TC02629

Appeal number: TC/2012/01812 & TC/2012/02460

VAT – input tax – "Fleming" claims –lack of evidence to support claims – evidence that companies making claims at times part of a group of which they were from time to time the representative member and at other times a group member and at yet other times registered in own right – true entitlement to any input tax recovery due unclear outside periods when within group registration - appeal dismissed for periods when companies not part of group registration – also complete absence of evidence in support of rejected claims for remaining periods that same accounting system in place as in periods for which claims accepted – claims dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

WMG ACQUISITION CO UK LTD **Appellant**

- and -

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

TRIBUNAL: JUDGE DAVID DEMACK

Sitting in public at Bedford Square London on 19 March 2013

Mr Julien Brugere, VAT director of WMG Acquisition Co UK Ltd for the Appellant

Mrs Erika Carroll of HMRC's Appeals and Review Unit for the Respondents

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DECISION

1. On 27 March 2009 Warner Music International Services Ltd ("WMIS") and Warner Music UK Ltd ("WMUK"), companies within the Warner Music Group, each submitted a "Fleming" claim to the Commissioners to recover input tax allegedly incurred by its employees on travel and subsistence and not reclaimed. (Stated shortly, "Fleming" claims are input tax repayment claims which, as a result of the decision in *Fleming t/a Bodycraft v Revenue and Customs Commissioners* [2008] STC 324, may be made outside the 4 (formerly 3) year statutory period for such claims. The Fleming decision permitted such claims as Parliament had failed to provide a transitional period for them prior to the introduction of the capping period).

2. Each claim was in the form of a voluntary disclosure. In WMIS's case, the claim was for £186,919 plus statutory interest and covered the period from 1 May 1988 to 30 April 1997. In WMUK's case it was for £172,823 plus statutory interest, and covered the period from 1 April 1973 to 30 April 1997.

3. On the claims being submitted, the Commissioners required each taxpayer to supply further information. Having considered that subsequently submitted together with that they themselves possessed, and in the light of their own advice in dealing with Fleming claims, on 11 November 2011 the Commissioners rejected both claims.

4. On 12 December 2011 WMIS and WMUK appealed the rejections claiming:

> (a) that they disagreed with the Commissioners' assessment of the level of evidence required to support the claims;
>
> (b) that the Commissioners had agreed that input tax on staff expenses had not been recovered at least as far back as 1999, and that input tax had only been recovered following the appointment of Meridian VAT Processing (International)("Meridian") in 2002;
>
> (c) that the Commissioners had queried whether there were any previous system issues preventing input tax recovery on staff expenses between 1973 and 1996;
>
> (d) that from 1973 to 2002 WMIS and WMUK did not have in place a system capability that enabled VAT to be separately identified; and
>
> (e) therefore, the expenses in question were treated as VAT inclusive, and neither appellant had in place a process to analyse separate components.

5. I should explain that Meridian is an international firm specialising in, inter alia, VAT input tax recovery.

6. Before me, Mr Julien Brugere, the Warner Music Group's VAT director, appeared initially for WMIS and WMUK but, as mentioned below, later for Warner Acquisition Co UK Ltd ("WMG"), and Mrs Erika Carroll of HMRC's Appeals and

Review Unit represented the Commissioners. I was provided with four bundles of copy documents by Mrs Carroll, and a single bundle by Mr Brugere.

7. Mr Brugere called two witnesses to give oral evidence. They were Mrs Breda Argyrou, the senior director of accounting at WMIS, and Mr Michael Maloney, an accountant and chartered tax adviser, who is also a director of Meridian. Mrs Carroll called Mr Daniel Edwards, a specialist officer of the Commissioners who is responsible for the VAT affairs of the Warner group of companies.

8. It is from the whole of that evidence that I make my findings of fact.

9. However, before doing so I should first deal with the question of whether WMIS and WMUK are entitled to make the claims. Although those companies made the appeals, both are part of group registration 424 1810 84, the representative member of which is WMG. I allowed Mr Brugere to make application for the appellant in each appeal to be changed to WMG and, despite opposition to the application by Mrs Farrell, I granted it.

10. At this point I should mention that, on 28 March 2012 the tribunal directed that the two appeals should proceed and be heard together.

11. As in the case in a great many "Fleming" appeals, problems arose at the outset in that neither WMIS nor WMUK had records going back to the beginning of its respective claim period. Nor for that matter had the Commissioners. But whereas in most cases it is possible for an appellant to provide evidence sufficient to satisfy the Commissioners (or, on appeal, the tribunal) that an entity was registered from a particular date and that it was registered in its own right or as part of a group registration, in the instant case that proved impossible. Mr Brugere acknowledged that for the period from 1 May 1988 to 30 November 1990 WMIS could prove neither that it was registered in its own right nor as a member of a group; and, if it were the latter, of which group it formed part. Similarly, in relation to WMUK, for the period prior to 1 June 1985, it could not show that it was either registered in its own right or as a member of a group.

12. Mrs Gaskell submitted that in relation to the periods referred to in the last preceding paragraph, I should dismiss the claims for, if an appellant was registered in its own right, any claim must be made under that registration. Alternatively, if the appellant was part of a group, since that group might still exist, the representative member must make the claim.

13. In response, Mr Brugere contended that it was unreasonable of the Commissioners to contend that if a taxpayer were registered in its own right any Fleming claim must be made as suggested by Mrs Gaskell. He maintained that "the exceptional circumstances of [WMIS's and WMUK's] claims call[ed] for an exceptional application of the rules and policies so as to achieve a fair and logical conclusion." The tribunal should not penalise WMIS or WMUK provided that, on balance, it could be reasonably established that each entity would probably have been registered for VAT.

14. The evidence adduced as to registration of WMIS and WMUK was provided solely by the Commissioners. Mr Edwards established that, during the period covered by its repayment claim, WMIS had been registered for VAT under various registration numbers. It joined the VAT group registered under number 424 1810 84 in 1990. It left the group in 1991 becoming registered in its own right under number 440 4525 78. It then rejoined group 424 1810 84 in 1993, and remained so registered throughout the remainder of the period of its claim. During the periods WMIS was part of the group registration, it was variously a subsidiary member of the group or the representative member. (WMIS's Fleming claim was made under VAT group registration number 730 8809 27, the representative member of which is Time Warner Ltd).

15. Mr Edwards also established that, during the period covered by WMUK's claim, the company had undergone a number of name changes, and had been registered for VAT under various registration numbers. The company joined VAT group 424 1810 84 in 1985 and continued to be a member thereof until the end of its claim period, 30 April 1997. (The Commissioners' evidence showed conclusively that registration number 424 1810 84 did not exist before 1985). WMUK was either a subsidiary member or the representative member of group number 424 1810 84 from 1 June 1985.

16. The least I would have expected from WMIS and WMUK was that they could have produced if not their original VAT registration certificates then something to indicate their first registration. In the event, they produced nothing. It is thus impossible to say who, if anyone, is entitled to make claims on their behalf when they were outside the group registration 424 1810 84. I entirely agree with the submission of Mrs Gaskell that I should dismiss the two companies' claims in so far as they fall outside that group registration, and do so.

17. I found both Mrs Argyrou and Mr Maloney to be honest witnesses, but as neither was involved with the Warner Group until after the claim periods concerned, their evidence was of limited value. (Mrs Argyrou joined the group in 2001, and Meridian was instructed in 2002).

18. Mrs Argyrou explained the system in place on taking up her employment to enable employees to recover expenses for which the Group was liable in the following way. Each employee entitled to claim was issued with an American Express credit card in his or her individual name. If the employee incurred expense on behalf of the Group he or she had to obtain a receipt in the name of the Group with the VAT registration number of the supplier on it. When the employee received the monthly statement from American Express, that person submitted it to the Group with the VAT receipt(s) in question. And, in order to ensure that the employee was not called upon to pay American Express out of his or her own funds, the company would process the claims as quickly as the one person dealing with VAT matters within the Group could do so. Mrs Argyrou estimated that some 70-75 claims per month were dealt with in that way.

19. Mr Brugere claimed that the Warner group had traditionally not recovered input tax on travel and subsistence expenses of employees in the years before 2002 for a variety of reasons:

(a) being part of a US group, the internal computer software used by both WIMS and WMUK did not allow it separately to account for input VAT on travel and subsistence expenses. Consequently, all amounts of expenses claims were marked "VAT inclusive";

(b) there was a lack of internal procedure for recovering input VAT incurred on such expenses;

(c) travel and subsistence expenditure consisted of numerous small value transactions, which would have required intensive work to process; and

(d) travel and subsistence was viewed as a VAT technical issue requiring careful analysis, and the group did not have adequate resources to deal with the matter.

20. Following its instructing Meridian in 2002, the Group lodged initial claims for input tax recovery on travel and subsistence expenses. It did so despite it claiming it to be difficult to calculate the tax concerned because at the time its computer systems could not separately identify claims for VAT on such expenses. However, the input tax claims for 1999 through to 2002 were subsequently met by the Commissioners. The claims were calculated by Meridian on the basis of the actual records.

21. Following the Fleming decision, the Group made claims going back to 1997, again based on records held. They too were met by the Commissioners.

22. For the period prior to 1 May 1997, in the absence of any records whatsoever from WMIS and WMUK, Mr Maloney explained that Meridian had calculated the amounts claimed by "extrapolation", explained as "by comparing 'known claims', i.e. those based on actual records, with total operational costs extracted from available financial statements of WMIS and WMUK". And, where financial reports were not available, i.e. no information about the total operational cost was accessible, Meridian used available indexation figures to estimate the input tax reclaimed. The indexation was based on UK published annual inflation rates.

23. Mr Brugere submitted that the way in which the Group dealt with input tax recovery on expenses claims from 1999 onwards was indicative of the practices it would have had in place throughout the claim periods concerned; on balance, it was more likely than not that VAT incurred on travel and subsistence expenses in the periods would not have been reclaimed as input VAT.

24. The Commissioners undertook a computer based audit of the purchase system of VAT group 424 1810 84 in 1995, and the reports they held produced by the audit team contained no indication that the group was not recovering input tax on staff expenses at the time. Mr Edwards told me, and I accept, that had the group been

entitled to recover input tax which it was not claiming he would have expected the reports to indicate that fact.

25. Mrs Carroll countered Mr Brugere's arguments by observing that the Group had provided no evidence whatsoever to demonstrate that the same accounting system as described for the period 1999 to 2002 was in operation from 1 May 1988 to 30 April 1997 in the case of WMIS and from 1 April 1973 to 30 April 1997 for WMUK. She submitted that it was unlikely that the same accounting system was in use throughout the claim periods concerned, they covering a period of immense change in the development of computerised accounting systems. Further, if the same accounting system was not in operation throughout the claim periods and from 1999 to 2002, the Group had not provided any evidence to demonstrate that the software issue that was said to prevent the recovery of input tax on employees' expenses between 1999 and 2002 was also an issue that prevented the recovery of input tax on those expenses in the claim periods.

26. Mrs Carroll further observed that input tax on other types of UK expenses incurred by the Group, such as non-employee expenses and business gifts, was recovered during the claim periods.

27. Records held by the Commissioners of visits to the Warner Group by their officers showed that nominal ledgers and their different codes had been examined, and that input tax on business gifts had been claimed for and allowed. The records also showed that a report on audit action on companies within the Warner VAT Group in the year ending 31 March 1997 indicated that input tax in respect of business entertainment, business gifts and costs incurred by the USA parent company was checked. The records further showed that the Group had recovered foreign VAT in the claim periods; they contained many requests for 'certificates of status of taxable person' – a necessary part of the process for making such claims. Mrs Carroll observed that the amounts involved in foreign VAT claims must have been distinguishable in order for the claims to other EU tax authorities to be dealt with.

28. She therefore submitted that WMG had not shown that it was more likely than not that the input tax on the Group's travel and subsistence expenditure had been incurred and not recovered; the information and documentation produced did not support its assertions.

29. The burden of proving that the two companies have not recovered the input tax on employee's travel and subsistence expenses falls on the taxpayer in appeals such as the present one. And whilst only the civil standard proof is involved, the tribunal cannot be expected to make decisions simply on the basis that a claim covers a period long ago for which a taxpayer cannot be expected to hold any records, so that its claims should be accepted without question and without evidence. It is simply not good enough for the two companies to say to the Commissioners, "You accepted our claims for input tax recovery for the period 1999 on 2002 on the basis of our records for that period. We say that we made no input tax recovery for earlier periods for which we hold no records whatsoever, but for which we say we operated in exactly

the same way and made no input tax recovery claims. You must accept our claims and repay the input tax concerned."

30. The two companies have not satisfied me on the balance of probability that they failed to make claims for the period concerned, and I therefore reject the claims. It follows that I dismiss the appeals.

31. 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.

DAVID DEMACK
TRIBUNAL JUDGE

RELEASE DATE: 5 April 2013