TC02430

Appeal number: TC/2010/07107

VAT – INPUT TAX – Fleming claim for unclaimed input tax for period 1 January 1986 to 30 April 1997 on the fuel element of mileage allowances reimbursed to researchers engaged by the appellant - HMRC's application to amend Statement of Case granted – Tribunal's jurisdiction was appellate rather than supervisory on the issue of whether appellant had previously recovered the input tax which was the subject of the claim.

FIRST-TIER TRIBUNAL
TAX CHAMBER

MARKET & OPINION RESEARCH INTERNATIONAL LTD **Appellant**

- and -

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

TRIBUNAL: JUDGE SWAMI RAGHAVAN
MRS C. J. DEBELL

Sitting in public at 45 Bedford Square, London on 18 and 19 June 2012

Mr Tarlochan Lall, Counsel, for the Appellant

Mr Shea, HMRC Officer for the Respondents

DECISION

1. The appellant is a well known market research company. The substantive issue in the case concerns a claim it made following the decision of the House of Lords in *HMRC v Michael Fleming (t/a Bodycraft)* [2008] UKHL 2, [2008] STC 324 which held that the three year cap on claims for repayment of under-claimed input tax must be disapplied until an adequate transitional period had been applied.

2. The *Fleming* claim, made by the appellant on 27 March 2009, was for input tax of £126,454.22 for periods ended between 1 January 1986 and 30 April 1997 on the fuel element of mileage allowances reimbursed to researchers engaged by the appellant.

3. As at the start of the hearing it was common ground between the parties that input tax was properly deductible and that any failure to claim input tax during the relevant period was due to the appellant's omissions and not the fault or misdirection of HMRC. On 6 May 2010 the claim was rejected by HMRC on the basis that there was insufficient evidence that the input tax had not been claimed during the claim period so if it had already been claimed before it could not be claimed again.

4. Prior to starting to hear argument on the substantive issue the Tribunal gave an oral decision on two preliminary matters:

(1) Whether HMRC's application of 2 April 2012 to amend its Statement of Case should be granted. The Tribunal directed at the hearing that the application should be granted.

(2) Whether the Tribunal's jurisdiction in relation to determining the issue of whether the appellant had already previously recovered input tax in the claim period was supervisory as contended by HMRC, or whether it was appellate as contended by the appellant. The Tribunal directed at the hearing that the Tribunal's jurisdiction on this point was appellate.

5. This decision sets out reasons for the decisions on those preliminary matters.

HMRC's application to amend its Statement of Case

6. On 3 May 2011 HMRC filed its Statement of Case.

7. On 12 August 2011 a directions hearing was listed at the Tribunal's own motion for 31 August 2011 but was subsequently vacated and the matter stood over until 30 September 2011.

8. On 28 November 2011 further case management directions which had been applied for jointly by the parties were made by the Tribunal.

9. On 2 April 2012 the Respondents applied for permission to submit an amended Statement of Case. They stated in their covering letter that:

> "The main difference to the original case submitted is with regard to the Tribunal's jurisdiction and the effect of *Kohanzad v Customs and Excise Commissioners* [1994] STC 967."

10. The statement of case enclosed on 2 April 2012 did not set out what changes had been made.

11. On 10 April 2012 the Tribunal notified the parties that the substantive hearing of the matter was to take place on 18-20 June 2012.

12. On 1 May 2012 the Respondents wrote to the appellant to enclose an amended statement of case which was said to highlight the substantive amendments. The correspondence was not received by the appellant until 8 May 2012. The amended statement of case did not show what deletions had been made and the appellant had to prepare their own marked up version.

13. HMRC explained the aim of making the application to amend their Statement of Case was to help the Tribunal to further the overriding objective in its procedural rules to deal with cases fairly and justly. As well making some corrections, the amendments were principally made with a view to alerting the appellant and the Tribunal to arguments HMRC would be making about the supervisory nature of the Tribunal's jurisdiction in the appeal.

14. Mr Lall for the appellant accepted, fairly in our view, that for the most the part the amendments were matters of legal submission going to the nature of the Tribunal's jurisdiction and were matters which could, if the parties had not raised them, have been raised by the Tribunal of its own motion. Nevertheless it was submitted that the appellant had suffered prejudice in having to spend additional time in dealing with correspondence and the jurisdiction issue for the hearing and this was prejudice that could not be compensated for in costs (without having to make out an application for costs on the basis of HMRC's unreasonable conduct under Rule 10(1)(b) of the Tribunal Procedure Rules.)

15. In our view the prejudice to the appellant in allowing HMRC's application was limited. Rather, the advance notice of the proposed amendments was helpful in that that if HMRC were to take a point on the Tribunal's jurisdiction it was desirable that their stance on this be made transparent as soon as possible to allow the appellant sufficient time to consider the issue and to be able to respond to it.

16. While the execution of HMRC's attempt to alert the appellant and the Tribunal to their revisions could have been better (in particular a marked-up copy of the amendments ought to have been served at the outset on 2 April 2012), we find that the nature of the proposed amendments was such that any prejudice to the appellant in allowing the application to amend the Statement of Case did not outweigh the benefits of bringing the issue to the fore in advance of the hearing. There were for instance no material allegations of fact which, if they had been made sooner would have meant the appellant could have led significantly different or additional evidence, or which would mean that they ought to be afforded the opportunity in advance of the hearing to do so. The issue of jurisdiction, if the parties had not raised it, was capable of being

raised by the Tribunal's own questions. There being limited prejudice, the appellant's point that the application to amend the Statement of Case should not be granted because the prejudice was not able to be compensated by costs is not material.

17. We therefore allowed HMRC's application to amend its Statement of Case.

Tribunal's jurisdiction on issue of whether appellant had already recovered input tax during the claim period

Appellant's arguments

18. The Court of Appeal in *John Dee Ltd. v Customs and Excise Commissioners* [1995] STC 941 observes that whether the tribunal is vested with supervisory or appellate jurisdiction is determined by whether the court would, on appeal, be in a position to consider evidence and re-make the decision.

19. Where the tribunal has a fact finding role "and could reverse findings of fact made by the commissioners" the tribunal's jurisdiction is appellate

20. Per *CGI Group (Europe) Ltd v Revenue and Customs Commissioners* [2010] UKFTT 224 (TC) the nature of the decision under appeal must be examined.

21. The focus of the tribunal on appeal must be the decision taken and the subject of the appeal.

22. In this case HMRC decided that it was likely that the input tax had already been claimed. That decision related to a matter of fact. If the tribunal disagreed with the Respondents' decision it could make a finding of fact and could reverse the decision. The decision taken by the Respondents in this case was on a matter of fact so was not subject to a supervisory jurisdiction.

23. The only provision identified by HMRC as granting discretion is Regulation 29(2) of the VAT Regulations 1995 which was not directly in point in this appeal.

24. Alternatively any discretion exercised by HMRC was of a general nature applying to all taxpayers who may make *Fleming* claims. The exercise of general discretion led to the issue of HMRC's guidance "Three year cap – Fleming – Section 121 of the Finance Act 2008". Unless any specific provision in that guidance revealed that further discretion was reserved to the Commissioners, decisions taken by the Respondents on whether or not the appellant complied with the guidance did not involve the further exercise of discretion.

Respondents' arguments

25. The Tribunal's jurisdiction on an appeal against an exercise by the Commissioners of discretion, such as that contained in the proviso to Regulation 29(2)(a) of the VAT Regulations 1995 is supervisory according to *Kohanzad v Customs and Excise Commissioners* [1994] STC 967. The supervisory jurisdiction is

to be exercised in relation to materials which were before the Commissioners rather than in relation to later material.

26. The appellant has to show the Commissioners' decision was unreasonable having regard to their legitimate requirements both that the alleged supplies to the appellant took place, that any related input tax was not claimed and to operate procedures which appear to them to be necessary to prevent fraudulent claims.

Law

27. Section 83(1)(c) VATA 1994 provides:

> 83 Appeals
>
> (1) …an appeal shall lie to the tribunal with respect to any of the following matters—
>
> …
>
> (c) the amount of any input tax which may be credited to a person;

28. The version of Regulation 29 of the VAT Regulations 1995 as it applies currently, and as at the time the appellant's input tax claim was rejected by HMRC on 6 May 2010 is as follows. This version reflects amendments which were made to the version of the Regulation which applied as at the date of the appellant's claim (27 March 2009). Of those amendments the only one which is of relevance to the issue under consideration here is subparagraph 4 which was inserted by the VAT(Amendment) Regulations SI 2009/586 with effect from 1 April 2009. The relevance of this subparagraph is considered at [43] and [44].

> 29 Claims for input tax
>
> (1) Subject to paragraph (1A) below, and save as the Commissioners may otherwise allow or direct either generally or specially, a person claiming deduction of input tax under section 25(2) of the Act shall do so on a return made by him for the prescribed accounting period in which the VAT became chargeable save that, where he does not at that time hold the document or invoice required by paragraph (2) below, he shall make his claim on the return for the first prescribed accounting period in which he holds that document or invoice.
>
> (1A) Subject to paragraph (1B) the Commissioners shall not allow or direct a person to make any claim for deduction of input tax in terms such that the deduction would fall to be claimed more than 4 years after the date by which the return for the first prescribed accounting period in which he was entitled to claim that input tax in accordance with paragraph (1) above is required to be made.
>
> (1B) The Commissioners shall not allow or direct a person to make any claim for deduction of input tax where the return for the first prescribed accounting period in which the person was entitled to claim

that input tax in accordance with paragraph (1) above was required to be made on or before 31st March 2006.

(2) At the time of claiming deduction of input tax in accordance with paragraph (1) above, a person shall, if the claim is in respect of—

(a) a supply from another taxable person, hold the document which is required to be provided under regulation 13;

(b) a supply under section 8(1) of the Act, hold the relative invoice from the supplier;

(c) an importation of goods, hold a document authenticated or issued by the proper officer, showing the claimant as importer, consignee or owner and showing the amount of VAT charged on the goods;

(d) goods which have been removed from warehouse, hold a document authenticated or issued by the proper officer showing the claimant's particulars and the amount of VAT charged on the goods;

(e) an acquisition by him from another member State of any goods other than a new means of transport, hold a document required by the authority in that other member State to be issued showing his registration number including the prefix "GB", the registration number of the supplier including the alphabetical code of the member State in which the supplier is registered, the consideration for the supply exclusive of VAT, the date of issue of the document and description sufficient to identify the goods supplied; or

(f) an acquisition by him from another member State of a new means of transport, hold a document required by the authority in that other member State to be issued showing his registration number including the prefix "GB", the registration number of the supplier including the alphabetical code of the member State in which the supplier is registered, the consideration for the supply exclusive of VAT, the date of issue of the document and description sufficient to identify the acquisition as a new means of transport as specified in section 95 of the Act;

provided that where the Commissioners so direct, either generally or in relation to particular cases or classes of cases, a claimant shall hold or provide such other evidence of the charge to VAT as the Commissioners may direct. [Emphasis added.]

(3) Where the Commissioners are satisfied that a person is not able to claim the exact amount of input tax to be deducted by him in any period, he may estimate a part of his input tax for that period, provided that any such estimated amount shall be adjusted and exactly accounted for as VAT deductible in the next prescribed accounting period or, if the exact amount is still not known and the Commissioners are satisfied that it could not with due diligence be ascertained, in the next but one prescribed accounting period.

> (4) Nothing in this regulation shall entitle a taxable person to deduct more than once input tax incurred on goods imported or acquired by him or on goods or services supplied to him.

29. The issue of whether the Tribunal's jurisdiction on the issue of whether the appellant had already recovered input tax during the claim period is supervisory or appellate affects how the Tribunal approaches the appeal. If it is supervisory, as the Respondents argue, the Tribunal ought to consider, in line with the approach taken in *Kohnazad*, whether the Respondents have exercised their discretion in a defensible manner and do this in relation to materials which were before the Respondents rather than in relation to later material. If the jurisdiction is appellate the Tribunal is to consider the evidence before it and reach its own finding of fact on the issue.

30. The starting point must be to examine the provisions on appeals in Part V of VATA 1994 which confer jurisdiction upon the Tribunal to see if they set out or point towards a particular answer. The relevant provision, s83(1)(c) VATA 1994, does not indicate the jurisdiction is supervisory. This is in contrast to other provisions in Part V which do spell out a particular approach, for instance s84(4) VATA 1994 which states "the tribunal shall not allow the appeal…unless it considers the determination is one which it was unreasonable to make…".

31. The absence of such explicit words indicating a supervisory jurisdiction in s83(1)(c) VATA 1994 is something we take into account but we do not think it can be conclusive that the jurisdiction is appellate.

32. In *Kohnazad*, Schiemann J, after considering provisions in the VAT Regulations 1983 materially similar to Regulation 29 of the VAT Regulations 1995, described the Commissioners as having a "discretion to allow credit for input tax, nothwithstanding that the registered taxable person does not hold such a tax invoice". He went on to state:

> "It is established that the tribunal, when it is considering a case where the commissioners have a discretion, exercises a supervisory jurisdiction over the exercise by the commissioners of that discretion."

33. We note that this statement was made against the backdrop of the former VAT Tribunal being conferred jurisdiction by s40(1)(c) VATA 1983 which was cast in the same terms as the relevant provision in this appeal, s83(1)(c) VATA 1994. Given a supervisory jurisdiction was found in *Kohanzad* even though there was no particular indication of that in the legislation which conferred jurisdiction in that case, the absence of explicit words such as those in s84(4) VATA 1994, which indicate a supervisory jurisdiction, cannot be determinative of whether the Tribunal's jurisdiction on appeals under s83(1)(c) VATA 1994 is supervisory.

34. On the one hand the drafting of s83(1)(c) VATA 1994 does not provide a ready answer but on the other it is not in dispute, following authority such as *Kohanzad,* that the Tribunal's jurisdiction over the Commissioner' discretion in relation to the proviso to accept other evidence in Regulation 29(2)(a) is supervisory.

35. When it comes to the issue of whether the appellant had already recovered input tax during the claim period it seems to us self-evident that input tax recoverable under an entitlement, once recovered cannot be recovered again. We are not persuaded that the issue of previous recovery engages the Commissioners' discretion under Regulation 29(2)(a) of the VAT Regulations 1995 in the first place.

36. If the finding is that the input tax was recovered previously then that is the end of the matter. If not, then the Tribunal can then go on to consider entitlement to make the claim and, if necessary, the Commissioners' exercise of discretion in relation to the proviso in Regulation 29(2) relating to holding evidence other than that enumerated in the preceding sub paragraphs of Regulation 29(2).

37. Whether claims had been made before and input tax thereby recovered is, in our view, a matter of objective fact. There is no indication that determination of this issue is reserved to the discretion of the Commissioners. If input tax had been recovered before there appears to us to be no basis for saying the taxable person could recover the input tax all over again, or that if they did make a claim to recover input tax in such circumstances, that the Commissioners would be empowered to allow such recovery on the basis of their discretion to allow "other evidence".

38. While the authorities say that when there is an appeal on Regulation 29(2) as to the Commissioners' discretion to accept "other evidence", the Tribunal's jurisdiction is supervisory, this does not mean questions of fact which precede the exercise of that discretion must be determined under a supervisory jurisdiction too.

39. That the issue is one of fact, while relevant, does not mean the jurisdiction must be appellate. When discretion is exercised it is likely that it will be exercised taking account of certain facts. The legislation could for example specify that certain facts are to be found to the satisfaction of the Commissioners, or on the basis of the Commissioners' opinion. However, here there is no indication that the legislation has adopted this course in relation to the factual determination of whether input tax had already been recovered. So while the issue of previous claims and recovery of input tax was a factual matter which HMRC would necessarily need to reach a view on in order to know whether it was able to accept an input tax claim, there is in our view no basis for the Tribunal to hold that the Tribunal's jurisdiction on this matter was only supervisory.

40. HMRC referred the Tribunal to the ECJ case of *Reisdorf v Finanzamt Köln-West* (Case C-85/95) [1997] STC 180 and in particular the general proposition stated there that at [29] that:

> "…the Sixth Directive gives member states the power to determine the rules relating to the supervision of the exercise of the right to deduct input tax, in particular the manner in which taxable persons are to establish that right…that power includes the power to require production of the original invoice…and also, where a taxable person holds it, to allow him to produce other cogent evidence that the transaction in which the transaction in which the deduction is claimed actually took place".

41. HMRC then referred to the decision of the VAT Tribunal in *Baba Cash and Carry VTD20416* which having discussed the above propositions in *Reisdorf* went on to set out the limited scope for a taxpayer to successfully appeal a case where the Commissioners had declined to make a direction under the proviso in Regulation 29(2)(a) which enabled them to direct that "such other evidence of the charge to VAT" should be provided.

42. In our view these cases do not help on the point of whether the determination of whether input tax has already been recovered is to be considered by the Tribunal under a supervisory jurisdiction. While *Reisdorf* refers to member state rules on the manner in which taxable persons are to establish the right of deduction, when we look at the relevant UK legislation, and in particular the proviso in Regulation 29(2)(a) as to "other evidence" this deals with the possibility of accepting evidence other than a VAT invoice. It does not subsume the logically prior question of whether there is no entitlement to input tax in the first place because the entitlement has already been satisfied through the input tax having been recovered previously. In *Baba Cash and Carry* the issue of whether input tax had already been recovered previously did not arise, and the application of Regulation 29(2)(a) and the Tribunal's supervisory jurisdiction was not in contention between the parties.

43. Although not raised by the parties we should mention that we have considered whether subparagraph (4) of Regulation 29 of the VAT Regulations 1995 alters the analysis. Regulation 29(4) which was inserted by SI 2009/586 with effect from 1 April 2009 provides:

> "(4) Nothing in this regulation shall entitle a taxable person to deduct more than once input tax incurred on goods imported or acquired by him or on goods or services supplied to him."

44. While an argument might be made that the presence of a specific provision preventing input tax to be deducted more than once means that, were it not for the provision, the taxable person would be entitled to deduct input tax more than once, we see little merit in that. Certainly, the appellant did not seek to make an argument on this basis, (although it could have done given it had made its claim on 29 March 2009, which was before the date of 1 April 2009 which was the effective date of regulation 29(4)). The spectre of multiple entitlements to deduct input tax being generated from the same import, acquisition or supply would be startling and in our view the provision only serves to clarify that the right to deduct input tax on an import, acquisition or supply does not arise more than once.

45. Regulation 29(4) confirms that, if as a matter of fact a deduction had already been made, a further entitlement to input tax cannot be created and therefore there is no entitlement in respect of which the Commissioners can consider "such other evidence of the charge to VAT" thereby engaging their discretion. Further, it is to be noted that Regulation 29(4) operates at the level of the entitlement of the "taxable person" rather than at the level of the Commissioners' direction making discretion in relation to other evidence. This is consistent with the view that the fact of whether input tax had already been claimed is a precondition to the exercise of the Commissioners' discretion as opposed to being a fact which is to be determined as

part and parcel of the exercise of the discretion. By contrast the drafting of Regulations 29(1A) and 29(1B) of the VAT Regulations 1995 show that where the intention is to restrict discretion the Commissioners would otherwise have the clear words "..the Commissioners shall not allow or direct…" are used.

46. Accordingly, we found that the Tribunal's jurisdiction on the issue of whether input tax claims had been recovered previously was not supervisory but appellate. The Tribunal would be able to reach its own finding of fact on this issue after hearing the evidence and in doing so could have regard to evidence even if it was not before HMRC when HMRC made its decision.

47. 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.

SWAMI RAGHAVAN
TRIBUNAL JUDGE

RELEASE DATE: 13 December 2012