provisions in section 36 VATA provide a supplier with an effective remedy to reclaim overpaid VAT, even where their customer is insolvent. The four year time limits are compatible with EU law.

91. None of the insolvency of PPP, the delays by HMRC or the refusal of HMRC to accept the basis of the claim affect the availability of those remedies. The availability of an appeal to the tribunal means that the rights can be effective enforced.

92. For the reasons set out above, I have concluded that there is nothing in sections 36 or 80 VATA nor anything arising out of the circumstances of this case which have made it "virtually impossible or excessively difficult" for FAL to exercise

its right to repayments of overpaid VAT. It is clear there is no breach of the EU principle of effectiveness.

93. It is equally clear that the tribunal has no jurisdiction to extend the four year time limit, start time running at a later date or consider an alternative remedy against HRMC under common law.

94. I find that the Appellant's arguments to the contrary have no reasonable prospect of success and grant the strike out application.

The Section 80 time limit issue

95. I now turn to the substantive issues in the case. HMRC's principle argument is that the Appellant's claim was out of time. The four year time limit imposed by section 80 started to run at the expiry of the 02/12 VAT period, so that the repayment claim had to be made by 29 February 2016 at the latest. The Appellant argues that the claim was made in a letter dated 19 February 2016. HMRC argue that that letter did not constitute a valid claim and a valid claim was not received until 11 April 2016 under cover of a letter dated 13 March 2016.

96. I start by returning to the case of *Bratt Auto Contracts Limited and another v Revenue and Customs Commissioners* [2016] UKUT 90 (TCC) in which the Upper Tribunal considered the requirements for a valid claim under section 80 VATA. In that case, the taxpayers were two associated companies and one of the companies, Bratt Auto Services Limited submitted a claim for the recovery of VAT which, it said, it had incorrectly accounted for. The claim was made by letter and was sent one day before the expiry of the statutory deadline. The letter calculated the claim as a global figure for the year 1989 but did not calculate the specific amounts for particular accounting periods within the year. HMRC rejected the claim on the grounds that they did not meet the requirements of section 80 and Regulation 37. The tribunal, Warren J and Judge Bishopp held:

> "The critical point is that s 80(2) requires a claim to be made, while s 80(6) requires the claim to be 'made in such form and manner' as may be prescribed; as we have said, the prescription appears in reg 37. In our view, these provisions taken together mean that a claim can be treated as a claim only if it satisfies the requirements of form and manner which are prescribed. There is no room within reg 37 for a claim to be made, without the specification of an amount or the method of calculation, but upon the basis that they will be provided later. … compliance with the reg 37 requirements is mandatory, and accordingly that a claim which does not
> *[2016] STC 1463 at 1474*
> satisfy those requirements is not a claim within the statutory meaning. … It is clear that sub-s (1) is directed at an amount for which the taxpayer has accounted as output tax but which was not output tax due for a single prescribed accounting period. It is impossible to read the subsection in any other way. Subsection (2) then provides for a claim for repayment of 'an amount under this section'; we agree with Mr Hill that the 'amount' referred to here must be the same amount' as is mentioned in sub-s (1). Thus although, as Roth J said in *Reed Employment*, it is possible to make claims relating to several prescribed accounting periods, by sending a letter or by voluntary disclosure, the taxpayer must comply with s 80(6) and reg 37 in respect of each period. Even if

the overall claim relates to several prescribed accounting periods a separate claim must be made for each such period, identifying that period, the amount for which repayment is sought and the method by which it has been calculated."

97. The reason for this requirement was explained as being that it is necessary in order to determine whether a particular claim has been submitted within the time limit. It also has implications for interest payable on a repayment.

98. After the date of the hearing, the Court of Appeal delivered its judgement in *Bratt* ([2018]EWCA Civ 1106), upholding the decision of the Upper Tribunal. Lord Justice Floyd, with whom the other Lords Justices agreed said:

> "24. It is true that regulation 37 does not, as the FTT held, expressly spell out the requirement that the claim must be made by reference to prescribed accounting periods, but it is clear in my judgment that such a requirement exists. The power under section 80(6) to make regulations is only for "claims under this section", and such claims can only be claims to establish HMRC's liability to credit the taxpayer with the amount of output tax which he has brought into account for a prescribed accounting period which is not output tax due. The "claim" must therefore be made by reference to the prescribed accounting period, and the "amount" of the claim in question must be the amount of the credit claimed for that period.
>
> …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. …
>
> 29. I think that HMRC's interpretation is supported by subsections (4) and (4ZA). Those subsections set a time limit for "a claim under this section" which runs from "the relevant date". In the case of a claim made by virtue of subsection (1) the relevant date is "the end of the prescribed accounting period mentioned in that subsection" (subject to an exception in the case of an erroneous voluntary disclosure). In connection with a claim made by virtue of subsection (1), the "prescribed accounting period mentioned in that subsection" is the accounting period in which the taxpayer accounted for an amount of output tax which was not output tax due. It is therefore clear that subsection (4) is using the term "claim under this section" to refer to a claim in respect of a single accounting period, thus uniquely identifying the "relevant date". The language of subsection (4) is not apt if a "claim under this section" could encompass more than one accounting period, and therefore more than one end of period.
>
> 30. Is this textual analysis supported by a consideration of the purpose of the provisions in question? In *Revenue & Customs Commissioners v General Motors (UK) Limited* [2015] UKUT 605, the UT (Henderson J (as he was then) and Judge Sinfield) agreed at [81] with a submission by counsel for the taxpayer that regulation 37 was essentially administrative in nature, being designed to ensure that when a section 80 claim is made, it has "sufficient particularity for HMRC to engage with it

> and decide whether or not to accept it". This of course does not mean that the claim must at the outset be sufficiently particularised for HMRC there and then to decide it. Nevertheless there is force in the suggestion made by HMRC that there would be a sound purpose in requiring identification of the period or periods in question, so that it would be possible to determine from the outset whether the whole or any part of it was out of time, or whether HMRC needed to go on and investigate it.
>
> 31. I agree with the UT that, if claims can be made other than by reference to prescribed accounting periods, then it would not be possible in some cases to determine without further investigation whether the whole or part of the "claim" was time barred. Suppose that a "claim" is made for a one year period which falls either side of the date which is three years before the letter of claim. The taxpayer says that he has accounted in that period for output tax which is not output tax due. In order to engage with such a purported claim HMRC need to know on what side of the line the over-accounting of output tax occurred, because it is possible that some or all of it occurred in a prescribed accounting period which is time barred. Mr Hill submits that this shows that the requirement to confine claims to individual accounting periods is not a pedantic technicality, but has a real purpose. A limitation period which works by reference to the end of prescribed accounting periods cannot work unless claims are set out with reference to those periods."

99. *Bratt* is binding authority for the proposition that a claim under section 80 VATA for repayment of overpaid VAT which relates to more than one accounting period must be broken down into separate claims for each accounting period, referring to the relevant period, the amount of the repayment claimed for that period and the method of calculation. A purported claim which does not comply with these requirements is not a valid claim.

100. Mr Beyzade sought to argue that detailed calculations of the amount of a claim are not required for there to be a valid registration of a claim, citing *Vodaphone Group Services Ltd v HMRC* [2014] UKFTT 701 (TC). In that case, Vodaphone made a claim within the time limit. It was agreed by HMRC that VAT had been overpaid, but for a different reason from that put forward in the initial claim. The new reasons were put forward outside the time limit and HMRC argued that it was a new, out of time, claim. The tribunal held that it was not a new claim and that the original claim was a valid, in time, claim even though, in the course of the investigation, it was agreed that the overpayment had arisen in a different way. In *Vodaphone*, the claims had been broken down by VAT period and this case does not help Mr Bayzade to overcome the obstacle presented by *Bratt*.

101. A valid claim must refer to a particular VAT accounting period.

102. HMRC publish a form, VAT 652, which can be used to make a claim under section 80. It requires the relevant information to be entered on an accounting period by accounting period basis. The Respondents did not seek to argue that a claim could only be made by submitting form VAT 652 and it was accepted that a letter would suffice, provided it included the required information and set out a claim for each accounting period in question. A claim for a global figure covering a number of accounting periods will not suffice.

103. It is therefore critical to determine what was enclosed with the February Letter. The burden of proving what was sent falls on the Appellant. The standard of proof is the normal civil standard, on the balance of probabilities.

104. The Appellant asserts that two summary sheets were sent with the February Letter, one setting out the revised VAT computations from 2008 to 2012 and summarising the VAT reclaimed by reference to each accounting period, the second summarising the revised sales following the revised VAT computation.

105. I will refer to these as "the Claim Summaries".

106. It is common ground that if the Claim Summaries were in fact enclosed with the February Letter, the claim would have been made in time. The question I have to determine is whether the Claim Summaries were, or were not, enclosed.

107. In the course of the hearing, three versions of the Letter were produced.

108. My hearing bundles contained a copy of the Letter. The page number of the Letter in the bundle was printed in the bottom right hand corner and was 284. It is dated 19 February 2016 and is addressed to "Dave O'Neill" at HMRC. It is a short letter and I will set it out in full:

> "Dear Mr O'Neill,
>
> Re: First Agency Limited ("FAL") VAT Reg: 850 2348 45/VAT Error £109,856.92
>
> Please find enclosed VAT documents you requested. They include original invoices, credit notes, revised invoices, Account statements that give rise to the invoices VAT computation (sic) based on the revised invoices for VAT quarters ended:
>
> 1. Q/E 31/08/08
> 2. Q/E 30/11/08
> 3. Q/E 28/02/09
> 4. Q/E 31/05/09
> 5. Q/E 31/08/09
> 6. Q/E 30/11/09
> 7. Q/E 28/02/10
> 8. Q/E 31/05/10
> 9. Q/E 31/08/10
> 10. Q/E 31/11/10
> 11. Q/E 28/02/11

12. Q/E 31/05/11

13. Q/E 31/08/11

14. Q/E30/11/11

15. Q/E 29/02/12

16. Q/E 31/05/12

Yours sincerely,

Mark Obez"

109. Included in the bundle, as enclosures to the letter, were a revised VAT account for the quarter ended 31 August 2008, the first period in question, a number of copy invoices, revised invoices, credit notes and account statements all for that period. There was a manuscript note "Q/E 31/08/08 (01/06/08-31/08/08)" at the top of the revised VAT account. The page number 285 was printed at the bottom right hand corner. This was the number of that page in the bundle. There were no other marks on the VAT account or the other enclosures (except for the page numbers). It was not suggested that this was a complete set of enclosures, but was intended to be a representative example of the type of documents sent with the Letter.

110. I will refer to this version as "the Bundle Version".

111. At the start of the second day of the hearing, the Appellant sought to admit in evidence a second version of the February Letter. This version, (which I will call " the Day 2 Version") had a differing set of attachments from the Bundle Version. The Appellant stated that the copy documents attached to the Bundle Version had omitted some documents and it did not reflect what had been sent to HMRC. Mr Bayzade stated that it was a more complete version of what was sent to HMRC at the time. The attachments comprised a sample invoice, revised invoice, credit note and account statement for the 08/08 period, all 16 of FAL's revised VAT accounts referred to in the Letter and, in addition, the Claim Summaries. There were no manuscript notes at the top of the revised accounts. There was a manuscript note "Summary of VAT Reclaimed" and underneath "AC" at the top of the VAT summary and a note "Summary of Revised Sales" at the top of the Sales summary. The Claim Summaries and the revised VAT accounts also had manuscript numbers at the bottom of each sheet which were numbered sequentially "AC 1" to "AC 18". The documents also had numbers printed in the bottom right hand corner which appeared to be page numbers. The Letter was numbered 138 and the invoices etc. were numbered from 140 to 143. The page numbers of the documents annotated with an AC number ran from 555 to 572. Mr Gbotta informed us that the writing on the AC documents, including the Claims Summaries was his handwriting.

112. The Respondents objected to the admission of the Day 2 Version. They did not accept that the Claims Summaries had been sent to HMRC with the February Letter. Following argument, I agreed to admit the Day 2 Version on the basis that it was a convenient document for the witnesses to refer to and without any admission as to what had been enclosed with the February Letter.

113. The final version of the letter was the original which was couriered from HMRC's offices in Belfast and delivered to the tribunal on the third day of the hearing. I will refer to this as the "Original". The Original and its attachments were examined by all the parties and the tribunal and copies were provided.

114. The enclosures with the Original comprised FAL's revised VAT accounts together with a full set of copies of the invoices, revised invoices, credit notes and account statements for each quarter comprised in the claim except the final quarter, 05/12. There was a manuscript note at the top of each revised VAT account stating the quarter to which it related. There were no page numbers on the Letter or any of the other attachments. There was no manuscript AC numbering on any of the attachments. The Claims Summaries were not included with the Original.

115. The Claims Summaries were included in the bundles, but as separate, stand alone documents. The bundles had been prepared by HMRC. The Claims Summaries were listed under the heading "Other Documents" and were described as "Summary of VAT reclaimed 2008/12 Undated" and "Summary of Revised Sales 2008/12 Undated". These versions had handwritten headings "Summary of VAT Reclaimed AC" and "Summary of Revised Sales SS" respectively. The VAT Summary also had handwritten notes by the total of the new VAT figure stating "VAT for bad debt relief claim" and by the total for the difference between the VAT paid and the new VAT figures stating "Overpaid VAT ECN/Regulation 38". The total of the revised sales figures was annotated "Unpaid commissions to FAL". The list of documents referred to the Letter as "Letter from Markc Obez to HMRC with enclosures". That was the Bundle Version.

116. Bundles had originally been prepared in June 2017 for the appeal on section 80 alone and the Bundle Version and the Claims Summaries had been included in those bundles on the same basis as above.

117. Mr Gbotta made two witness statements, the first (in May 2017) and the second (which incorporated the first) in October 2017. Each incorporated the statement:

> "On 20 February 2016 the Appellant submitted an Error Correction Notice (comprising of a cover letter, credit notes, original invoices and revised invoices, related credits, VAT computation (sic), and the summary of VAT reclaimed and the sales figures set out on an A4 sheet etc) which were received by the Respondent on 22 February 2016 at 07:01 AM. (See pages 161-162)"

118. There was also a reference to a tab in the bundles. The document referred to was the Post Office proof of delivery. There was no evidence of what had been sent, although I consider it likely that it was the Letter. The Appellant did not raise the

issue that Bundle Version was incomplete at any time between the preparation of the bundles in June 2017. and the start of the hearing in November 2017

119. The first time a copy of the Letter which purported to have the Claims Summaries enclosed was produced was when the Day 2 Version was submitted for admission on the second day of the hearing.

120. I heard witness evidence from Mr Gbotta and Mr Obez about what had been sent to HMRC with the February Letter and I heard witness evidence from Mr McDonnell about how the Original came to be before the tribunal.

121. I did not find either Mr Obez or Mr Gbotta reliable witnesses. Both witnesses avoided answering questions on occasion. Mr Gbotta's evidence was often confused and confusing and despite him being accountant to both FAL and PPP and preparing the VAT accounts and statutory accounts of both companies, there were some surprising gaps in his knowledge of events. There were also inconsistencies in his evidence, some of which I point out below.

122. I take into account that Mr Obez did not speak good English, but throughout the hearing he had the services of a professional interpreter. Even bearing the language difficulties in mind, Mr Obez's evidence was inconsistent and he was, at times, evasive. His credibility generally was undermined by an incident on the second day of the hearing. As noted, Mr Gbotta was not present whilst Mr Obez was giving evidence. Before the lunch adjournment, I warned Mr Obez, in accordance with normal procedure, not to speak to anyone about the case during the adjournment. HMRC's solicitor, Ms Nourescu saw Mr Gbotta and Mr Obez sitting together and talking in a room and they stopped talking when she knocked on the door. Mr Obez and Mr Gbotta were each questioned about this in the absence of the other. Mr Obez agreed that he had spoken to Mr Gbotta during the short lunch break but he denied speaking to him about the case. He was asked again whether he said "anything about the evidence, documents, the way it was going. Anything at all". He again denied having said anything about the case. Mr Gbotta was questioned in Mr Obez's absence and informed the tribunal that Mr Obez told him he had been asked questions about Regulation 38, that he did not understand it and had told the tribunal to speak to his accountant. Mr Obez was recalled and Mr Gbotta's statements were put to him His answers were evasive, but he eventually said that he had not told Mr Gbotta that he had been asked about Regulation 38 and had not told Mr Gbotta that his reply was that they should ask his accountant. He said he had asked about Regulation 38 for his personal understanding and was not intending to be in contempt of court.

123. I found Mr McDonnell a straightforward and honest witness.

124. Mr McDonnell could not give evidence about what was actually enclosed with the February Letter. The Letter had been sent to Mr O'Neill and although Mr McDonnell was working with Mr O'Neill, they were in different offices. Mr McDonnell would have seen a sample of the documents, but was unable to comment on what Mr O'Neill received. Mr O'Neill retired from HMRC last year.

He was not called to give evidence because it was not until the second day of the hearing that the February Letter and its enclosures became an issue.

125. Mr McDonnell's principle contribution was to explain how he arranged for the Original to be brought to the tribunal. The tribunal sat later than normal on the first three days of the hearing. Mr McDonnell was giving evidence at the end of the third day and Mr Bayzade was in the process of cross-examination. Mr McDonnell remained as long as possible, but owning to care responsibilities at home he was forced to leave to catch his plane back to Belfast before Mr Bayzade completed his cross-examination and Mr Bayzade submits that I should therefore accord Mr McDonnell's evidence little weight. Whist I take into account that the cross-examination was incomplete, I note that there was no request to recall Mr McDonnell for the fourth day of the hearing which was some months later and, in any event, Mr Bayzade *had* completed his questions to Mr McDonnell about the Original before he had to leave and I therefore give full weight to that particular aspect of his evidence.

126. I set out the full Letter above. It said that it enclosed the FAL documents Mr O'Neil requested and that they "include original invoices, credit notes, revised invoices, account statements…and amended VAT computations…". Although the Letter says the enclosures "include" those items, those were the only items attached to all versions except the Day 2 Version and it is surprising that the Letter did not mention the VAT claim and revised sales summaries when these are the critical documents which actually constituted the claim.

127. The Letter was signed by Mr Obez who gave evidence about how the letter was put together. Mr Obez had received all the invoices and credit notes etc from Mr Lieven's secretary and had sent them by registered post to Mr Gbotta for him to send to HMRC. Mr Obez had written the Letter, but Mr Gbotta had helped to translate it into English. Mr Obez initially said that Mr Gbotta confirmed to him that the documents had been sent and he (Mr Gbotta) emailed him with a scanned copy of all the documents sent. He received a scanned copy of "a whole bunch of documents". No such email was produced in evidence. Mr Obez also confirmed that the cover letter and documents attached to the Day 2 Version, which included the Summaries, had been sent to HMRC.

128. Subsequently, Mr Obez said that Mr Gbotta had only sent him the translated "document" (presumably the Letter) but had not send him the rest of the documents actually sent to HMRC as these had originated with FAL. So Mr Obez was unable to state what had been sent to HMRC.

129. Mr Obez also agreed that the AC numbering on the Day 2 Version must have been added after the documents were sent to HMRC. He acknowledged that the "VAT computations" referred to in the letter were the revised VAT accounts, not the Summary.

130. Mr Gbotta also gave inconsistent evidence on this point. He said that he prepared the attachments for the Letter and had sent all the documents including the

document putting the claim in to HMRC. He confirmed that he had prepared the documents marked AC1 and AC2 (the Summaries), that they were part of his working papers and that the AC numbering was his handwriting. He explicitly stated that he had added the AC numbering on 19 February 2016 before sending the Summaries to HMRC and he repeated several times that the Summaries had been included with the Letter.

131. He had previously been asked to compare the Bundle Version, which was a copy of the documents in HMRC's possession, and which had no AC numbering, with the Day 2 Version and he had agreed that the AC numbers could not have been written on what was sent to HMRC.

132. Mr Gbotta was recalled on the fourth day of the hearing to answer questions on the Original. He sought to explain why HMRC's Original did not have the AC numbering on the revised VAT computations by saying that all the documents, including the Summaries, had previously been sent to HMRC (and so had no handwritten notes on them) and that HMRC had put the Letter with the previous documents, not those sent with the claim.

133. Mr Gbotta was taken to the hearing bundles which were prepared in June 2017 for the original hearing on the section 80 claim alone. The notice of appeal was drafted by Mr Gbotta and there were a number of attachments. Different sets of attachments were labelled in the bottom right hand corner with a letter and number reference (eg, G1-G7, D1-D5).

134. The notice of appeal set out the action FAL took when it discovered the error, which included "…made new sales and VAT computation based on revised invoices (see doc. AC enclosed)…". "Doc. AC" was numbered AC1-AC18 and consisted of the Summaries and the revised VAT computations. The Summaries had the page numbers 555 and 556 printed in the bottom right hand corners. These were the page numbers of those documents in the June 2017 hearing bundle. It is clear that the copies of the Summaries attached to the Day 2 Version were copies of these pages. Mr Gbotta continued to insist that the Summaries with the handwritten numbering were sent with the Letter.

135. As mentioned, Mr McDonnell was not able to comment directly on whether the Summaries had been enclosed with the Letter, but he knew where the Letter was stored in a cupboard in HMRC's Belfast office and on the second day of the hearing, he contacted a colleague and requested her to "extract the letter of 19 February 2016 and any other correspondence adjacent or attached to the letter". He asked for the documents to be scanned and sent by email and for the originals to be couriered to HMRC's Counsel, Mr Elliott. He said he had asked his colleague to take out everything to do with the letter and correspondence and to send it to the tribunal. The Original seemed to be the totality of what he thought existed and he was not aware that any pages had been removed.

136. Mr Beyzade challenged Mr McDonnell strongly on how he could be sure that all the documents which had been received by Mr O'Neill, and which he had not seen before, had been sent to the tribunal. Mr McDonnell stated that he had given clear instructions to his colleague, who was a senior and experienced officer. She would have understood what a serious matter it was to interfere with evidence to be put before the tribunal. She would have been aware of the importance of the documents to the tribunal and she knew that he was in the witness box giving evidence under oath. He believed that his colleague would not have provided him with documents she knew to be incomplete and she would not have removed documents which were attached to the letter.

137. Mr McDonnell also pointed to other evidence that the Summaries had not been included with the February letter. I note these were items in the correspondence and not matters of which Mr McDonnell had first hand knowledge.

138. Mr Bird sent his review conclusion letter rejecting the initial claim on 11 January 2016. Mr Obez accepted that decision in an email of 21 January 2016. He asked for clarifications on certain matters. Mr Bird responded by email on 26 January. He referred to the possibility of making a new Error Correction Notification (ECN) and of making a bad debt relief claim. He also specifically raised the issue of the time limits for making an ECN being four years from the end of VAT period in which the output tax should have been reduced. As Mr Bird was the review officer, he indicated that Mr Obez should continue his negotiations with Mr O'Neill to resolve the matter. Mr O'Neill emailed Mr Obez on 2 February referring to Mr Bird's email and asking how he wished to proceed. Mr Obez responded on 10 February suggesting that FAL wanted to submit an ECN and a bad debt relief claim. Mr O'Neill emailed on 12 February setting out the requirements form making an ECN in respect of the Regulation 38 adjustment and a bad debt relief claim and again referring to the four year time limit.

139. Mr Obez responded on 18 February saying he had asked their accountant in London (presumably Mr Gbotta) to "re-print" all the documents and send them to Mr O'Neill. He said they had previously been sent to Mr Leonard (the officer who first dealt with the matter). He then asserted that in relation to the time limits, Mr O'Neill should take into account that FAL was "prevented to make a claim by the previous HMRC officers" (sic) and referred to the fact that HMRC had only accepted that VAT was overcharged in 2015. He ended "We therefore feel that the limit should not applied to us as it's the HMRC officer who is responsible for the delay" (sic).

140. On 22 February Mr O'Neill informed Mr Obez that he only required the credit notes as he already held copies of the revised invoices and amended VAT returns. He asked whether FAL would be making a bad debt relief claim.

141. On 23 February (after the February Letter had been sent and after the special delivery receipt showed HMRC had received something) Mr Obez emailed Mr O'Neill simply stating "I wish to submit an Error Correction Notification in respect of the Regulation 38 adjustment for the overcharged VAT".

142. On 1 March 2016, after the deadline, Mr O'Neill emailed Mr Obez to acknowledge receipt of the "credit notes and other documents". He had some queries on the credit notes to which I will return. The email concluded "Could you also advise as to when you intend to submit the Error Correction Notification as I have not yet received this form".

143. Mr Obez responded on 3 March, addressing some of the queries and continuing "As for the submission of the [ECN], I was not aware of the existence of any specific form to fill and submit. I thought my email [presumably the one of 23 February], the documentations submitted together with summary of the claim could be taken as the submission of the [ECN]. Now if there is a specific form to submit, then please forward it to me". This is the first reference to a summary of the claim. It is unclear to what it relates. It could be the reference to the total of the claim in the heading to the Letter but the implication is that it is something different from "the documentations submitted". Mr O'Neill sent a link to form VAT 652 to Mr Obez on 4 March 2016. Mr Gbotta enclosed the completed form VAT 652 with a letter dated 13 March 2016, received by HMRC on 11 April. The letter did not refer to the form, which broke down the claim by VAT period as required by *Bratt Autos* and was signed by Mr Obez and dated 31 March 2016.

144. Mr O'Neill sent a decision letter on 5 July 2016 rejecting the claim for a number of reasons and also stating that claims relating to VAT periods up to 02/12 were out of time. There was a further claim for the period 05/12 which was accepted as being within the four year time limit but was rejected for other reasons.

145. In Mr Gbotta's letter, sent on behalf of FAL, and dated 12 July 2016 but received by HMRC on 15 August 2016, he requested a review of the decision and had this to say about the claim being made out of time:

> "The inspectors caused the delays in the course of their investigation. We complained to VAT Error Correction Team on two occasions…The Complaints Officer …concluded…"I have accepted that HMRC was responsible for delays in the conduct of this case…". It would therefore be unfair to reject our claim for a delay caused by HMRC".

146. There is no mention of the February Letter constituting an in time claim.

Discussion on the Section 80 time limit issue

147. The burden of proving that the ECN claim was made in time is that of the Appellant to the usual civil standard of the balance of probabilities.

148. The Appellant has provided no direct evidence as to what was sent to HMRC with the February Letter. For example, the email of the letter and all its enclosures which Mr Obez, at one point, said he received has not been produced.

149. The strong inference from the evidence derived from the various versions of the February Letter placed before the tribunal is that the Summaries were not enclosed with that letter.

150. I am satisfied that Mr McDonnell's colleague sent him everything she could find that accompanied the February Letter and I consider it very unlikely that she removed any documents. I am also satisfied that that was the original of the Letter. The Summaries were not attached to it or with it. The VAT computations which were with the Original did not have any AC numbering written on them. That numbering must have been added to copies after 19 February 2016 .

151. It seems clear that the AC numbering was added by Mr Gbotta to copies of the Summaries and the VAT computations when he was preparing the notice of appeal and accompanying documents which were in the June 2017 hearing bundles. Copies of the Summaries from this source, including the bundle page numbering, were what were included with the Day 2 Version. I do not accept that the Day 2 Version was a fuller version of the original Bundle Version.

152. I do not accept that the Summaries were enclosed with the Original February Letter and I find, as a fact, that they were not.

153. This finding is corroborated by the email chain and letters discussed in paragraphs 13 to 146 above. HMRC have never argued that form VAT 652 is necessary for a valid claim under Regulation 38. It was accepted in evidence that if the Summaries had been included with the Letter, the claim would have been made in time. However, the contemporaneous correspondence indicates that no such claim was made. HMRC repeatedly reminded Mr Obez of the time limit and asked when he was going to submit the claim. In particular, on 1 March 2016, Mr O'Neill acknowledge receipt of all the other documents but asked when Mr Obez was going to make the claim. This strongly suggests that the Letter did not include anything which could amount to a valid claim ie the Summaries.

154. A further telling document is the review request letter of 12 July 2016. This does not suggest at all that a valid, in time, claim was made; it instead states that the time limit should not apply because the delay was caused by HMRC.

Decision on the Section 80 time limit issue

155. For the reasons set out above, I have concluded that the February Letter did not constitute a valid claim under Section 80 VATA in accordance with Regulation 38. A valid claim was made only in the form VAT 652 enclosed with Mr Gbotta's letter of 13 March 2016 received by HMRC on 11 April 2016.

156. Accordingly, FAL's claim was made outside the four year time limit for all VAT periods up to an including 02/12 although the claim in respect of the period 05/12 was in time.

The Section 80 claim: did it comply with Regulation 38?

157. I now turn to the substantive reasons for HMRC's rejection of the claim. On the basis of my decision on the time limit issue this is only relevant for VAT period 05/12, although they are equally applicable to the other periods comprised in the claim.

158. I have set out in some detail above how the Regulation 38 adjustments work, and in particular, the need for symmetry in the adjustments made by both the supplier and the customer. If only one party makes the adjustments, that will not suffice.

Was there a reduction in the consideration and if so, was the overpaid consideration repaid?

159. The starting point is Section 80 itself. A claim only arises if there has been a reduction in the consideration for a supply.

160. The consideration in question is the commission which PPP agreed to pay to FAL in return for its services in collecting payments from telecommunications companies. The contract between the parties is set out in a Service Agreement dated 15 October 2010. The arrangements had been in existence since 2008 but there was no other contract in the bundles, so the basis on which earlier payments were made is uncertain.

161. The Service Agreement stated that "For the service provided, the company [FAL] will receive a commission of : Year 2010: 20% commission. Year 2011: 20% commission. Commission needs to be reviewed every accounting period".

162. It further stated:

> "First Agency Limited will collect money on behalf of PPP Web Limited.
>
> First Agency Limited will withhold an amount equivalent to its commission from PPP Web Limited's funds and will invoice PPP Web Limited for this commission".

163. On the face of the contract, FAL is entitled to 20% of the money it collects and it gets paid by retaining that amount before passing the balance to PPP.

164. The alleged "mistake" was that it was intended that FAL's commission would be 20% of the commission which PPP charged to its partners. There is no mention of this or the amount of PPP's commission from the partners in the Service Agreement so it is unclear how, if this was the intended agreement, FAL would have known what commission to deduct.

165. Mr Obez agreed that if the commission arrangement was different, the contract should have been amended. We were not taken to any amended contract.

166. Mr Obez said in evidence that the mistake was discovered in February 2012. Mr Gbotta initially said it was discovered earlier, in the course of HMRC's investigation, then later said it was in February 2012. There is no evidence about what triggered the discovery, which was made by Mr Gbotta, and no evidence of his informing FAL and PPP of the error. The only evidence in the bundles is a letter from Mr Obez to Mr Gbotta dated 28 February 2012 which stated:

> "Further to our last meeting, Lieven and I agreed to reduce First Agency's overstated commission that you reported to us

> I therefore hereby send you with this letter the new revised invoices and related credit notes that he gave me in order that you can quickly account for them."

167. Mr Obez stated in a letter to HMRC dated 17 November 2013 "During the investigation we told [the VAT officer] that we discovered that mistakes were made in VAT computations of both companies." When this was drawn to his attention, he became evasive.

168. The VAT form 652 itself which was signed by Mr Obez states "This VAT reclaimed was paid on over declarations following errors made by our bookkeeper. The errors were then discovered during the VAT investigation."

169. It does seem remarkable that this error persisted for four years without anyone noticing. Mr Obez was the sole shareholder of PPP and a director of FAL from March 2011. He had been a director of PPP up to July 2008, Mr Lieven was the sole shareholder of FAL and had been a director up to March 2011. If the true agreement was something different from that which appeared in the Agreement on the basis of which FAL charged PPP, both Mr Obez and Mr Lieven must have been aware of it, yet they did not implement it. Nor was the difference in VAT negligible. Mr Obez's witness statement said that PPP was paying 28.5% commission to the partners. So if FAL's commission was 20% of that amount, it should have been deducting 5.7% of the receipts from the telecommunications companies instead of 20%. In monetary terms, the VAT paid to HMRC was £148,508 instead of £38,655.60. The amount of the commission charged was over £740,000 instead of just under £195,000.

170. The failure to notice is even more remarkable, given that FAL was making substantial losses every month and was paying the VAT on the basis that it was receiving a 20% commission, but was in fact receiving virtually no income as, on the Appellant's case, it did not deduct its commissions from payments to PPP as the contract provided and PPP did not subsequently pay the commissions. We were told that Mr Lieven was putting money into the company all this time to keep it afloat. When Mr Obez was asked why FAL did not deduct the commission, as it was entitled to under the contract, he became evasive and did not provide an answer.

171. Indeed, even if it was not discovered until February 2012, both companies persisted in using the same method of calculating FAL's commission so that an overpayment also arose in the 05/12 quarter which is included in the present claim. Mr Gbotta's explanation for carrying on using what he knew to be the wrong calculations was that he did not want to prepare the accounts on the basis that there had been a decrease in consideration as he wanted HMRC to agree to this first. It is not usual practice for a business to require HMRC's agreement to its VAT computations in advance. One would expect the business to submit its accounts and returns on the basis of what it believed was the correct position. Mr Gbotta is a qualified accountant and he informed us he has 15 years of experience and is very familiar with the operation of the VAT system. It is therefore unclear

why so many of his actions in this matter departed from normal commercial practice.

172. Regulation 31(1)(i) requires a decrease in consideration to be evidenced by the issue of credit notes. New invoices and credit notes were indeed issued. An email from Mr Obez to Mr Leiven of 13 March 2012 acknowledges the receipt of documents including revised invoices and credit notes "for the correction of the error in relation to FAL's commissions". It seems the credit notes were originally dated 28 February 2012, which is what one would expect as Regulation 38(5) requires that "Every entry required by this regulation shall, …be made in that part of the VAT account with relates to the prescribed accounting period [VAT period] in which the increase or decrease is given effect in the business accounts of the relevant taxable person". So what should happen is that FAL issues the invoices and credit notes in February 2012, the overpaid VAT is entered in its VAT account for the period when the consideration was reduced i.e. the 02/12 account and this is reflected in its VAT return. The return will then show too much VAT has been paid and FAL can claim the overpaid amount. Similarly, the VAT account of PPP should show the reduction in its input VAT, giving rise, via its VAT return to an additional payment to HMRC equal to the amount claimed by FAL.

173. That did not happen. Instead, Mr Gbotta requested that the revised invoices and credit notes were issued for the periods when the original invoices were issued and he went through every VAT period between 08/08 and 02/12 and amended the value of the invoices for those periods. I will discuss the question whether the VAT accounts were amended below, but in any event, no adjustments were made to the VAT returns of either FAL or PPP. Mr Gbotta's rather confused explanation as to why he made the retrospective adjustments was unconvincing. He suggested that because FAL's and PPP's VAT quarters ended a month apart it would cause a lot of difficulties and extra work if the invoices were entered in the correct VAT accounts. It seems to me that a lot more work was involved in amending all the records going back four years and in any event, this was not in accordance with the statutory requirements.

174. So FAL could have reclaimed the overpaid VAT in March 2012, through its VAT return, but instead waited until 19 August 2013 (by which time PPP had been liquidated and struck off the Register of Companies) to make a repayment claim. Again Mr Gbotta's stated reason for not making a claim was that he considered that one should not make the claim until the position was agreed with HMRC. He did not want to make the claim unless he was sure it would be successful and did not want to incur the costs of going to the tribunal when they were taking a view contrary to HMRC's opinion. If no-one made a claim unless it was agreed with HMRC, the tribunal would be put out of business.

175. In any event, FAL had not reached agreement in August 2013. Mr Gbotta sought to say that the 19 August 2013 letter was not a claim but a complaint. Whilst the letter does indeed complain about HMRC's delays, it also includes the statements "I write to notify you of errors in the VAT returns of the above mentioned

company [FAL] between the periods 2008-2012. The total of VAT overpaid is about £109,856.92. …We have therefore been instructed by our client, First Agency Ltd to put in a request for the repayment of the VAT overpaid."

176. On the basis of the evidence, it is far from clear that the consideration had been miscalculated. On the face of the contract, the correct commission was charged. If it had been miscalculated, it seems implausible that none of Mr Obez, Mr Leiven or the companies' common accountant noticed the significant overpayment of commissions and VAT for four years.

177. The bundles contained a joint declaration by Mr Obez and Mr Lieven that Mr Gbotta had discovered an error in their VAT returns and that they had agreed to reduce the overstated commissions. This was dated March 2016 and I attach little weight to it.

178. There is, however, some contemporaneous evidence of agreement. Mr Obez sent a letter to Mr Gbotta on 28 February 2012 saying that he and Mr Lieven had agreed to reduce First Agency's overstated commission and enclosing the revised invoices and credit notes. There are further emails referring to the error and the invoices and credit notes.

179. If there was an agreement to reduce the consideration, it is unclear why the repayment was not claimed through the VAT return when the alleged error was discovered (and the timing of the discovery is also unclear), but nearly 18 months later.

180. Mr Bayzade sought to argue that the case of *Barlin Associates Ltd v HMRC* [2014] UKFTT 957 (TC) indicated that the issue of a credit note can constitute the adjustment of consideration within Regulation 38. That may be so in the circumstances of that case but the case is not a general authority for the proposition that the issue of a credit note constitutes a reduction in consideration. In *Barlin*, the appellant issued an invoice to its customer which the customer did not pay. Barlin eventually sued the customer in the High Court. The case was settled and the customer agreed to pay a smaller amount in full and final settlement of the claim and Barlin was to issue a credit note for the balance. The credit note effectively extinguished the balance of the debt and the smaller amount actually paid became the consideration. That is not the case here. The credit notes issued by FAL might be evidence of an *agreement* to reduce the consideration, but are not, by themselves, an actual decrease in the consideration.

181. I remain sceptical about the existence of an error in the computation of the commission, but accept that there is evidence of an agreement to reduce the consideration and that credit notes and revised invoices were issued. That, however, is not enough. The agreement must be implemented by an actual repayment of the overcharged consideration or a credit of the amount owned to the customer against an amount owed by the customer. An agreement to decrease the consideration cannot be equated with the decrease itself and Regulation 38 requires there to have been an actual decrease in the consideration for a supply.

182. The case of *Inventive Tax Strategies Ltd (in administration) v HMRC* [2017] UKFTT 667 (TC) involved a company which sold tax avoidance schemes. Customers who implemented a scheme had a right to a refund of the fees they paid if the scheme failed. The scheme did fail. The company was insolvent and went into administration. Credit notes were issued to customers in respect of the fees which they were entitled to have refunded and the administrator claimed overpaid VAT in respect of the reduction in consideration under Regulation 38. The tribunal rejected the claim, applying the ECJ decision in the case of *Freemans plc v Customs and Excise Commissioners* [2001] STC 960. Judge Sinfield said, at paragraphs 36 and 37:

> "36. In my view, paragraphs 33 to 36 of Freemans show that a legal entitlement to a refund is not sufficient to reduce the taxable amount and create a right to a repayment of VAT until the refund is paid to the customer or credit given is used by the customer. In paragraph 33, the ECJ states that what is now Article 90 "… requires the member states to reduce the taxable amount whenever, after a transaction has been concluded, part or all of the consideration has not been received by the taxable person". That paragraph shows that the focus in determining whether there has been a cancellation, refusal and total or partial non-payment or price reduction is what has been received by the supplier. That is consistent with the ECJ's approach to the meaning of consideration for the purposes of Article 73 in paragraph 27 of Elida Gibbs, namely that it is "the value actually received in each case". In this case, the Appellants have received the full amount of the fees and no amounts have been refunded to the customers. The need for there to be an actual repayment, as opposed to merely conferring an entitlement to one, is clearly seen in paragraph 35 of Freemans where the ECJ held that "[i]t is only when the customer uses the … [discount] that the discount is actually paid, so that … the taxable amount for the corresponding purchase must be reduced accordingly." It follows that actual payment of a refund is required, in which case there will be a reduction in the price only to the extent of the amount actually refunded. This is consistent with common sense and commercial reality. It cannot be right that the Appellants receive a repayment of 100% of the VAT where the customers receive a refund of less than 100% of the fees.
> 37. For the reasons given above, I have decided that, where a supplier has received consideration in return for a supply, the price of that supply is not reduced after the supply takes place unless and until the customer actually receives a refund, whether in the form of a payment or by way of credit against an obligation to make a payment. In the absence of such a refund or credit, there is no reduction in the price or decrease in consideration and the taxable amount of the original supply is not reduced. As no payment has been made or credit given in the case, the Appellants are not entitled to any refund of VAT."

183. So even on the basis that FAL and PPP did agree that the amount of the commission was wrong and should be reduced and FAL issued the appropriate credit notes, there is no reduction in consideration unless and until the overpaid consideration has actually been refunded, either by way of actual payment, or by way of credit. FAL says that PPP owed it the amount of the commissions, as they had never actually been paid, so the reduction could have been implemented by a credit against the amount owed by PPP to FAL. There is no evidence this was done.

184. I was not taken to any written evidence in the bundles to indicate that there had been a credit. In evidence Mr Obez stated that there had been no actual repayment to PPP and he was unable to confirm that on discovering the mistake any credit was given against the debt said to be owed by PPP to FAL.

185. I find that, even though, on the balance of probabilities, a decrease in consideration had been agreed, there was no repayment or credit in respect of the overcharge so there was no actual decrease in consideration.

Decision on the reduction in consideration issue

186. The contract between the parties was clear as to the commission entitlement. There is nothing to show how or why it was discovered the contract did not represent the parties' agreement. It is inherently implausible that, if the actual agreement was different from the contract, no-one would have realised that the amounts owed by PPP (as the commissions had allegedly not been deducted as they should have been), and the VAT paid, over a four year period was four times the amount it was supposed to be. This is particularly surprising given the financial situations of the companies. I am not persuaded that there was a mistake but there does appear to have been an agreement to reduce the commission, as evidenced by the emails and the credit notes. However, I have found that there was no actual refund of the overcharged amount. Nor did FAL give a refund by way of credit of the overcharged amount against sums it said it was owed by by PPP.

187. I have therefore decided that there was no effective reduction in consideration.

188. That, in principle, deals with the case. However, in order to consider the remaining elements of the Regulation 38 requirements I will assume that there was a reduction in consideration.

Was the decrease given effect in the business accounts of FAL?

189. The business accounts are not the same as the VAT accounts, although Mr Gbotta sought to say that they were. Regulation 38(5) makes it clear that they are different things. It contemplates a process whereby, first, a reduction in consideration is given effect in the "business accounts" of the relevant taxable person. This might give rise to the issue of credit notes/revised invoices, but is something different. The business accounts are the internal records of the business; the ledgers or spreadsheets recording sales and purchases etc. Regulation 38(5) contemplates that the recording of the decrease in consideration will happen in a particular accounting period and the prescribed amendments to the VAT accounts will be made in that period.

190. Mr Obez said that the accounts ledgers were amended, but not the VAT accounts. When asked whether the ledgers were before the Tribunal he was unable to say and referred us to Mr Gbotta. Mr Gbotta asserted that the business accounts were the VAT accounts; a surprising statement for an accountant of his experience.

191. The bundles did contain documents described as "ledgers" although they were only looked at during the submission stage of the hearing. They appear to have been printed in 2017 and were annual summaries. They referred to "commissions received", contrary to the evidence that the commissions had not been paid, but contained nothing relevant to a decrease in the commission due.

192. The Appellant has not proved, on the balance of probabilities that the business accounts were amended to reflect the decrease in consideration.

Were the VAT accounts of FAL adjusted in accordance with Regulation 38?

193. Mr Obez, in his witness statement, said that Regulation 38 had been fully complied with but it was clear from his oral evidence that he did not really understand its requirements and when asked for any detail, suggested we refer to Mr Gbotta. He did say that although the ledgers had been amended, they had been prevented by HMRC from amending the VAT accounts.

194. Mr Gbotta's witness statement said that upon receiving the credit notes and revised invoices he revised the VAT accounts of both FAL and PPP through revised VAT computations. He stated that the credit notes and invoices were provided on 28 February in relation to the periods up to 02/12 and in June for the 05/12 period. As noted above, this means that after discovering the error, the wrong commission was again charged in the 05/12 quarter and then subsequently amended by the issue of credit notes and new invoices.

195. Regulation 38 is mandatory. Regulation 38(5) provides that every entry in the VAT accounts required by the Regulation *shall* be made in the VAT account that relates to the accounting period in which the decrease in consideration is given effect in the business accounts. If it were intended that the adjustments were to be referred back to the historic periods when the consideration was overpaid, that would mean that all the VAT returns would also have to be amended. Further, the section 80 time limit runs by reference to the particular accounting period in respect of which output VAT has been brought into account which was not output VAT due. Output VAT which has been wrongly overcharged ceases to be due when the reduction in consideration is agreed and accounted for as required by Regulation 38. There is no limit on the time which might elapse between the original VAT charge and the decrease in consideration. If the adjustments were to be made retrospectively and allocated to the period of the original supply, it would automatically prevent a claim where the original period was more than four years before the decrease-and that potentially would breach the principle of effectiveness. In my view, this explains the mandatory nature of Regulation 38 and a claim must comply with its terms to be valid.

196. Mr Obez wrote to Mr Gbotta on 28 February 2012 stating that he and Mr Lieven had agreed to reduce FAL's overstated commission and enclosing the revised invoices and credit notes "in order that you can quickly account for them". He sent an email to Mr Lieven on 15 May 2012 in which he stated that although the original invoices and credit notes had been dated at the end of February, the dates

had to be changed to the same dates as *"the wrong original invoices in order to facilitate the reconciliation and reclassifying of those documents (because there are too many and the account* (sic) [presumably, accountant] *may not be able to find his way)"*

197. Mr Gbotta stated that he went through every single VAT account, that is the account for each period between 08/08 and 02/12 and amended the amount of the invoices and the amount of the VAT in each case. His explanation was , as noted, somewhat confusing; he indicated that because the VAT period ends for FAL and PPP were a month apart it would have created a great deal of work if the adjustment had been done in the proper way. This does not make sense. If Regulation 38 had been properly applied, the adjustment would have been made in FAL's VAT account for 02/12 showing the overpayment and the corresponding adjustment would have been shown in PPP's VAT account for its period ending 03/12. This seems to be a fairly straightforward process.

198. Revised VAT accounts, on the above period by period basis were submitted with the February Letter. Mr McDonnell had prepared a schedule showing that the total of the adjustments over all the periods added up to the £109,856.90 which was the amount claimed.

199. The only accounts which complied with Regulation 38 and were validly made were those for the periods ending 02/12 and 05/12. So the adjustments for earlier periods failed to comply with Regulation 38 and were invalid.

Were the VAT accounts of PPP adjusted in accordance with Regulation 38?

200. On the first day of the hearing the Appellant sought to introduce in evidence revised VAT accounts for PPP for each of the periods from 09/08 to 03/12. These documents were not in the hearing bundles, except for the account for the 03/12 period which had been provided by the Appellant. That account showed the reduced amounts of commission invoiced by FAL for the 03/12 period only. The bundles did contain PPP's original VAT accounts, showing the original amounts of the commission. Mr Gbotta stated that the revised documents were printed the previous day but were taken from his records. Mr Elliott argued that the revised accounts had not been provided to HMRC in the course of the investigation and that part of the reasons for rejecting FAL's claim was that the accounts of PPP had not been amended as required by Regulation 38.

201. As with the revised FAL accounts, Mr Gbotta had adjusted PPP's VAT accounts on a period by period basis. For the reasons set out above, this does not comply with Regulation 38 so the adjustments for periods before 03/12 are, in any event, invalid.

202. Even if valid, Mr Elliott submitted that PPP's revised accounts had not been prepared at the time of the alleged reduction in consideration and had not, in fact, been prepared until some time after PPP had been liquidated.

203. PPP's VAT return for the 03/12 period was submitted on 26 April 2012. It showed VAT payable of £3091.73: the amount shown on the original VAT account for that period. The VAT accounts should be reflected in the VAT return. The return did not reflect the full amount of the underpayment as it should have done, which would have resulted in a payment to HMRC of an additional £109,856.90. The return did not even reflect the additional VAT due for the 03/12 period which, according to the revised accounts, should have resulted in a payment of £7087.99.

204. Mr Gbotta suggested that the accounts could not be revised immediately because HMRC had not agreed the position. This is not a convincing explanation and it is inconsistent with his assertion that the accounts had been adjusted.

205. Mr Gbotta said he did not think that the £109,856.90 had been repaid by PPP to HMRC.

206. In a letter from Mr Obez to Mr O'Neil at HMRC of 6 July 2015 Mr Obez stated that because "we are suspended pending any decision you may make …we have not been able to make the necessary amendments and corrections." He stated that no amendments were made to the "accounts and VAT returns". In an email to Mr Bird of 21 January 2016, Mr Obez stated (in relation to PPP) that his understanding of Regulation 38 required that PPP reduce its VAT liability in its VAT return. He went on to say that this could not be done in 2015 when Mr O'Neill suggested that Regulation 38 adjustments should be made. As PPP had gone out of business, "there was therefore no way that the referred regulation could be applied."

207. This clearly suggests that the amendments to the accounts had not been made in 2015.

208. When these letters were put to Mr Obez and it was pointed out to him that Mr Gbotta had said the VAT accounts had been adjusted he referred us to Mr Gbotta and suggested that maybe Mr Gbotta had been wrong or the translation of the letters was wrong. Mr Obez said that Mr Gbotta had probably translated both letters and he had certainly seen both letters before they were sent.

209. As noted above, Mr Obez also said that he had amended the ledgers but not the VAT accounts. He provided the information to Mr Gbotta and Mr Gbotta would prepare the accounts. He did not know when the revised accounts had been prepared.

210. When Mr Obez's letter and email were put to Mr Gbotta, he asserted that Mr Obez was really talking about the VAT return and not the VAT accounts and that the accounts had been amended even though he, Mr Gbotta had not amended the returns. He acknowledged that he had seen the letters but "did not read every line". He could not remember whether he had helped translate the letters.

211. Mr Gbotta also said that the revised VAT accounts had been sent to HMRC, indeed had been sent on several occasions. VAT accounts are internal documents

which are not routinely sent to HMRC. HMRC receive only the VAT returns which should reflect the accounts.

212. In an email from Mr Leonard of HMRC to Mr Gbotta of 21 November 2013 Mr Leonard referred to a meeting which had been held on 19 November 2013 to discuss the VAT affairs of the PPP group. He asked for a number of documents including "the VAT summaries [ie accounts] for PPP for VAT periods 31/08/08 to 31/03/12". The bundles had been prepared by HMRC and contained only the original VAT accounts, except for the one period referred to above. Mr Gbotta was taken to the PPP VAT accounts which were in the bundle and he confirmed that he had prepared them and these were what had been sent to HMRC. He said that he had sent them "over and over" and might have sent them again in November 2013. Whether or not they had been sent before, it seems it was these, original, accounts which were sent in November 2013, long after PPP had been liquidated. If PPP's VAT accounts had been revised, it is surprising that they were not the ones sent to Mr Leonard.

213. That the original accounts were sent is borne out by Mr Leonard's email to Mr Obez of 22 January 2014 in which he says

> "I have reviewed the information provided in connection with the Voluntary Disclosure made by Mr Gbotta on behalf of First Agency Limited and can confirm that the adjustments made in the VAT accounts of First Agency Limited are not reflected in the VAT accounts submitted by PPP and as a consequence no VAT will be repaid."

214. If PPP's *revised* VAT accounts had been sent in response to the November 2013 request, the entries would have been the mirror image of those in FAL's revised VAT accounts. The fact that they were not strongly indicates that no revised accounts had been prepared for PPP by January 2014. PPP was liquidated in November 2012. By 2014 PPP did not exist and it is not possible to revise the VAT accounts of a company which does not exist.

215. Mr Gbotta asserts that PPP's VAT accounts were revised. The evidence set out above, and in particular the correspondence between Mr Obez and Mr O'Neill and that between Mr Obez and Mr Gbotta on the one hand and Mr Leonard on the other, coupled with the fact that the amendments were not reflected in the VAT return indicates otherwise. The oral evidence did not persuade me that the written evidence was wrong or misleading.

216. I find that the decrease in consideration (if there was one) was not reflected in PPP's VAT accounts as required by Regulation 38.

217. Even if the revised accounts produced at the hearing are taken at face value, they do not comply with the requirements of Regulation 38 as the adjustments are made on a historic basis and not in the period when the alleged decrease in consideration was given effect in the business accounts (assuming that effect was given to it).

Discussion of the Section 80 claim: Regulation 38 issue

218. There are many aspect of this case that simply do not "stack up". There is a lack of commerciality in the arrangements between FAL and PPP. Why did FAL not deduct the commissions it was entitled to? Why did PPP not pay what it owed? If FAL could only survive by its shareholder injecting money (because FAL was receiving no income from PPP) why did he do so? How did no-one notice for four years that the wrong amount of commission was being paid (or not paid) and that the amount of commission charged and VAT paid were four times what they should have been? How could the accountant to both companies be unaware that the commissions were not being paid? Why did an experienced accountant adopt so many non-standard practices which were not in accordance with the VAT legislation? Why did he suggest that HMRC's lack of agreement prevented him from making the necessary adjustments in the accounts or making the claim?

219. The burden of proof in this case is on the Appellant to show that, on the balance of probabilities, it made a valid claim complying with Regulation 38. The terms of Regulation 38 are mandatory and prescriptive. All of the requirements must be satisfied. If any element is lacking, the claim fails. I have carefully considered all the evidence, including the documents in the bundles and the oral evidence given at the hearing and I have concluded:

- Whilst it is doubtful there was an error about the amount of the commission, there was an agreement to reduce the commission (the consideration for the supply) but that agreement was not implemented by a repayment of the overpaid commission or a credit of the overpaid commission against a debt owed to the supplier. Accordingly there was no decrease in consideration for the purposes of Regulation 38.

- If there was a decrease, the Appellant has not proved, to the necessary standard, that it was given effect in any business accounts. If one assumes that there was a decrease which was given effect in the business accounts:

- FAL made most of the adjustments to its VAT accounts in the wrong periods. Regulation 38 requires the adjustment to be made in the period when the reduction in consideration is given effect and instead the adjustments were applied in the periods when the original invoices were issued. Accordingly, the adjustments for all periods except 02/12 and 05/12 were invalid.

- PPP did not revise its VAT accounts to reflect the decrease in its input tax and it made no payment of the additional VAT it owed to HMRC.

Decision on the Regulation 38 issue

220. As set out in paragraph 219 above, I have concluded that the conditions mandated by Regulation 38 were not satisfied in any of the periods under appeal.

Overall decision on the Section 80 claim

221. For the reasons set out above, I have decided that the claim was out of time in respect of all periods except 05/12.

222. For the further reasons set out above, I have decided that the requirements of Regulation 38 were not in any event satisfied in relation to any of the VAT periods under appeal (although some of the requirements may, as set out above, have been satisfied in relation to the 02/12 and 05/12 periods). Accordingly the claim is invalid.

The bad debt relief claim

223. As an alternative to the Section 80 claim, the Appellant claims that it is entitled to bad debt relief of £38,655 in respect of PPP's failure to pay it the commissions which were due to it.

224. The requirements for a valid claim are set out at paragraphs 8 to 11 above. Broadly:

- There must be a debt
- That debt must be written off in the accounts of the claimant as a bad debt, and the claimant must provide evidence that it has done this
- The claim must be made within four years and six months of the later of the date of the supply and the date when the consideration for the supply became "due and payable" to the person who made the supply.

Bad debt relief: the time limit issue

225. The Appellant stated that the bad debt relief claim was made on 16 May 2017. In fact the claim was made on 4 May 2017. Regulation 166 provides that unless HMRC "otherwise allow or direct", which they did not do in this case, a claim for bad debt relief must be made in a specified way in the claimant's VAT return. The claim may be made in any VAT return provided it is within the time limit. Regulation 166 is mandatory.The Appellant claimed bad debt relief in its VAT return for the quarter ended 05/17 which was submitted on 4 May 2017. It appears that the return was submitted in order to make the claim as there were no other entries on it. This was followed up by a letter of 8 May 2017 enclosing a copy of the return.

226. I was also taken to a letter dated 1 March 2017 which was to "HM Revenue and Customs" but was otherwise unaddressed and was unsigned. It set out a schedule of VAT quarters, the due date of payment for each quarter, the VAT inclusive and exclusive amounts and the VAT for each quarter. The VAT totalled £38,655.60, the amount of the claim. This was not a VAT return and so was not a valid claim within Regulation 166, and even if it was, it was outside the time limit referred to below.

227. The Appellant seeks to argue that time did not start to run until July 2015 when HMRC agreed the basis of the claim. Mr Gbotta, in his witness statement suggested that it was not practicable to submit a claim earlier. He stated:

> "While the Respondents were still disputing the error, the Appellant could not determine with certainty the amount of the Bad Debt. If the Appellant proceeded and made a Bad Debt Relief Claim without knowing the exact amount of debt, the Respondent would have argued that the claim lacked consideration, and that it therefore lacked certainty and clarity. It is likely that the claim would have been rejected if it were made prior to HMRC's acceptance of the amount…"

228. As I have commented above in relation to the Section 80 claim, it is for the Appellant to decide what to put in its accounts and what claims it may or may not have. If it were necessary to wait until HMRC had agreed a claim before making it there would be no need for the Tribunal. The Regulations are clear as to when time starts to run and, as in the case of the Section 80 claim, this Tribunal has no power to defer that time, nor does the principle of effectiveness have any application in this case.

229. The relevant date when time starts to run is the date when the debt becomes due and payable. The alleged debt was that arising from the non-payment by PPP of the commissions due to FAL. I discuss the existence of the debt and its writing off below, but for present purposes, I will assume that the requirements for the relief are met. The Service Agreement between the parties provides that payments must be made within 30 days of the date of invoice, so the debt created by each invoice would be due and payable at the expiry of the 30 day period.

230. The bad debt amounted to £245,251. The Appellant argued that there was a binding agreement entered into between PPP and FAL on 17 September 2011 that PPP would pay £30,000 each year end from the end of December 2013, in respect of the commissions from the commencement of activities until 31 December 2012, until the commissions were cleared. Mr Bayzade submitted that the effect of the agreement was that the date when the invoices became due and payable was postponed, so that time did not start to run for the purposes of the claim.

231. There was much argument as to whether the agreement was binding, whether that mattered and whether the agreement was a deferral of the due date or simply giving time to pay amounts already due.

232. I agree with Mr Elliott that any invoice issued more than 30 days before 17 September 2011 was, in any event, already due and payable under the terms of the Service Agreement, so that any agreement between PPP and FAL could only have been an agreement to defer payment in respect of those invoices and not a postponement of the due date.

233. I do not consider it necessary to go into the other arguments as it was agreed that, even if there was a deferral of the due date, that deferral would have come to an end and the debt would have become due and payable, at the latest, when the director of PPP made the decision to remove PPP from the Companies Register.

The application to strike PPP off the Register was made by Mr Obez on 9 July 2012.

234. The date which is four years and six months from 9 July 2012 is 8 January 2017. The claim was made in May 2017 and is therefore out of time.

235. Having found that the claim for bad debt relief was out of time, it is not strictly necessary to consider whether the requirements for relief were met, but I will do so for completeness.

Was there a debt and if so, was it written off in the accounts?

236. The Appellant submits that the commissions which should have been paid by PPP to FAL constituted a debt owed to FAL. The burden of proving there was such a debt is on the Appellant.

237. There is reference to the debt in correspondence. An email from Mr Obez (PPP) to Mr Lieven (FAL) dated 6 September 2011 states "Thanks for accepting the postponement of part of the debt that PPP owes FAL, for the contractual quarterly commissions. …". The alleged agreement between PPP and FAL dated 11 September 2011 is headed "Plan for the clearance of arrears of commissions as of 31 December 2012."

238. Over the four year period, the amount of commissions due from PPP would have been approximately £700,000 on the basis of the original 20% commission and this reduced to £245,000 by reference to the reduction in consideration following discovery of the "error" . If these were unpaid, one would expect to see a "debtors" figure reflecting this in FAL's accounts. The accounts for the year ended 31 October 2011 filed at Companies House on 4 August 2012 showed debtors of £47,477. The accounts were unaudited, abbreviated accounts and there was no further detail. The accounts to 31 October 2012, which covered the period including PPP's dissolution, were submitted to Companies House on 24 August 2013 and showed debtors of £9,739.

239. Amended accounts for the year to 31 October 2012 were submitted to Companies House on 10 October 2017. These accounts showed debtors of £297,200 and £258,956 for 2011.

240. Mr Gbotta prepared the original accounts and the amended accounts. He suggested it was usual for payments between principal and agent to be posted to a "client account" and that he had done this with payments between PPP and FAL. This was his explanation for the fact that the alleged debt owed to FAL by PPP was not shown in the "debtors" figures in the accounts. There was no reference to a "client account" in the statutory accounts. Mr Gbotta said that he assumed the commissions had been paid and when he discovered they had not been paid, he had to reverse the entry in the client account and transfer it to debtors. He could not explain why this was not done until 2015 and amended accounts were not submitted until 2017.

241. In the course of the Appellant's submissions I was taken to an undated document, which I was informed was the extended trial balance for 2010-11. The witnesses did not speak to this document. This referred to a client account and also to commissions *received*. (emphasis added). Mr Gbotta's evidence was that he was unaware that the commissions were not being paid. That is why PPP's VAT returns claimed input tax in respect of the commissions, which was in breach of Section 26A VATA, as PPP had not in fact paid the VAT.

242. Mr Gbotta initially said that he only discovered that PPP had not been paying its commissions in February 2012. He was clear that he had discovered it at the time the error about the commissions was discovered. When it was suggested that if that was the case, the debt should have been shown in FAL's 2012 accounts which were filed in 2013, which he had prepared after he became aware of the debt and, indeed, after PPP's liquidation, he said he did not know when he found out about the debt, but confirmed that he knew about it in 2014. There was no explanation as to why the bad debt relief claim was not made until three years later.

243. Mr Obez clearly did know about the debt and he agreed in cross-examination that it should have been shown in the accounts. Yet he signed the original accounts as showing a "true and fair view" of FAL's position when that debt did not appear in them.

244. As I have noted above, it is not credible that the accountant to both companies should not have been aware of the fact that PPP was not paying its commissions over such an extended period and the contemporaneous VAT accounts and returns and statutory accounts were all consistent with the commissions being paid.

245. Mr Obez was unable to explain why FAL did not just retain its commissions which it was supposed to do under the service agreement. Indeed, he was evasive about the matter when questioned. FAL's original VAT computations showed that FAL was making substantial losses every quarter. He stated that Mr Lieven was meeting the outgoings personally, but agreed that the only way FAL could survive was if PPP was paying its commissions.

246. I was not taken to any document showing that the debt, if it existed, was written off in accordance with Regulation 167(c).

Conclusion on bad debt relief claim

247. Having considered all the evidence, I find that the Appellant has not proved, on the balance of probabilities, that it was owed a debt by PPP or that any debt was written off.

248. In any event, the claim was out of time.

Overall decision

249. I have concluded that there is no reasonable prospect of success in relation to the arguments that the EU Principle of Effectiveness applies in the present case, so as to extend the time limits for the section 80 claim and/or the bad debt relief claim, or that there can otherwise be a deferral of the starting date for time to run in respect of either of those claims. Accordingly, I allow the application to strike out the new grounds of appeal based on those arguments.

250. For the reasons set out above, I have concluded that the section 80 claim was out of time for all periods up to and including 02/12 and the bad debt relief claim was also out of time.

251. To the extent that any of the claims were in time, I have concluded that the Appellant has not satisfied the burden of proving that it met the conditions for either the section 80 claim or the bad debt relief claim.

252. Accordingly I dismiss the appeals.

253. 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.

MARILYN MCKEEVER
TRIBUNAL JUDGE

RELEASE DATE: 12 JULY 2018