TC01476

Appeal number: LON/2003/0658

Value Added Tax – Whether agreement under s85 VATA 1994 – No – Whether reinstatement appropriate – No – Whether legitimate expectation that agreement reached – No – Applicant out of time and did not submit valid claim – No discretion to be exercised in their favour – Application dismissed

FIRST-TIER TRIBUNAL

TAX

HARLEYFORD GOLF CLUB LTD **Applicant**

- and -

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

TRIBUNAL: DR K KHAN (Judge)
RUTH WATTS-DAVIES FCIPD, MIH

Sitting in public in London on 30 June 2011

Mr Richard Vallat, Counsel, for the Applicant

Mr Robert Wastell, Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. The Applicant applies for re-instatement of its appeal (or, alternatively, permission for appeal out of time) to allow determination of the quantum of a VAT repayment owed by the Commissioners of Her Majesty's Revenue and Customs ("Commissioners"). The Applicant also seeks interest under the Value Added Tax Act 1994 ("VATA 1994") Section 85A (2) (alternatively under Section 84(8) on the amounts of VAT repaid. Such interest to be calculated on a commercial basis or on such other basis as the Tribunal may direct. The Applicant seeks the cost of the appeal and of this Application.

2. Harleyford appealed in 2003 against the refusal of the Commissioners to repay amounts of VAT on taxable supplies of membership benefits. The actual claim was for the repayment of output tax in the sum of £103,958.54 (as quantified in November 2006) for the periods 09/01 to 06/06. The Commissioners said that payment for debentures in a company formed to operate the Golf Club was non-monetary consideration for the supply of services, namely the grant of membership rights.

3. There were procedural delays with the 2003 appeal with the Applicant providing further and better particulars and an amended grounds of appeal by letter dated 16 May 2006. They confirmed that they had not been making supplies of debentures since 21 August 2001. The Commissioners filed and served an Amended Statement of Case on 24 July 2006 accepting that no such supplies were made from that date. The Applicant withdraws his appeal in writing on 12 October 2006. On 23 November 2006, the Applicant made a qualified claim for voluntary disclosure in the sum of £103, 958,54 for the periods 09/01 to 06/06. The Commissioners repaid £61,900.14 for the periods 12/03 to 06/06. They refused to pay for the period before that time. They say there was only an invalid unquantified claim. When the claim was quantified in November 2006, it was out of time to make a claim going back more than three years. The Applicant now seeks repayment of the amounts relating to the periods being August 2001 and September 2003. The Commissioners would have paid the original claim had it been quantified at the time.

4. The issues before the Tribunal are:

   (a). Whether there has been a settlement of liability with quantum to be decided by the Tribunal if not agreed; and

   (b) Whether the Applicant's appeal LON/2003/658 should be reinstated.

The Tribunal believes the issue of the settlement should be considered first since there is no need to consider reinstatement if there has been a settlement of liability.

5. The Applicant's main contention is that there was an agreement within the meaning of Section 85 VATA 1994 which left the quantum to be determined by the Tribunal, if not agreed. As such, it is not a question of reinstating the appeal which had been withdrawn but rather of finally determining a live appeal.

6. In the alternative, the Applicant says that the original appeal should be reinstated (if the tribunal has power to do so) or that the Applicant be given leave to appeal out of time.

7. The Commissioners say that there has been no section 85 VATA agreement between the parties. Further, there should be no reinstatement of the appeal since the tribunal has no power to do so or alternatively, there are no circumstances giving rise to reinstatement.

8. The Applicant has also raised underlying arguments on legitimate expectation and of the directory nature of Regulation 37 VAT Regulations 1995 ("Regulation 37"). They have asked the Tribunal to consider these arguments when considering whether to reinstate the appeal and/or extend time.

Agreed Facts

9. The parties provided the Tribunal with a Statement of Agreed Facts which is dated 28 March 2011. The Tribunal recites those facts below:

> 1. Harleyford Golf Club Ltd ("Harleyford") is a company formed on 1 June 1995 to develop and manage a golf club on the Harleyford Estate.
>
> 2. Following a decision of the VAT and Duties Tribunal in 1996 Harleyford had been accounting to HMRC for output tax on "notional interest" on debentures issued to members as part of the original recruitment process.
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> 3. On 21 May 2003, Harleyford wrote to HMRC seeking repayment of VAT paid on the notional interest from the second quarter of 2000 on the basis of the VAT and Duties Tribunal's decision in the *Rugby Football Union* case. Harleyford asked HMRC to treat the letter "*as a claim under s.80 VATA 1994"* and noted that they were *"in the course of formulating the reclaim"*
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> 4. On 11 June2003 HMRC rejected the claim on the ground that Harley ford's situation was not on all fours with the *RFU* case which did not impinge on Harleyford's situation. HMRC told Harleyford that "*we cannot accept your letter as notice of an intending claim for repayment of tax charged on National Interest in relation to debentures issued by HGP*."
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> 5. Harleyford filed a notice of appeal on 7 July 2003 and HMRC filed a statement of case on 20 October 2003.
>
> 6. On 23 June 2004 Harleyford filed amended grounds of appeal and on 21 January 2005 further and better particulars of the amended grounds.

7. On 24 July 2006 HMRC filed an amended statement of case which accepted that "*in relation to the period from 21 August 2001 the Applicant did not make any supplies of membership or membership rights and accordingly [the Commissioners'] decision is to that extent varied so as to relate only to the period up to 21 August 2001.*"

8. On 24 July 2006 HMRC faxed Harleyford's then representatives attaching its amended statement of case and asking "*please could you send me a copy of your client's voluntary disclosure? Neither my clients nor I have a copy although we do have a letter dated 21 May 2003 which indicates an intention to make one.*"

9. Neither Harleyford nor its representatives responded to that request.

10. On 12 October 2006 Harleyford filed a notice of withdrawal of the appeal on the basis that since the Commissioners had accepted the new argument, there was no longer any significant dispute between the parties.

11. HMRC acknowledged the withdrawal in a letter to the VAT Tribunal of 24 October 2006. HMRC pointed out that Harleyford's contention that there was no substantive dispute between the parties was incorrect, saying that there would still be a substantive dispute, albeit only in relation to the period before 21 August 2001. The parties agreed that Harleyford should have its costs from the date of the amendment to the grounds of appeal.

12. On 24 November 2006 Harleyford submitted a quantified claim to HMRC.

13. On 6 February 2007 HMRC rejected the claim for all the periods which ended more than three years prior to 24 November 2006 on the ground that prior to that date the claimant had not stated the amount of the claim and the method by which it was calculated as required by s.80(6) VATA 1994 and reg. 37 of the Value Added Tax Regulations 1995 ("VAT Regs 1995").

14. In its letter dated 6 February 2007 HMRC indicated that Harleyford had the right of appeal to an independent VAT and Duties Tribunal but must appeal within 30 days. Harleyford did not exercise that right of appeal.

15. On 11 April 2008 Harleyford wrote to HMRC seeking repayment of the outstanding sums. This was rejected on 8 may 2008, but Harleyford was informed of its right to appeal to the tribunal. Harleyford sought reconsideration but this was rejected on 21 July 2008. HMRC again informed Harleyford of its right of appeal, albeit

that it would now be an appeal out of time. Harleyford did not exercise that right of appeal.

16. Harleyford, through its then representatives, wrote to HMRC regarding its substantive case in January and February 2009, April 2009, November 2009 and February 2010. On each occasion HMRC rejected its submissions.

17. On 4 August 2010 Harleyford made its application for reinstatement.

Applicable Law

10. Under section 80(6) of the VATA 1994 a claim for repayment of overpaid VAT "*shall be made in such a form and manner and shall be supported by such documentary evidence as the Commissioners prescribed by regulations …*"

11. **Regulation 37 of the VAT Regulations 1995 ("VAT Regulations 1995")** deals with claims for repayment of overpaid VAT and provides that:

> "*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."*

12. Section 85 of the VATA 1994 provides that:

> **"85 – Settling appeals by agreement**
>
> (1) *Subject to the provisions of this section, where a person gives notice of appeal under section 83 and, before the appeal is determined by a tribunal, the Commissioners and the Applicant come to an agreement (whether in writing or (otherwise) under the terms of which the decision under appeal is to be treated-*
>
> *(a) as upheld without variation, or*
> *(b) as varied in a particular manner or*
> *(c) as discharged or cancelled*
>
> *the like consequences shall ensure for all purposes as would have ensued it, at the time when the agreement was come to a tribunal had determined the appeal in accordance with the terms of the agreement (including any terms as to costs).*
>
> *(2) Subsection (1) above shall not apply where, within 30 days from the date when the agreement was come to, the Applicant gives notice in writing to the Commissioners that he desires to repudiate or resile for the agreement.*

(3) Where an agreement is not in writing –

(a) the preceding provisions of this section shall not apply unless the fact that an agreement was come to, and the terms agreed, are confirmed by notice in writing given by the Commissioners to the Applicant or by the Applicant to the Commissioners, and

(b) references on those provisions to the time when the agreement was come to shall be construed as references to the time of the giving of that notice of confirmation.

(4) Where –

(a) a person who has given a notice of appeal notifies the Commissioners, whether orally or in writing, that he desires not to proceed with the appeal; and

(b) 30 days have elapsed since the giving of the notification without the Commissioners giving to the Applicant notice in writing indicating that they are unwilling that the appeal should be treated as withdrawn.

the proceeding provisions of this sections hall have effect as if, at the date of the Applicant's notification, the Applicant and the Commissioners had come to an agreement, orally or in writing, as the case may be, that the decision under appeal should be upheld without variation.

(5) References in this section to an agreement being come to with an Applicant and the giving of notice or notification to us by an Applicant include references to an agreement being come to with, and the giving of notice or notification to or by, a person acting on behalf of the Applicant in relation to the appeal."

13. Rule 17 of the Tribunal Procedure (First-tier Tribunal)(Tax Chamber) Rules (SI 2009/273) ("the 2009 Rules") provides for the withdrawal of appeals to the Tribunal:

"**17. Withdrawal**

(1) *Subject to any provision in an enactment relating to withdrawal or settlement of particular proceedings, a party may give notice to the Tribunal of the withdrawal of the case made by it in the Tribunal proceedings, or any part of that case –*

(a) at any time before a hearing to consider the disposal of the proceedings (or, if the Tribunal disposes of the proceedings

without a hearing, before that disposal), by sending or delivering to the Tribunal a written notice of withdrawal; or

(b) orally at a hearing.

(2) The Tribunal must notify each other party in writing of a withdrawal under this rule.

(3) A party who has withdrawn their case may apply to the Tribunal for the case to be reinstated.

(4) An application under paragraph (3) must be made in writing and be received by the Tribunal within 28 days after –

(a) the date that the Tribunal received the notice under paragraph (10(a); or

(b) the date of the hearing at which the case was withdrawn orally under paragraph (1)(b).”

14. Rule 16 of the VAT Tribunal Rules 1986/590 (“the 1986 Rules”) provided that:

“**16. Withdrawal of an appeal or application**

(1) *An Appellant or applicant may at any tie withdraw his appeal or application by serving at the appropriate tribunal centre a notice of withdrawal signed by him or on his behalf, and a proper officer shall send a copy thereof to the other parties to the appeal.*

(2) The withdrawal of an appeal or application under this rule shall not prevent a party to such appeal or application from applying under rule 29 for an award or direction as to his or their costs or under section 84(8) of the Act for a direction for the payment or repayment of a sum of money with interest or prevent a tribunal from making such an award or direction if it thinks fit so to do or under section 56(3), (4) or (5) of the 1996 Act or under paragraph 123(4), (5) or (6) of Schedule 6 to the 2000 Act or under section 42(4), (5) or (6) of the 2001 Act.

15. Section 84(8) of the VATA 1994, which was repealed with effect from 1 April 2009, provided that:

(8) Where on an appeal it is found –

(a) that the whole or part of any amount paid or deposited in pursuance of subsection (3) above is not due; or

(b) that the whole or part of any VAT credit due to the Applicant has not been paid.

so much of that amount as is found not to be due or not to have been paid shall be repaid (or, as the case may be, paid) with interest at such rate as the tribunal may determine; and where the appeal has been entertained notwithstanding that an amount determined by the Commissioners to be payable as VAT has not been paid or deposited and it is found on the appeal that that amount is due, the tribunal may, if it thinks fit, direct that that amount shall be paid with interest at such rate as may be specified in the direction."

Cases referred to

1. *Lamdec Ltd* (VAT Decision 6078)
2. *Tourick (RM) & Co* (VAT Decision 7712)
3. *Petch v Gurney* (1994) STC 689
4. *Discover Travel & Tours International Ltd* (VAT Decision 18665)
5. *R v Soneji and another* [2006] 1 AC 340
6. *Reed Employment v HMRC* [2011] UKFTT 596 (TC)
7. *Matthews v HMRC* [2011] UKFTT 24 (TC)
8. *Scorer v Olin Energy Systems* [1985] STC 218
9. *Shazia Fashions Fabrics*, Decision No.7184
10. *R (Building Societies Ombudsman Co Ltd) v Customs and Excise Commissioners* [2000] STC 892
11. *R v Department for Education and Employment, ex parte Begbie* [2000] 1 WLR 1115
12. *R (M and Others) v The School Organisation Committee, Oxford City Council* [2001] EWHC Admin 245
13. *Johnson v Gore Wood & Co* [2002] 2 AC 1
14. *Matthias t/a The Music Warehouse v The Commissioners*, Decision No. 17692
15. *R (DFS Furniture Co Plc) v Commissioners* [2003] STC 1
16. *R (on the application of Browallia Cal Ltd) v General Commissioners of Income Tax* [2004]
17. *National Galleries of Scotland* No. 19372
18. *Smith v Brough* [2005] EWCA Civ 261
19. *Ogedegbe v HMRC Tax Tribunal*, LON/2009/0200
20. *R (on the application of Cook) v General Commissioners of Income Tax and another* [2007] STC 499
21. *R (oao Lower Mill Estate Limited and another) v HMRC [2008] EWHC* 2409 (Admin)
22. *R (Cook) v General Commissioners of Income Tax* [2009] STC 1212
23. *Atec Associates Limited v The Commissioners* [2010] UKFTT 176 (TC)
24. *B Fairall Ltd* [2010] UKFTT 305 (TC)
25. *Nathaniel & Co Solicitors v The Commissioners* [2010] UKFTT 472 (TC)

26. *CGI Group (Europe) Ltd v The Commissioners* [2010] UKFTT 224 (TC)
27. *Hanover Company Services Ltd v The Commissioners* [2010] UKFTT 256 (TC)
28. *Oxfam v HMRC* [2010] 686
29a. *Reed Employment plc and others v The Commissioners* [2010] UKFTT
29b. *Mathews and The Commissioners* [2011] UKFTT 24 (TC)
30. *Flasz v Havering Primary Care Trust* [2011] EWH 1487 (Admin)
31. *Noor v The Commissioners* [2011] UKFTT 349 (TC)
32. *Pytchley Ltd* [2011] UKFTT 277 (TC)

Documents

16. The Tribunal was provided with three ring binders. These were:

1. Document bundle
2. Authorities' bundle
3. Applicant's authorities bundle

17. There were two witnesses: Mr Richard Taylor and Mr P Davies Brown, both officers of HMRC.

Submissions of the Applicant
Section 85 Agreement

18. Mr Vallat argued that the Commissioners accepted settlement in 2006 and amended their Statement of Case on 24 July 2006 to acknowledge the settlement. Consequently, the Applicants withdrew their appeal. He acknowledged that the claim was not quantified until 2006 but that does not mean that there was not a settlement since the surrounding sequence of events amounted to a settlement. The claim which was being settled was for "all periods after June 2001". Since August 2001, the Applicant has ceased making any supplies of debentures which were treated as taxable supplies of membership benefits. Section 85 VATA 1994 provides that in settling appeals by agreement those agreements may be in writing or otherwise. The Applicant says that the agreement was not in writing but an agreement can be inferred from the parties' conduct. They draws reference to the House of Lords in *Scorer v Olin Energy Systems* [1985] STC 218 which was concerned with a similar provision to section 85 VATA, dealing with the settlement of appeals by agreement. Lord Keith observed that (at 223):

> "The situation must be viewed objectively, from the point of view of whether the inspector's agreement to the relevant computation, having regard to the surrounding circumstances including all material known to be in his possession, was such as to leave a reasonable man to the conclusion that he had decided to admit the claim which had been made."

19. The judge said that a reasonably competent inspector would know the claim which had been made and if settled and would have the relevant documentation. He would also know the period for which the claim was settled. Counsel said one therefore had to look at the amended Statement of Case in 2006 to understand what was agreed between the parties as this document was critical to his argument.

20. In the first instance he draws reference to the case of *R (on the application of DFS Furniture Co Plc) v Customs and Excise Commissioners* [2003] STC 1 where the Court of Appeal in considering section 85 VATA 1994 decided that a refund and withdrawal of the appeal could amount to a settlement but "it all depend on the context in which the refund was made". In looking at the context, Mr Vallat draws reference to the case of *Lamdec Ltd* (VAT Decision 6078) a decision of the Tax Tribunal where the tribunal considered certain letters as giving rise to an agreement and stating that it is not necessary to agree all matters. It was possible for some matters to be left outstanding and there could be an agreement between the parties on the substantive issues. The context of the agreement is therefore important. The Appellants cited the case of *Tourick (RM & Co)* (VAT Decision 7712). In this case, the Commissioners agreed to withdraw an appeal and informed the Applicant but later sought to recover the amounts in the assessments which were supposedly withdrawn. The taxpayer successfully argued that the withdrawal of the appeal was tantamount to an agreement not to recover the sums assessed.

21. The Applicant says the taxpayer was led to believe that HMRC had withdrawn the appeal and accordingly there was agreement between the parties.. They also cited the case of *Discover Travel &Tours International Ltd* (VAT Decision 18665), which decided that an error is not an agreement, as further support for the approach taken by the tribunal in *Lamdec Ltd.*

22. The Applicant say that the fact that they did not make any supplies of membership rights after August 2001 shows that an agreement between the parties was made and draw reference to paragraph 11(b) of the amended Statement of Case 2006 which states :

> "The Commissioners accept that in relation to the period from 21 August 2001 the Applicant did not make any supplies of membership or membership rights and accordingly their decision is to that extent varied so as to relate only to the period up to 21 August 2001".

23. The statement that the" decision is to that extent varied" would, in the view of the Applicant, lead a reasonable person to conclude that for the period after August 2001 The Commissioners had decided to admit the claim. Their understanding is simple that claim had been settled and agreed. The Applicant therefore issued a notice of withdrawal of the appeal which, to the Applicant, created a clear link between the

two events. The withdrawal of the appeal is the sine qua non of the settlement of the case. In other words, the Commissioners accepted the Applicant's arguments set out in their Further and Better Particulars (21 January 2005) and wrote to the Applicant on 24 October 2006 accepting the Applicant's statement that "there is no substantive dispute between the parties" since the only remaining matter relates to "the period before 21 August 2001". The Applicant says that this supports the view that the 2003 claim was acceptable.

24. The Applicant says that the withdrawal of the claim and the amendment of the Statement of Case (2006) were directly linked and constituted an exchange of views and actions. Simply stated, the Applicants withdrew because they knew they had an agreement on substantive points but had to agree the quantum.

25. The Applicant says that "claim" is a claim made in 2003 for repayment of VAT in relation to "notional interest" paid on certain debentures since 30 June 2000. That letter (May 2003) was accepted as a voluntary disclosure (claim) by the Respondents in their amended Statement of Case (2006).

26. The Applicant says that there was an agreement on costs since the Respondents, in their letter of 24 October 2006, stated that they "did not object to the Applicant's application for costs from the date of submission of the Further and Better Particulars". The payment of costs is a consequence of the settlement or determination of an appeal and would not arise if a withdrawal. This further evidences an agreement.

27. With regard to section 85 VATA 1994, the Applicant says that the settlement is tantamount to a decision given by the Tribunal since a settlement is a determination of the matter. The Applicant says that where the quantum was left outstanding, the case is very similar to a decision where the tribunal makes a decision as to liability and leaves the party to agree quantum, with liberty to apply if they cannot reach agreement. There is, in general, no time limit in which applications have to be made following the Tribunal's determination.

28. In short, the Applicant says that a reasonable person in this situation would believe that there was an agreement and would be taken to have acted reasonably in withdrawing the appeal.

Reinstatement

29. The Applicant applies for reinstatement, if necessary, of the original appeal out of time pursuant to rule 17(3)-(4) and 5(3)(a) of the 2009 Rules or for leave to appeal out of time against the decision of 6 February 2007 (voluntary disclosure in respect of the periods 09/01-09/03 totalling £37,003) or the decision of 5 May 2008 (09/01-09/03) pursuant to section 83G(6) VATA 1994 and Rule 4 2009 Rules.

30. The Applicant also believes that they can avail themselves of Rule 19 2009 Rules (power of Tribunal to extend time and to give directions) should it be

necessary. This Rule can be applied given the overriding objectives of the Rules relating to fairness and justice. The Applicant says that this is similar in scope to section 49 Taxes management Act 1970 ("TMA 1970").

31. In support of this argument they cite the case of *R (on the application of Browallia Cal Ltd) v General Commissioners of Income Tax* [2004] STC 296 where commenting on section 49(1) TMA 1970, Evans-Lombe J held (at 12-15) that s.54 TMA 1970 did not

> "purport to guide the General Commissioners in any way as to how that discretion to permit appeals to be lodged out of time should be exercised."

32. He continued, that their discretion is

> "not confined … to determining whether there was a reasonable excuse for the failure to lodge the appeal within time but would also embrace such considerations as the lack of any prejudice to the Commissioners as a result of failing to lodge an appeal in time, and demonstrable injustice to the taxpayer if such an appeal is not permitted to be lodged out of time."

33. The case of *R (on the application of Cook) v General Commissioners of Income Tax and Another* [2007] STC 499 supports this view. The Tribunal was invited to balance the interest of both parties and to consider the merits of the appeal when considering prejudice since the "deprivation to a party of the opportunity of putting forward an arguable meritorious appeal was itself an obvious prejudice."

34. The Applicant said that the Tribunal should allow the original appeal to be reinstated or give leave to appeal against the later decision, out of time, for the following reasons:

> (a) Harleyford's substantive claim has been accepted by HMRC as good;
> (b) Harleyford has a substantive legitimate expectation, that it would be entitled to recover tax based on the position set out in HMRC's amended Statement of Case 2006;
> (c) Harleyford's original claim and/or appeal were valid;
> (d) There is no particular prejudice to the HMRC from the delay, since the arguments revolve around a small number of documents and questions of law, rather than more complex factual issues that would be made more difficult to resolve by the passage of time;
> (e) Although substantial, the delay is justified by the unusual sequence of events. HMRC's objections about the quantification of the claim were only raised some three and a half years after the claim was originally made, and at a stage when Harleyford reasonably believed that the proceedings were effectively concluded. This led Harleyford

to spend much of the next two years in correspondence with HMRC and subsequently in dispute with two successive sets of tax advisers.

35. Given the circumstances, the Tribunal should be prepared to exercise its discretion to extend the time to reinstate the original appeal or allow a new appeal.

36. The Applicant says that the withdrawal of the appeal was not unconditional but rather linked to the conduct of the Respondents and their amendment of the Statement of Case (2006) following an exchange of views between the parties. In the circumstances, the reasoning in *Shazia Fashions Fabric* (Decision No.7184) relating to an unconditional withdrawal of an appeal was not applicable to this appeal.

Underlying arguments

37. The Applicant makes certain underlying arguments and asks the Tribunal to consider these when deciding whether the matter should be reinstated or a time extension granted. There are two main arguments. The first relates to legitimate expectation.

38. The Applicant says that if there is some objection to the Applicant's reliance on section 85 VATA 1994, they also have a claim based on legitimate expectation. Given the Commissioners have agreed to settle and repay, the Applicant has withdrawn their appeal in reliance on the agreement as set out in the amended Statement of Case (2006) and the Commissioners should not later seek to resile from that agreement. They draw reference to the case of *Oxfam v HMRC* [2010] STC 686, where Sales J said that the jurisdiction of the Tribunal could extent to public law issues.

39. The second underlying argument relates to Regulation 37 of the VAT General Regulations 1995, the Applicant draws reference to section 80(6) VATA 1994 which states that a claim under this section may be made "in such manner and form and shall be supported by such documentary evidence as the Commissioners shall prescribe by Regulations". The point here is that while Commissioners may treat a claim as invalid since it is not quantified, they are not obliged to do so and may waive the requirement (expressly or by conduct). Once the requirement has been waived, the Commissioners should not be entitled to invoke it at a later stage. In this case, the Applicant says that the Commissioners have clearly waived the requirement by rejecting the claim for other reasons and accepted the Applicant's appeal as validly made and drafting a statement of case without knowing the quantum of the claim.

40. The Applicant in conclusion says either the Tribunal should confirm that the original appeal was settled as to liability in October 2006, with quantum to be determined at a further hearing or failing that, the original appeal should be reinstated (the Applicant should be given permission to commence a new appeal out of time) to allow them to argue that they were entitled to the repayments sought in 2003 either on the basis of its substantive legitimate expectation or on the basis that the original claim was valid.

Respondents' submissions

Section 85 Agreement

41. The Respondents say that there was no agreement. As a bare minimum there has to be an offer and an acceptance for there to be an agreement.. This was explained in the case of *R (DFS Furniture Co Plc) v Commissioners* [2003] STC 1 where the Court of Appeal explained that there must be a coming together to form an agreement. The Court said that in order for there to be an agreement this "plainly implies not merely that they are of the same mind in relation to a particular matter, but also that their minds have met first to form a mutual consensus, and that meeting of minds, that mutual consensus, has resulted from a process in which each party has to some extent participated".

42. The Respondents say that there was no such agreement and in any event the Applicant unilaterally withdrew their appeal.

43. They further say that the amended Statement of Case (2006) cannot amount to an offer to settle the claim. Neither party has in fact made any offers nor would correspondence after the withdrawal suggest that no such offers were made. They also dispute whether, even if there was an agreement, there could have been an agreement without a quantification of the repayment of VAT. The lack of a properly quantified claim was fatal to any agreement.

44. The Respondents say that the Applicant was under the mistaken impression that liability for full repayment of the output tax for the period 08/01 to 12/03 had been agreed. This was a mistake. The first time there was a suggestion that the Commissioners had agreed a contractual settlement was by a letter dated 1 February 2010 from the Applicant's advisers. There was no section 85 VATA agreement before that date and there was no such agreement in 2006/2007. It is what the Respondents call "an ex post justification which has been put forward by the Applicant's formal representatives with whom it is in dispute."

45. Mr Wastell, for the Respondents, says that if there was an agreement there were no terms of that agreement. The amended Statement of Case simply confirmed that there was no vatable supply rather than accept that there was a payment due to the Applicant.

46. The Respondents say that the withdrawal of the appeal by notice on 12 October 2006 had the effect of placing the Applicant in the same position as if the Tribunal had determined the appeal against it. By section 85(2), the Applicant has thirty days to write to the Commissioners to repudiate or resile from that position. Having withdrawn the appeal, the onus is on the Applicant to seek to reinstate that appeal and the Applicant had not done so.

Reinstatement

47. The Respondents say that there is no express power given to the Tribunal to reopen the appeal under the 1986 Tribunal Rules and there is authority to suggest that the Tribunal had no jurisdiction to do. They draw reference to the *Shazia Fashion Fabrics* case and the decision of the Tribunal in *Matthias t/a The Music Warehouse v Commissioners* (Decision No.17692).

48. The Respondents accept that matters which were not concluded before 1 April 2009, can be examined under the 2009 Rules, if the Tribunal, in its discretion, think it is "fair and just" to do so. This is the position in *Atec Associates Ltd v Commissioners* (Decision No.17692). The 2009 Rules contain an express power in Rule 17 to reinstate a claim which has been withdrawn if an application is made in writing and received within 28 days. The 1986 Rules have no such power. The Respondents say that, given the Appellant's excessive delay, the Tribunal should exercise its power to disapply Rule 17 of the 2009 Rules and to refuse reinstatement of the appeal. Further, the Appellant has not made a timely appeal or resiled from its withdrawal of the appeal within 30 days as allowed by s.80 (2) VATA. The Rules have an underlying discretion to be applied "fairly and justly". The Respondents say that no explanation has been provided for the delay and no witness evidence has been offered to justify and explain why the Application was only made on 4 August 2010. The Respondents see no reason why Rule 17 of the 2009 Rules should not be disapplied since to allow the Applicant to re-open the claim would constitute an abuse of process and would not be in the public interest. A matter which has been determined should not be reopened and litigated given the presumption as to the finality of litigation.

49. The Respondents accept that the Tribunal has discretion in these matters and suggest that the circumstances of this case should not give rise to an exercise of that discretion for the following reasons:

1. The public interests in the finality of litigation and supplement.
2. The Applicant was legally represented and should have known that its claim had to be quantified. It withdrew the Appeal notwithstanding that the Commissioners had identified that the May 2003 letter of intended claim was not sufficient and had asked for a copy of a properly quantified claim.
3. The Commissioners would have been entitled to raise Regulation 37 quantification issues at or after the appeal had the Applicant not withdrawn.
4. There has been excessive and unreasonable delay since the Commissioners notified the Applicant's office in January 2007 throughout which time the Applicant had been legally represented.

5. In February 2007 and again in April 2008 the Commissioners invited the Applicant to appeal to the Tribunal if it did not agree with their application of the time capping provisions. It chose not to do so. In February 2009 the Applicant considered applying to appeal out of time but did not do so.

6. No explanation has been offered for the delay. The Applicant has served no evidence putting forward any reasons or mitigating circumstances.

7. The Applicant has raised a public law challenge and such claims require strict compliance with time limits contained in the rules governing judicial review. The Applicant has delayed for three and a half years and there is no merit in their claim.

50. The Respondents make the point that the Applicant has not raised any exceptional circumstances for the reinstatement of the appeal. They cite the case of *R (Cook) v General Commissioners of Income Tax* [2009] STC1212which directs the court to balance any prejudice to the parties with the merits of the case.. In that case Dyson LJ cited with approval the decision in *The Commissioners of Inland Revenue for Judicial Review of a Decision of the General Commissioners of Income Tax (Hugh Love*) [2005] CSOH 135 where Lord Drummond Young said that the central features of provisions designed to allow appeals to be brought, even though a time limit has expired, is that the circumstances are exceptional in nature. The Respondents say that the circumstances of this case are not exceptional. The Applicant was aware of the possibility of appealing early as January 2007 but did not do until 5 February 2010. They say that the exceptional delay has caused prejudice to the Commissioners in not being able to "close their books" on the case and to have "good administration". The principle of the finality of litigation is fundamental to the common law and this must be observed.

51. The Respondents say that this is not an exceptional case but justifies the waiving of the applicable time limits which appear to have been ignored by the Applicant.

Underlying arguments

52. The Respondents say that the Applicant's case is weak. First, the section 80 VATA claim is time barred. By subsection 80(6) VATA, a claim to repayment of overpaid tax "shall be made in such form and manner and shall be supported by such documentary evidence as the Commissioners prescribed by regulation". Regulation 37 of the VAT Regulations 1995 deals with claims for repayment of overpaid VAT and provides, inter alia, that the section 80 claim should be made in writing to the Commissioners and state the amount of the claim and the method by which the amount was calculated. The claim which is made was not in accordance with Regulation 37. Under section 80(4) VATA there is a three year cap beginning at the end of the period in which the money was accounted for to the time when a valid claim was submitted. These requirements are mandatory. Reference is made to *R (Building Societies Ombudsman Co Ltd) v Customs and Excise Commissioners* [2000]

STC 892 where the Court of Appeal rejected the argument that the claim which did not comply with Regulation 37 would be sufficient and to the case of *Nathaniel & Co Solicitors v Commissioners* [2010] UK FTT 472 (TC) where the Tribunal reiterated that the requirements of Regulation 37 are mandatory.

53. As regards the legitimate expectation argument, the Commissioners do not accept that the Tribunal has jurisdiction to determine the challenge the decision based on legitimate expectation. Further, the argument proposed by the Applicant presupposes the existence of an agreement by the Commissioners to repay tax which did not exist. The Commissioners never agreed to pay output tax and have not at any stage represented to the Applicant that the provisions of VATA 1994 and the VAT Regulations would not be applied. Further, the Applicant is out of time to raise this as a ground of appeal and it should not be entertained.

Witness evidence

54. Witness statement of Richard Taylor, Higher Officer HMRC, dated 5 May 2011. The following points were raised:

(1) Mr Taylor confirmed the facts as outlined earlier

(2) He confirmed in paragraph 14 of his statement that on 2 February 2010 he received a letter from the Applicant advisers (Hillier Hopkins) stating "that they believed the matter under appeal was a valid claim and their appeal was determined by agreement under section 85 of the VAT Act 1994 even though quantum was not agreed". He confirmed that he replied on 2 February 2010 that "the appeal was not settled by agreement; there was no section 85 agreement". He confirmed this position in his oral evidence.

(3) He also confirmed the contents of his letter of 24 June 2008 which stated, inter alia, that in reply to the Applicant's statement that "HMRC initially accepted the voluntary disclosure". He stated that "I can find no response to acceptance" and further that the Commissioners issued a letter on 23 May 2003 and on 11 June 2003 stating "we cannot accept your letter as notice of an intending claim for repayment of tax".

He also said that in reply to the Applicant's statement that "no VAT was due and our client was entitled to reclaim VAT from 21 August 2001". He stated that "I am unable to locate any letter from our Solicitor that explicitly states that your client was entitled to a refund from 21 August 2001, please can you advice of the letter that you consider does so".

55. He confirmed this position in his oral evidence.

Witness statement of Peter Davies-Brown, Higher Officer at HMRC, dated 10 March 2011

56. His witness statement made the following points:

1. It confirmed various dates which are in the agreed facts.
2. In paragraph 10 he confirmed that the claim covering the periods 09/01-01/03 totalling £37,003 was subject to a three year capping.
3. He also stated at paragraph 6:

> "I considered the case and examine all previous related correspondence electronically to establish if a quantified claim had been received prior to the matter from Mazars dated 24 November 2006. I can find no previous quantified claim. Considering the history of the case, I thought it appropriate to prepare a submission to HMRC Error and Assessments team."
>
> He confirmed that his letter of 17 January 2007 to the Applicant stated that for a claim to be valid under Regulation 37 the claim had to be quantified and state the method of calculation used.

57. He stated in oral evidence that he did not believe there was a section 85 agreement .

58. Both witnesses gave oral evidence and were cross –examined.

Discussion

59. The Applicant makes the point that their notice of withdrawal makes the link between withdrawal and settlement clear, stating that "the Commissioners in their amended Grounds of Appeal at paragraph 11b accept the Applicant's arguments as set out in its Further and Better Particulars, and there is no substantive dispute between the parties". The Applicant says that the Commissioners in response in their letter of 24 October quoted this passage and noted that there would be a substantive dispute "only in relation to the period before 21 August 2001". The Applicant says that this shows a consensus between the Applicant and the Commissioners that VAT paid after 21 August 2001 was repayable. There was also a consensus as to costs, as the same letter stated that the Commissioners "did not object to the Applicant's application for cost from the date of submission of the Further and Better Particulars". The Applicant says that the payment of costs is a matter of consequence of the settlement or determination of the appeal. They say that this constitute an agreement for the purposes of Section 85 VATA 1994 since it is as if the Tribunal determined the appeal in accordance with the terms of the agreement.

60. Let us first look at when an agreement is reached between parties. This means that the parties would have agreed terms and conditions such as to discharge the

appeal and to settle the main points of dispute. The agreement reached must settle all outstanding matters. One would normally expect there to be determined how much tax is due or at least point to a formula for determining that figure. The parties would not necessarily have important matters outstanding where there could be further arguments. An agreement by its nature means that there has been a meeting of minds between the parties. In looking at the correspondence between the parties and all the relevant facts objectively assessed would a reasonable man would conclude that there is agreement between the parties ?.

61. Let us start by looking at the relevant chronology to understand what was agreed. On 23 June 2004 the Applicant applied to amend the Notice of Appeal on the grounds that "the method of calculation of VAT due in this case is incorrect as it is incompatible with the decision in the case of *RFU* LON/02/0443". On 19 July 2004, the Commissioners acknowledged the amendment of the Notice of Appeal and requested Further and Better Particulars of the allegation concerning the incorrect calculation of VAT due and in particular they requested information on "why it is alleged that the method used in the calculation of VAT due is incorrect". They also asked for "particulars of any calculations which the Applicant alleges in the alternative". On the same day, 19 August 2004, the Applicant's advisers (Oury Clark) stated that they had discussed the matter with "our legal advisers" and explained that "the present method of calculating the VAT based on notional interest is incorrect following the *RFU* decision". On 21 August 2004 the Commissioners apply for a direction for Further and Better Particulars and List of Documents and on 21 January 2005 Further and Better Particulars are served by the Applicant. Those particulars state that the Applicant "has since August 2001 cease making supplies which were the basis of the previous Tribunal decision i.e., the grant of rights of membership". On 17 February 2005 HMRC wrote saying they are unable to amend the Statement of Case and on 3 May 2005 they request further information arising out of the Further and Better Particulars. On 16 May 2006, the Applicant provides amended grounds of appeal by letter. In that letter, the Applicant states that they would be "grateful if you could treat this letter as a matter of urgency and if it is clear that we are unable to reach an agreement would be looking to have the matter set down for hearing as soon as possible". On 24 July 2006 the Commissioners provide an amended statement of case and in that amended statement of case the relevant clauses are Clause 10 and 11. Clause 10 states the Applicant's arguments and 10(b) states "the Applicant stopped supplying membership services with effect from August 2001." In response, the Commissioners say that "they accept in relation to the period from 21 August 2001 the Applicant did not make any supplies of membership or membership rights and accordingly their decision is to that extent varied so as to relate only to the period up to 21 August 2001".

62. At this point, the Commissioners are accepting that there is no vatable supply. It does not appear to the Tribunal that they are accepting to pay the Applicant a sum of money. On 24 July 2006 the Commissioners faxed to the Applicant an Amended Statement of Case and asked for a copy of their voluntary disclosure. They say that they have the letter of 21 May 2003 which refers to an intention to make such a disclosure. On 12 October 2006 the Applicant served a notice of withdrawal of

appeal saying that there is no longer a substantive dispute between the parties and seeking costs from the date of submission of the Further and Better Particulars. On 24 October 2006 the Commissioners wrote to the Tribunal and Applicant noting the Notice of Withdrawal and stating that there is still a "substantive dispute", albeit only before 21 August 2001. On 30 October 2006, the Commissioners wrote to the Tribunal asking for the hearing to be vacated as the appeal had been withdrawn and noting "although the assertion that there is no substantive dispute between the parties is incorrect". This is followed on 24 November 2006 where the Applicant seeks repayment of VAT for the period 09/01 to 06/06 in the sum of £103,958. On 17 January 2007 the Commissioner wrote to the Applicant saying that there is no evidence of a quantified claim being received until the Schedule submitted on 24 November 2006. They said that the repayment for 09/01 to 09/03 cannot be processed since for a Section 80 claim to be valid it must be quantified and states the method used and three year capping provisions apply from the date of receipt of a valid claim. The parties agree that this was not done. A claim made under VATA 1994 Section 80 must meet the criteria set out in Reg 37 (SI 1995/2518). A valid claim must set out the amount being claimed and show how that amount has been calculated and provide evidence which supports the calculation. A letter expressing an intention to claim is not a claim. It is for the claimant to make a proper claim. In their letter of 6 February 2007, the Commissioners say and reiterate from their letter of 17 January 2007 that "there was no evidence of a previous quantified voluntary disclosure, ("as required by VATA 1994 s.80 subject to reg.37"). On 8 May 2008, the Commissioners reiterated this position. This was reiterated again on 28 January 2009 by the Commissioners. Indeed the debate continues for some period until 1 February 2010 when the Applicant states for the first time that there is a valid Section 85 agreement in respect of liability and this was disputed by the Commissioners on 2 February 2010. The two witnesses for the Commissioners , who were involved in the correspondence,dispute that there was a Section 85 agreement.

63. The Tribunal believes that taking the correspondence as a whole over time there was no Section 85 agreement. The Commissioners contacted the Applicant in July 2006 asking for a copy of their voluntary disclosure since there was simply a letter on file from May 2003 stating their intention to make such a claim. There is nothing in that period between May 2003 and July 2006 to indicate that there was an agreement between the parties indeed the Amended Statement of Case cannot on its own amount to an offer to settle the claim. The Applicant's withdrawal of their appeal does not provide evidence of an agreement between the parties. The Commissioners can only be liable to pay after all liabilities are established and they are content to make payment. The onus is on the claimant to make a valid claim and to demonstrate the amount being claim is an accurate assessment of the liabilities. The claimant must clearly show that an amount accounted as VAT was not VAT and should not have been accounted for. The evidence does not suggest that this was done.

64. The withdrawal of the appeal appears to be a unilateral act unrelated to the discussions taking place at the time. Certainly there was no agreement on the quantification of the payment of the VAT liability or a method to be used for its calculation as one would expect in a Section 85 agreement. The Applicant certainly

appeared to think that there was agreement to repay the full amount of output tax for the period 08/01 to 12/03 as evident from their communication of 12 September 2006 where they say, "it looks like HMRC are agreeing to repay the VAT accounted for on the notional interest charge in connection with the issue of debentures from 1 August 2001 to date". However, such statement appears to have arisen from a misunderstanding since the Commissioners appeared not to have reached such an agreement. Indeed, the Applicant appeared to have contemplated an agreement under Section 85 VATA only from 1 February 2010. Objectively speaking it is difficult to see how the parties had agreed on a settlement of the dispute.

65. There appear to be no settlement in the traditional sense and certainly there appear to be no negotiated settlement between the parties. Mr Vallat said that the agreement could be inferred from the parties' conduct and draws reference in particular to paragraph 11b of the Amended Statement of Case. It is quite clear to the Tribunal that this paragraph is no more than recognition by the Commissioners that the Applicant was not making vatable supplies. It is not an acceptance of an obligation to pay and settle the matter. Given that the Applicant was requested by the Commissioners to make a voluntary disclosure and to quantify the claim, it is difficult to understand how any negotiated settlement could be reached if this is not done and agreed.

66. The communication between the parties in the period between June 2004 and November 2006 and then from January 2007 to February 2010 is confusing and not settled. It does not suggest that there is an agreement between the parties.

67. The letter from the Commissioners on 24 February 2006 speaks of a "substantive dispute" but only in relation to the period "before 21 August". This would suggest that the outstanding matters between the parties are not settled.

68. The Commissioners say that "it appears from the Applicant's representatives' facts of 12 October 2006" that the appeal has been withdrawn but at the same time the Commissioners provide dates to avoid and the time estimate for a hearing. This is not consistent with having reached an agreement.

69. The Commissioners on 17 January 2007 state that there is "no evidence of a quantified claim". The letter makes clear that there is a three year capping and the Commissioners say that they would be "unable to process the repayment for your client in respect of the periods 09/01 to 09/03". This would suggest that some six months after the Commissioners' amended Statement of Case there is still lack of clarity as to what has been agreed and certainly a dispute as to whether there is a quantified claim and whether the period from 09/01 to 09/03 is included in any agreement. This position is noted in a letter dated 6 February 2007 from Peter Davies-Brown, who also confirms this position in his witness statement and in oral testimony given at the hearing.

70. The Applicant's advisers (Mazars) raise the issue of the 09/01 to 09/03 period in their letter of 11 April 2008 drawing reference to the case of *Commissioners v Fleming t/a Bodycraft* [2008] UK HL 2 and inviting the Commissioners to review "historic claims of VAT overpaid". The Commissioners explained that Business Brief 07/08 did not relate to input tax for accounting period ending before 1 May 1997 and therefore had no bearing on the Applicant's case. The Applicant was still therefore pursuing the claim and was advised to do so under the appeals process since the request for payment have been refused.

71. The Applicant states that they were unable to provide a quantified claim given that the information requested in their letter of 21 May 2003 was not provided by the Commissioners. However, in spite of that information not being provided a quantified claim was provided on 24 November 2006. This does raise the question as to whether the information requested was essential for the submission of a quantified claim. It is also clear that in spite of the Applicant stating the Commissioners acted on the voluntary disclosure, there is correspondence from the Commissioners on 11 June 2003 stating that they cannot accept the letter as notice of an intending claim for repayment of tax. There is also no correspondence which clearly states that the Applicant was entitled to a refund from 21 August 2001. This position was borne out by the witness statement of Mr Richard Taylor and in his oral evidence given at the hearing. He also confirmed that the Commissioners accepted that VAT was not due in respect of debentures with effect from 21 August 2001 and had not agreed to make a repayment.

72. The Tribunal would have expected more consensuses in the documentation and correspondence for there to be an agreement. The Applicant had accountants and lawyers as their advisers and they should have addressed the issue of quantum as part of any settlement. This would be normal professional practice for those familiar with the law and practice in matters of taxation. Rather this was strangely left outstanding when it was required for a valid claim. The agreement itself, if it existed, would have been arrived at after some discussion followed by an offer of settlement. There was neither offer nor form of words which would have made it unequivocal that the parties had agreed. The correspondence evidencing an agreement would have arisen before the agreement was reached to show the parties were of one mind. This was not apparent. The Amended Statement of Case was clearly not an offer to settle. The Commissioners were asking the applicant as late as July 2006 to provide a copy of their voluntary disclosure since only the letter of May 2003 was on file. It seems to the Tribunal that the parties were not of a common mind, there were too many loose ends for there to have been an agreement. A reasonable man would not think there was an agreement between the parties, having regard to all the circumstances and correspondence and the information in the possession of the inspector.

Reinstatement

73. The Applicant applies for either reinstatement of the original appeal out of time and that Rule 17(3)-(4) and 5(3)(a) 2009 Rules or leave to appeal out of time against a decision of 6 February 2007 or the decision of 5 May 2008 under Rule 83G(6) VATA 1994 and Rule 4 of 2009 Rules.

74. While there was no express rule allowing reinstatement under the 1986 Rules there was a broad power under Rule 19 (power of a tribunal to extend time and to give directions) to do so. The Applicant says that they are not seeking to benefit from their own delay in this matter and further there is no express restrictions under the 2009 Rules on the discretion to extend time save in the light of the overriding objectives of fairness and justice. The discretion is therefore broad and must consider any injustice to the taxpayer as well as any prejudice to the Commissioners. It is analogous to the power given under section 49 TMA 1970.

75. The Applicant says that their claim was agreed by HMRC and they have a legitimate expectation that they would be entitled to recover tax based on the position set out in the Commissioners' Amended Statement of Case (2006). Further, they say that there is no particular prejudice to the Commissioners from the delay, which though substantial is justified by the unusual sequence of events. There can be no prejudice given the small number of documents and questions of law involved and these can be addressed even with the passage of time.

76. The Commissioners say that there should be no reinstatement given the excessive delay by the Applicant and no explanation has been offered for the neither delay nor witness evidence to justify and explain why this application was only made on 4 August 2010. The Respondents also say that to seek to reopen the case several years later is an abuse of process and contrary to the public interest in the finality of litigation.

77. The Applicant withdrew their appeal by notice on 12 October 2006. Section 85 VATA treats the Applicant as if the Tribunal had determined the appeal. Section 85(2) VATA allows the Applicant 30 days to write to the Commissioners to repudiate or resile from their position and therefore having withdrawn the appeal the onus is on the Applicant to seek to reinstate the appeal. The Applicant did not seek to reinstate the appeal within the statutory time limits. There can therefore be no statutory reinstatement of the appeal.

78. In the absence of statutory reinstatement, does the common law allow there to be a reinstatement. The cases of *Shazia Fashions Fabric* and *Mathias t/a The Music Warehouse* are both cases dealing with reinstatement once there has been a withdrawal by the Appellant. These cases establish that where there is an unconditional withdrawal there cannot be reinstatement. The Applicant in this case had various exchanges with the Commissioners over a period of time and it seems, believed, there was an agreement to settle and then proceeded to withdraw the appeal

on the basis of that belief. If one accepts this understanding of the situation then it is possible to say that there was not an unconditional withdrawal of the appeal.

79. While there was no express power for the Tribunal to reopen the appeal under the 1986 Rules, Rule 17 of the 2009 Rules provides the Tribunal with power to reinstate if the withdrawing party applies to do so within 28 days. Further, s.85 (2) VATA gives the Applicant 30 days to repudiate from a notice of withdrawal. The Appellant withdrew on 12 October 2006, so the 1986 Rules applied. These applied until the transfer of tribunal functions to the First-tier Tribunal on 1 April 2009 which is approximately two and a half years later. We know, from the decision in *Atec Associates ltd* that the 2009 rules would apply even to cases started before 1 April 2009 if "current proceedings". The question then is whether the Tribunal should exercise its discretion given under the 2009 Rules to either reinstate the appeal or give leave to appeal out of time. As stated earlier, the Tribunal's discretion is quite broad and unfettered and must fit within the overriding objectives of fairness and justice.

80. There has been substantial delay by the Applicant in presenting their case. The delay was approximately three and a half years. During that time no appeal was raised. The Applicant was advised by accountants and lawyers during this period and it seems that they were not properly advised on their on-going dispute. It is not for the tribunal to make a determination on the actual advice given to the Applicant.

81. It is in the public interest that there be a finality in litigation. Once the appeal had been withdrawn that should normally be taken as a determination of the matter with the Applicant pursuant to Section 85(2) VATA. However, the Applicant says that there are a number of points in their favour. The first is that there has been no prejudice to the Commissioners from the delay and there are only a small number of documents and questions of law rather than more complex factual issues that will be made more difficult to resolve by the passage of time. They say that the delay is justified by the unusual sequence of events and in the circumstances the Applicant reasonably believe that the proceedings had been concluded when they withdrew the appeal. They say that their original claim and/or appeal were valid and they form a legitimate expectation that they would be entitled to recover the tax on the basis of the 2006 Amended Statement of Case.

82. The Tribunal does not believe that the matter should be reinstated or indeed leave given for an appeal out of time. There has been an excessive delay and there is no reasonable explanation for this delay. The Commissioners made clear to the Applicant that their letter of May 2003 was not sufficient as a claim and asked for a properly quantified claim. Regulation 37 of VAT Regulations 1995 provides that a claim of this type should have contained documentary evidence and stated the amount of the claim and the method by which that amount was calculated. This is a requirement in law. This was not done and this requirement is mandatory. The Court of Appeal has accepted this position in the case of *R (Building Societies Ombudsman Co Ltd) v Customs and Excise Commissioners* [2000] STC 892. This is supported by the Court in the *Nathaniel & Co Solicitors v the Commissioners* [2010] UK FTT 472

(TC) case where the Court stated that regulation 37 is mandatory. The Tribunal does not agree with the Applicant's submissions that regulation 37 is directory.

83. The Applicants were invited to appeal in February 2007 and again in April 2008 if they did not agree with the Commissioners' application of the capping provisions. The Applicant chose not to do so. They considered applying in February 2009, which would have been out of time but again there was no actual appeal. The Applicant has offered no real reason for this delay and has provided no real evidence putting forward any reasons or mitigating circumstances. The main reason seems to revolve around the fact that there was an agreement in place and the parties operated on the misunderstanding that there was such an agreement and the appeal was withdrawn. It is not a satisfactory reason, as explained above, nor does it have merit in a legitimate expectation argument since it presupposes the existence of an agreement with the Commissioners to repay the tax. In the circumstances, it cannot be considered to be unfair not to allow the appeal to be reinstated or to be made out of time. The Tribunal does not accept the Applicant's argument for an extension of time caused by issues relating to correspondence with the Commissioners on quantification of the claim and in dispute with tax advisers. The quantification was achieved without help from the Commissioners and the dispute with advisers is a matter for the Applicant alone.

84. The Tribunal understands the need to balance the interest of the parties and to accept a reasonable excuse for delay. This approach was highlighted in the case of *Ogedejbe v HMRC*, LON/2009/0200 where Sir Stephen Oliver pointed out:

> "While this Tribunal has the power to extend the time for making an appeal, this can only be granted exceptionally."

85. The Applicant says the circumstances are exceptional since it is important that the Applicant be given an opportunity of putting forward an arguable meritorious appeal where there is no clear case of prejudice. It must be a requirement placed on the Applicant, on whom the burden rests, to act in an expeditious manner in seeking to make the appeal. This was not done. The Commissioners explained to the Applicant as early as January 2007 that they could have appealed but this was not taken up an appeal was only made in the middle of 2010. This is several years later.

86. A point has been made regarding prejudice and while there is no overt prejudice, it is important that there be an end to the litigation and the Applicant is not given an open-ended opportunity to appeal. The public interest requires the finality of litigation and it is implicit in the legislation that actions be brought in the shortest possible time and time limits observed for bringing such actions. The Applicant sought to justify the delay by saying that the issue of quantification of the claim "led Harleyford to spend much of the next two years in correspondence with HMRC and subsequently in dispute of two successive sets of tax advisers". We are aware that the quantification of the claim was done without any help from the Commissioners and indeed they provided none of the requested information which leads one to believe that the quantification could have been achieved without the help of the

Commissioners as indeed it was. We therefore do not accept this as a reasonable excuse.

87. The Tribunal does not believe that there are exceptional circumstances in this case which justify the waving of the applicable time limits set in the legislation. The Applicant appears not to have been properly served by the advisers who seem to have operated without regard to the time limits in the legislation laid down for bringing an appeal by the requisite date. It is in the interest of all parties to be efficient and economical in the conduct of litigation and the Applicant has not acted in a manner which would justify the reinstatement of the appeal or the permission to appeal out of time.

Legitimate expectation

88. The Applicant makes the point of having withdrawn the appeal in reliance on the Commissioners' agreement to repay tax on the basis set out in their Amended Statement of Case, the Commissioners would not now seek to resile from that agreement.

89. The Applicant was not aware that there was any defect with the claim and they say that the Commissioners have now raised an objection based on the non-qualification of the claim, which cannot be taken to vitiate the claim. The Commissioners made representations to the Applicant through their Statement of Case and cannot now deny those representations.

90. The case of *Oxfam v Commissioners* [2010] STC 686 indicates that the Applicant can rely on substantive public law rights before the Tribunal and the Tribunal can use its normal powers to respect those rights. This seems a desirable approach.

91. The first point to make is that the Applicant presupposes an agreement with the Commissioners. The Tribunal does not believe that there was such an agreement to pay output tax and such was not represented to the Applicant by the Commissioners. Accordingly, there is no inherent unfairness towards the Applicant. Further, there can be no settlement of liability where the quantum was left to be decided. As such the Applicant should not have expected to be paid its output tax without such quantification. Further, the Applicant is far out of time to raise such grounds of appeal. The representations on which the Applicant sought to rely were made in July 2006. One would have expected the Applicant to have a timely claim where public law issues are to be considered.

92. It should also be borne in mind that the Tax Tribunal has been ambivalent in its approach to the *Oxfam* case. In the case of *Mathews v HMRC* [2011] UK FTT 24 (TC) the Tribunal stated:

> "The First-tier Tribunal's jurisdiction in relation to legitimate expectation is currently a matter of some doubt. Sales J *Oxfam v*

HMRC [2010] STC 686 said that the Tribunal did have such jurisdiction. Judge Hellier in *CGI Group (Europe) Ltd v HMRC* [2010] SFTD 1001 followed this as a preliminary ruling although on appeal (2010 SFTD 1178) it was decided that the relevant Notice did not apply to the facts of that case. The opposite point of view is that there is other High Court authority against that jurisdiction that did not bind Sales J but does bind this tribunal. It is fair to say that the decisions of the First-tier Tribunal on this issue have shown considerable difference."

93. The Upper Tribunal in *Reed Employment v HMRC* [2010] UK FTT 596 (TC) described the authority of the tax tribunal to look at this argument as "uncertain".As an observation, it seems possible to raise public law arguments in this tribunal within the terms of s.83 VATA 1994. Indeed , it is desirable to do so , if only to reduce the costs to the litigant in having to litigate twice; once at the tribunal and then in seeking judicial review.The tribunal appears to have power to determine all matters relevant in making a determination under s83 VATA 1994.

94. The Tribunal finds, in this case, that the legitimate expectation argument raised by the Appellant is unfounded since it is premised on the existence of an agreement by the Commissioners to repay tax and such agreement did not exist. This is sufficient to dispose of the point raised in this case.

Regulation 37 VAT Regulations 1995

95. The Tribunal has dealt with this matter and finds that Regulation 37 is mandatory. The Tribunal does not believe that it is correct to say that a claim which is not quantified may be treated as a valid claim. A claim under Section 80 VATA must meet the criteria set out in Regulation 37 to be valid and therefore must set out the amount being claimed and explain how that amount has been calculated.

Time Limits

96. The Applicant submits that importing the time limits from the administrative court is misconceived. However, the concerns as to the need to bring judicial review claims have been answered by those cases in which the decision of *Oxfam* have been applied by pointing out that Section 83G(1) VATA 1994 provides that an appeal is to be made at the end of the period of 30 days only. In this case, this time limit has not been met for making an appeal.

Conclusion

97. Accordingly, for these reasons the application should be dismissed. There was no settlement of liability and the appeal should not be reinstated to determine the quantum of vat repayment nor should leave be given for a new appeal out of time.

98. 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.

DR K KHAN
TRIBUNAL JUDGE
RELEASE DATE 28 September 2011