TC03381

Appeal number: TC/2012/06746

Value Added Tax – (1) Recoverable output tax – Fleming rule/ Section 121 FA 2008 – Principles of quantification– (2) Whether original claim susceptible of amendment – No; - Appeal allowed in part

FIRST-TIER TRIBUNAL
TAX CHAMBER

NHS DUMFRIES AND GALLOWAY HEALTH BOARD **Appellant**

- and -

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

TRIBUNAL: JUDGE KENNETH MURE, QC
MR S A RAE, LLB, WS
MR P R SHEPPARD, FCIS, FCIB, CTA

Sitting in George House, 126 George Street, Edinburgh on 7, 8 and 9 October and 17-18 December 2013

For the Appellants, David Southern, Barrister; and for the Respondents, Sean Smith, QC and Ian Mowat, Solicitor, Office of the Advocate General for Scotland

Preliminary

1. By way of introduction Mr Southern on behalf of the appellant addressed us briefly. He explained the "historical" background to claims of this nature. Public bodies by and large carried on *non-business* activities, but commonly also conducted other activities which were within the VAT system. Thus they could recover input tax and became accountable for output tax. Where a public body carried on a *business*, it was treated similarly to a private trader for VAT purposes.

2. Historically, output tax had been paid to HMRC by public authorities in error to a certain extent and this was properly recoverable. Mr Southern noted the decision in *Fleming t/a Bodycraft v HMRC*, which enabled the recovery of input tax incurred over an extended period. That principle is now incorporated in Section 121, FA 2008. This appeal relates to a claim for repayment of output tax paid incorrectly in respect of zero rated and exempt supplies over the 23 year period from 1 April 1974 to 4 December 1996 (described herein as "the Fleming period") and is primarily concerned with supplies of catering by the appellant.

3. Mr Southern referred us to his Skeleton Argument and para 43 thereof. The matters in dispute included whether the tax repayment now claimed for the period before May 1984 (including repayment for hot "takeaways") was part of an existing claim or a new claim, and as such out of time and irrecoverable. Otherwise, what is the percentage which should be applied to calculate the amount of zero-rated supplies ie the zero-rated percentage or "ZRP" in respect of which output tax paid can now be recovered? (As explained *infra* this should include *exempt* supplies too.) In particular is it 18.08% as submitted by the appellant, or about 15% as suggested in correspondence by HMRC, or otherwise?

4. In this context regard had to be paid to changes in eating habits. There had been a change from "set" meals to sandwich takeaways. The latter were zero-rated, but were less popular in the 1970's and 1980's. The Tribunal had to consider, Mr Southern submitted, whether his client's approach and calculations were reasonable and the methodology robust.

5. The appellants had proposed initially a figure of 20.11% as representing zero-rated sales, but later restricted this to 18.08%. Mr Southern referred to p68 and 135 in the documents. He submitted that VAT charged on supplies which were properly *exempt* should be included in this calculation too.

The law

6. A common Bundle of Authorities was prepared for this and the other related Health Board appeals. These are listed in the Appendix hereto.

Evidence

7. The appellant's first witness was **Christine Carruthers**. She is currently Accounts Service Manager with Forth Valley Health Board. (She has never worked

for Dumfries & Galloway, the appellant in this case, but is conversant with the accounting systems operated by the Scottish Health Boards.)

8. Miss Carruthers read and adopted her Witness Statement. She spoke to her personal experience of hospital dining-rooms as run by certain of the Scottish Health Boards, and which were commonly used by staff and visitors alike. Staff could take food for consumption at their desks where they worked. This could be hot or cold, breakfast rolls being particularly popular.

9. The matter of VAT recovery had tended to be neglected prior to 1993 in spite of information circulated by government. However, "blue books" were prepared annually for the Scottish Health Boards. These were financial and costs records maintained for management accountancy purposes, and the information contained therein provided a valuable reference in preparing such repayment claims.

10. Although Miss Carruthers has not been employed by this appellant Health Board, she has worked for others and gave, in our view, helpful and reliable evidence as to their practices in relation to internally-run catering facilities.

11. The appellant's next witness was **Ross William Muir**. He is an accountancy and economics graduate, who has advised clients on indirect taxation throughout his career. He is employed by a specialist VAT Consultancy, Liaison, based in Bristol. Mr Muir himself works locally and has advised several Scottish health bodies.

12. Mr Muir read and confirmed the terms of his Witness Statement. He spoke to the calculations on which the *Fleming* repayment claim was based. He explained the catering sample exercise undertaken for the appellant over a representative seven day period in October/November 2007. Essentially the exercise was an attempt to apportion standard-rated and zero-rated supplies. (There was no zero-rated record kept at the point of sale.) Basically the former supplies were food consumed on the premises, while the latter were takeaways. The procedure followed HMRC guidance. A percentage of 20.11% in respect of zero-rated sales resulted. The sample exercise depended on written records made by catering staff at point of sale. A "breakdown" into 25 common supplies was made. HMRC by letter dated 3 March 2008 approved this percentage (docs p180), he considered.

13. This calculation was the basis for the necessary extrapolation of recoverable VAT over the *Fleming* period. The calculation was supported by the availability of the "blue book" records for 11 of the 23 years. Adjustments were made firstly for inflation over the extended period by reference to the Retail Price Index. The initial percentage for zero-rated sales was reduced after consideration of "blue book" records to 18.08% (the figure founded on in submissions by Mr Southern). A further revisal of the apportionment fell to be made, according to Mr Muir, to take account of the changing pattern of consumption over the *Fleming* period. Formal "set" meals in restaurant and canteen facilities diminished, while takeaways, particularly sandwiches increased. The *ratio* of sandwiches in relation to overall takeaways has to be taken into account in "weighting" the apportionment. (The Tribunal would observe that in

addition to zero-rated sales, *exempt* income is included in calculating the VAT recoverable. This aspect is discussed *infra* para 37.)

14. In cross-examination Mr Muir was pressed about Liaison's promotional material and its declared aim of maximising recoveries. While he had to consider and advise his clients on repayments of VAT due, he indicated that Liaison's role might be described more completely as that of ensuring tax compliance.

15. He was asked about the manner of conduct of the sampling test of 2007. He explained that a spreadsheet summary was prepared, completed at the till by staff, and finalised by the catering manager. He was referred to limited variations in the handwriting. He explained that his understanding was that the sample sheets prepared by him were sent out blank for completion by the appellant's staff as instructed.

16. Mr Muir was then asked about the treatment of *exempt* income. He rejected the view of Miss Langley (HMRC's officer) that it should be disregarded. He considered that income received directly from students was *exempt* and catering to them was *exempt* too as closely related. Student income from government funding on the other hand was *non-business* and outwith the VAT system. (This of course is a question of law for the Tribunal). In the calculation of the recoverable output tax there was no need to differentiate between zero-rated and exempt income. Catering was run at a loss. Finally, Mr Muir acknowledged that sales of sandwiches increased, and therefore the sales percentage which they represented in earlier years fell to be scaled back.

17. We considered Mr Muir a credible witness. He had researched the relevant material diligently. He was able to assist us considerably in the manner of his presentation.

18. The appellant's final witness was **John Brown**, who until his recent retirement acted as Area Catering Manager of the appellant. (It was convenient to interrupt the cross-examination of Mr Muir to hear and conclude Mr Brown's evidence.)

19. Mr Brown adopted the terms of his Witness Statement. He has worked in hospital catering for about 40 years with acknowledged success. He explained that the consumption of sandwiches and rolls had increased since 1990, to the extent that a 50% reduction in volume was appropriate for the 1980s, and a further 25% reduction for the 1970s.

20. The ratio of sandwiches sold in relation to cold takeaways generally is important. The lower the proportion of sandwiches, the less the recoverable percentage of output VAT falls to be restricted.

21. From 1974 to 1997 Mr Brown estimated that sandwiches would have constituted at most 60% of takeaway food. Also, he estimated that from 1975 to the 1990s, cold takeaway food was divided equally between sandwich sales and other cold takeaways. While these approximations seem broadly consistent, they may be in conflict with comments by the appellant's Deputy Director of Finance albeit in

relation to a later period in a letter to HMRC dated 3 November 2010. She writes (p15):-

> "In the zero-rated catering reviews which have taken place over the past six or so years this has been predominantly takeaway sandwiches and rolls. There is very little if any income generated from the sale of salads, fruit and milk from the dining rooms."

22. Unfortunately Mr Brown was not invited to comment on that. We note, however, in the seventh paragraph of his Witness Statement that he was conscious of a significant increase in "healthy choices" since the late 1980s.

23. In supplementary questioning by Mr Southern, Mr Brown explained that the extracts from the daily cash book of the Crichton Royal Hospital had been compiled by persons serving at the cash registers. They were all known to him personally. He had no reason to believe that they were inaccurate.

24. In cross-examination it was suggested to Mr Brown that the handwriting in the records of the Crichton Royal and the tea-bar for out-patients at Dumfries Royal Infirmary seemed similar. Mr Brown explained that the Crichton Royal tea-bar was staffed by the same person throughout and that the copies produced may have been compiled by one person on the basis of information provided by others. (In fact there appear to be differences in the style of the number 7 used.)

25. While we do not criticise Mr Brown's credibility, we have reservations about his estimates of the proportions of sandwiches in the overall volume of takeaway food during the period for which recovery of output tax is sought. We have to pay regard to the letter of the Deputy Director of Finance quoted *supra*. Ultimately the burden of proving the integrity of the calculations on which the appeal is based falls on the appellant.

26. The only witness called on behalf of the respondents was **Miss Kathleen Langley**, a specialist tax officer of HMRC, and who was involved in reviewing the appellant's repayment claims. She read out and confirmed the terms of her Witness Statement.

27. Miss Langley explained her familiarity with *Fleming* type claims and her involvement in the present repayment claim from the outset. In February 2011 she had approved a repayment of £102,825, but rejected a further claim made in the following April. She explained HMRC's policy in relation to repayment claims for tax overpaid on takeaway food. Crucially a robust methodology in calculating the claim had to be demonstrated. She noted the decision in *Compass Services UK Ltd*, which restricted the sense of premises for consumption of food, so increasing the volume of zero-rated takeaways. The appellant had made an initial claim for overpaid output tax in March 2009 and a detailed correspondence followed. The sampling test conducted in October /November 2007 was founded on. Quite apart from the use of the Retail Price Index in calculating turnover in earlier years, the respondents had enquired about any changes in catering sales patterns. Reference had been made to

the "blue books". The significance of catered events, trolley sales and sandwich bars was considered. Salads and fruit sales had increased since the 1970s.

28. Documentation had been produced by the appellant, which had in part been difficult to decipher. A zero-rated percentage of 20.11% had been calculated on its behalf, but a lower base figure of 18.08% had been proposed by Liaison as sandwich bars and other catering outlets had not been in existence during part of the *Fleming* period. Thereafter Miss Langley had authorised a repayment of £102,825. She had proposed a 15% ZRP, which in other contexts Liaison had favoured. This to Miss Langley seemed fair, and was consistent with (lower) figures settled for other Health Boards.

29. Then the matter of an adjustment to reflect the changed pattern of sales over the *Fleming* period fell to be made. Sandwich sales had increased prodigiously. Accordingly Miss Langley had reduced the 15% ZRP by half for the 1980s and by 75% for the 1970s to reflect this.

30. On 9 March 2011 Liaison provided a recalculation seeking a repayment of £154,062, which included a further element for hot takeaway sales pre May 1984. This reflected the 18.08% for cold sales. While Liaison had accepted that some reduction should be made for the growth in sandwich sales, it had restricted these percentages on the basis that there were significant cold takeaway sales other than of sandwiches.

31. Miss Langley adhered to her reasons for the 15% figure set out in her Decision of 7 September 2011. The increased claim, including "hot takeaways", was also rejected. Miss Langley considered that there was insufficient evidence supporting this. In any event it represented a new claim and was time-barred. After an independent review by other HMRC officials, Miss Langley's decisions were upheld.

32. Miss Langley then turned to the three grounds of appeal, viz the reduction in the ZRP from 18.08 to 15%; the restriction in the reductions made for changes in the volume of takeaways; and the rejection of the "hot food" claim. While Miss Langley did not dispute the method of calculation of the ZRP, which accorded with Notice 709/1 of HMRC, a 15% figure had been adopted by Liaison in other Health Board claims (albeit, we note, to have been rejected by the respondents). On her calculations a figure of 14.32% had resulted, close to the 15% adopted by her. In particular treating student catering income as exempt was incorrect: correcting that error would reduce the ZRP to 14.32%.

33. So far as the proportion of sandwich sales was concerned, it had been confirmed by Miss Lewis, the Deputy Director of Finance (p15/16 of docs) that little, if any, income came from takeaways of salads, fruit and milk. There was inadequate information to support the appellant's restricted reductions of 30% and 45%. Also, in relation to the suggested volume of hot takeaway sales, inadequate supporting information had been produced.

34. In cross-examination Miss Langley was pressed about her comments in para 60 of her Witness Statement about catering income from students and its correct classification as exempt or taxable. (That, of course, is a matter of law for the Tribunal to determine.) She explained that her approach proceeded on the basis of an HMRC publication, Notice 701/30, para 8.5 (see p132b). She maintained that catering to "non-business" students was non-business income only if sold at or below cost. The legal basis of that qualification was disputed by Mr Southern (see para 47).

35. We found Miss Langley an impressive witness. She presented her arguments ably and negotiated the content of the voluminous documentation with great skill.

The issues

36. The subject of the appeal is a claim for repayment of an excess of output tax paid by the appellants during the 23 year period from April 1974 to December 1996. It is set out by letter from VAT Liaison dated 30 March 2009 (doc 3 *et seq*) under Section 121 FA 2008 and following on the decision in *Fleming (t/a Bodycraft)*, which upheld in unqualified terms the right of a taxpayer to recover VAT incorrectly paid.

37. The repayment sought is for excess VAT accounted for in respect of catering and the provision of food by the appellant in its canteens and other outlets to variously its staff, patients' families and friends, outpatients and medical and other students. While the appellant is not *in business* inasmuch as it provides a public service, it can engage in business activities especially in relation to ancillary activities, one example of which is catering. Supply of food for consumption on the supplier's premises is standard-rated. "Takeaways" are zero-rated (except in the case of hot food which became standard-rated after May 1984 whether or not consumed on the premises). The nature of premises in this context was considered in *Compass Contract Services UK Ltd*. The provision of sandwiches for staff to eat at their immediate work-place or elsewhere rather than in a staff canteen would ordinarily be regarded as zero-rated. Catering for students falls to be specially considered. We were addressed on that by counsel as a contentious issue (see para 47). We consider that this is an exempt supply. Accordingly, VAT had been charged and accounted for (mistakenly) on supplies which were properly zero-rated and exempt during the relevant period.

38. Sensibly parties accept that if a satisfactory formula can be devised to reflect a non-taxable proportion, then this could form the basis of a repayment claim. Initially in their Skeleton Argument the appellant notes only zero-rated supplies on which VAT had been accounted for, but following on a helpful intervention by Mr Sheppard it was accepted (and acknowledged in a Note prepared for the appellant in the course of the hearing) that *exempt* supplies had been made too. A corresponding adjustment falls to be made also in respect of input tax incorrectly claimed in relation to exempt supplies. Both parties accepted this in principle.

39. In our view the fraction showing the output tax overpaid and recoverable is calculated by dividing the value of the zero-rated and exempt supplies by the value of all supplies, standard, zero-rated and exempt. That is the recoverable portion.

40. An exercise was conducted by the appellant to calculate this. This was enabled by the availability of "blue-book" records kept routinely by Scottish health authorities. A figure for a recoverable excess of 20.11% was calculated. This appeared to find favour with HMRC (see para 43, vi).

41. An alternative recoverable excess of 14.32% was suggested by Miss Langley on behalf of the respondents (see p68b). The major difference in her approach was the exclusion of "exempt income" from the numerator. Miss Langley's approach results in a higher proportion of the supplies being standard rated and a correspondingly lower sum recoverable.

42. The other substantial issue raised in relation to the claim was whether it could extend to the repayment of excess VAT paid on "hot takeaways" sold before May 1984. This seems largely to depend on a sound interpretation of one particular paragraph (docs p4 – final paragraph) of the appellant's repayment claim of 30 March 2009.

43. Before dealing with the eight or so points of contention it seems appropriate to set out in a preliminary way our **Findings in Fact and Law,** viz -

(i) During the relevant time the appellant was responsible for the provision of health services including the maintenance of several hospitals within its designated area. These were not business activities and fell outwith the scope of VAT.

(ii) The appellant provided a catering service for payment apart from the provision of meals, free of charge, to patients. It maintained canteen and takeaway facilities at its various premises. These were used by staff, outpatients, persons visiting patients, and medical and related students. (This was a business activity for VAT purposes.)

(iii) The supplies of food for consumption in its canteens and restaurants were standard rated. Takeaway foods, such as sandwiches, were zero-rated, except that in the case of hot food takeaways supplied since May 1984, the standard rate is applied. In addition the appellant also made exempt supplies of food: these largely consisted of catering supplied to students.

(iv) The appellant (and the other Scottish Health Boards) maintained detailed management accounting records relating to their finances, including catering ("blue-books"). These were available for 11 of the 23 years in the relevant period.

(v) During the period from April 1974 to December 1996 the appellant accounted for output tax at standard rate on all its catering sales, even on those which were (properly) zero-rated or exempt.

(vi) An analysis was made of catering supplies made during October and November 2007. These records show the prices of different categories of supply. The standard-rated proportion of the supplies can thus be identified. Here the excess, viz 20.11%, represents the percentage repayable for these months. This percentage was approved for these months by HMRC in their letter of 3 March 2008 to the appellant (docs p1-80).

(vii) The relevant period for which recovery is sought predates the above analysis by just over ten years. It is accepted that the nature of the appellant's sales outlets changed somewhat. That served to increase the supply of cold takeaways. Accordingly it was agreed by parties that the calculation of 20.11% should be reduced to 18% approx.

(viii) Moreover, during the relevant period the pattern of eating habits altered. Sales of sandwiches and takeaways increased, generally being consumed other than in the appellant's dining rooms and canteens. "Set" meals diminished. Due allowance falls to be made for this by making two adjustments, viz the percentage of cold takeaways which the volume of sandwiches supplied bears to the overall total; and (more straightforward) a "straight line" adjustment reflecting regular annual increases in sandwich purchases.

Submissions

44. Counsel were agreed that in light of the evidence and argument as they had emerged in the course of the hearing, eight points arose for determination by the Tribunal. They addressed us in turn on these.

45. The first three are inter-related. What figure should be taken initially as the ZRP which forms the basis for quantifying the output tax recoverable? (Strictly this includes not only zero-rated supplies, but also exempt supplies, not subject to output tax, as the Tribunal observed.) Mr Southern suggested a figure of 18.08%.

46. In reply the primary stance of Mr Smith was that the formula presented by the appellant was unsafe and fell to be rejected. Perhaps more realistically he argued as a reserve stance and in line with correspondence from his expert witness, Miss Langley, that a figure of 15% was more appropriate, effectively excluding in the calculation the output tax wrongly accounted for in respect of exempt supplies (point two). Reference might be made to the comparative calculations at p68b of the documents.

47. We consider that the higher figure proposed by Mr Southern is appropriate. The exempt supplies of catering, viz to students, fall to be taken account of in the computation (effectively added to the numerator), so increasing the recoverable percentage of VAT from about 15% to 18%. We consider that the food supplied to students is part of the appellant's business activities, not its public activities. It falls within the VAT scheme as *exempt* income on which output tax should not have been paid. Accordingly this overpayment should be recoverable. This seems consistent with the fundamental principles enshrined in the Directive 2006/112/EC, Articles 132, 1(i), and 134. We consider that the supply of catering is ancillary to the exempt supply of education where this is part of the *business* activities of the taxpayer. Useful reference, we think, can be made to the decision of the First-tier and Upper Tribunals in *Brockenhurst* College [2014] UKUT 0046 (TCC), which we discovered during our researches. We disagree with the argument put forward by Miss Langley in correspondence (her letter of 12 November 2008 to Liaison, p37k of the docs) to the effect that this is non-business income but nonetheless liable to standard rate tax. We agree with Mr Southern's observations that para 3 of that letter contains a *non-*

sequitur. Standard or zero-rating seems irreconcilable with the main source of income being *non-business*. In that event it would be outwith the scope of VAT. On the view that the supply of education is *exempt*, then catering as being ancillary thereto should also be viewed as *exempt*.

48. These calculations are shown comparatively on p68b. While Mr Southern proposed the figure of 18.08% recorded in correspondence, we wonder whether the percentage of 18.74% recorded in Version 2 is the more accurate. (We note para 59 of Miss Langley's Witness Statement.)

49. The third and inter-related issue arises in relation to the extrapolation of the initial percentage over the 23 year period. Acknowledgement has to be made of the effect of changed patterns of dining. In particular the consumption of cold takeaways, essentially sandwiches, increased, while formal "set" meals consumed in canteen or cafeteria decreased correspondingly. While the former are zero-rated, the latter are standard-rated. We agree that the zero-rated fraction falls to be decreased for the earlier years.

50. We agree that the process of extrapolation must take account of changes in the pattern of catering. The problematical aspect is, however, assessing what proportion of cold takeaways are represented by sandwiches. Mr Brown, the appellant's catering manager, suggests (para 6 of his Witness Statement) that sandwiches formed approximately 50-60% of cold takeaways. This, however, is contradicted by the Deputy Director of Finance in categorical terms (para 3 of her letter at p15 of her docs). We refer to our comments in paras 19 - 21 supra. While we did not have the benefit of hearing Miss Lewis, she does speak to catering reviews over an extended period. She describes only a negligible income from "salads, fruit and milk". The lower the percentage of sandwiches in takeaway sales, the less the ZRP falls to be restricted. However, we are mindful that the burden of proof throughout rests on the appellant. It has to demonstrate the robust nature of its calculations. For his part Mr Brown spoke to the proportion of sandwiches as a matter of impression. Their respective stances may be irreconcilable and in the absence of more satisfactory evidence we do not consider that there was any significant income generated from non-sandwich cold takeaways.

51. The next aspect on which we were addressed was whether the repayment claim could be extended to <u>hot</u> takeaway food, which was zero-rated until May 1984. We were invited to consider the final paragraph on p2 of Liaison's letter to HMRC of 30 March 2009 in conjunction with its subsequent letter of 9 March 2011 paras 2 and 3. (These are included at p4 and 25 of the docs.) The proper scope of a repayment claim was considered in *Reed Employment Limited*, to which we were referred. The test of whether a further demand represents a "new" claim is a matter of fact and degree. While an arithmetical correction or particularisation of the original claim may easily be read together, a different head of claim would have to be considered distinctly. (We note particularly paras 33 and 38 of the Judgement.)

52. In our view particular attention has to be paid to the wording in Liaison's letter of 30 March 2009. It considers on page 2 "zero-rated catering claim". It notes in this

context hot takeaways before May 1984. It explains that these would be "very difficult to estimate" and that "the claim errs in HMRC's favour". That, in our view, represents a considered stance by the appellant and its advisers. No approximation of what might be recoverable is given, and there is no reservation in respect of this possible head of claim. Indeed, the terms of the letter, in our view represent a waiver of VAT incorrectly accounted for on hot takeaway supplies. In these circumstances the quantification of an increased claim (point five) is not further considered.

53. Mr Southern then referred to the *burden of proof* and the *role of the Tribunal*. These do not appear to be matters of contention, and, indeed, he approved and adopted the terms of paras 4 to 8 in the respondents' Skeleton Argument. We acknowledge and have followed the guidance cited there and we note particularly the extracts from the opinion of Lord Macfadyen in *John Doyle Construction Ltd v Laing Management (Scotland) Ltd*. Subject to the qualification made about the proportion of sandwiches in the cold takeaway total we accept the logical force in the appellant's approach. There is no suggestion that it cannot be readily applied. Valuable information is available from the "blue books". In correspondence HMRC sought to "fine-tune" the appellant's approach rather than dismiss it outright. The appellant's formula is robust and logical in principle. It can readily be applied to produce a fair and reasonable result in our view.

54. The eighth and final matter which Counsel addressed was one raised by the Tribunal and is noted *supra* (para 38). This relates to the amount of exempt supplies taken into consideration in calculating the recoverable percentage of output tax incorrectly accounted for. This was raised as the hearing progressed as it became clear that output tax had been accounted for (wrongly) not only in respect of zero-rated supplies but exempt supplies too. Logically, any input tax recovered by the taxpayer and relating to exempt supplies should be repaid to HMRC. Before the conclusion of the hearing Mr Southern produced a Note giving details of the appellant's partial exemption method. If the Tribunal were to accept the claim for repayment of output tax in full the appellant acknowledged that it had over-claimed input VAT totalling £1,900.51 in respect of exempt supplies. The respondents in turn replied, but did not agree that sum or propose an alternative figure.

Decision

55. On the basis of our views as expressed in the preceding section we allow the appeal, but only to the extent of directing that in calculating the ZRP the value of exempt supplies should be included in the numerator. This increases the ZRP, and having regard to the calculations set out at p68b of the Bundle, produces a percentage of 18.74%. However, standing Mr Southern's submissions and the correspondence exchanged a figure of 18.08% seems more appropriate. A reduction falls to be made for input tax overclaimed in respect of exempt supplies as explained in para 38. We invited parties to submit their views and they did so in somewhat detailed notes, the respondents' reply coming after the conclusion of the hearing. We do not consider that we can quantify the reduction without being further addressed, and that apart from evidential difficulties. Hopefully, parties can agree a compromise figure and avoid a lengthy extension to these proceedings. For that reason our decision should

be viewed as being in principle, and relating to the formula to be applied. If it proves to be necessary, we would be happy to hear Parties further as to precise arithmetical calculations.

56. Insofar as the appellant seeks to increase its claim by reference to "hot takeaways" supplied before May 1984, the appeal is refused.

57. 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.

KENNETH MURE, QC

TRIBUNAL JUDGE

RELEASE DATE: 4 March 2014

APPENDIX

Joint List of Authorities

Statutes

1. Finance Act 1972, Schedule 4, Group 1
2. VATA 1983, Schedule 5, Group 1
3. Value Added Tax Act 1994: sections 41, 78, 80, 83-83G
4. VAT Regulations (SI 1995/2518), regulation 37
5. Finance Act 2008: section 121

Case Law

6. *Blamire v South Cumbria Health Authority* [1993] PLQR Q1 Court of Appeal
7. *John Doyle Construction Ltd v Laing Management Scotland Ltd* 2004 SLT 678 (Outer House)
8. *John Doyle Construction Ltd v Laing Management Scotland Ltd* 2004 SC 713 (Inner House)
9. *Compass Contract Service UK Ltd v C & E Comrs [2006] STC 1999*
10. *Drake v Harbour* [2008] EWCA Civ 25
11. *Fleming (t/a Bodycraft) v R & C Comrs* [2008] STC 325
12. *Red 12 Trading Ltd v R & C Comrs* [2010] STC 589
13. *Morrison Bowmore Distillers Ltd v R & C Comrs* [2010] UKFTT 394 (TC)
14. *Guide Dogs for the Blind Association v R & C Comrs* [2012] UKFTT 687 (TC)
15. *Irene Henderson v Eddie Mair Limited,* unreported, Lord Menzies, 20 April 2012
16. *General Motors UK Ltd v R & C Comrs* [2013] UKFTT 443 (TC)
17. *KDM International Ltd v HMRC* [2013] UKFTT 315 (TC)
18. *Loss Relief Group Litigation Order v CRC* [2013] EWHC (Ch)
19. *Reed Employment Ltd v R & C Comrs* [2013] STC 1286 [2013] UKUT 0109 (TCC)
20. *Why Pay More for Cars Ltd v HMRC,* UKFTT (TC) 19 September 2013
21. *WMG Acquisition Co UK Ltd v HMRC* [2013] UKFTT 215 (TC)

Guidance – HMRC

22. Business Brief 12/06 [2006] ST1 2126
23 HMRC's Fleming Guidance on Section 121 of the Finance Act 2008 (17.9.10 version)

Noted additionally –

HMRC v Brockenhurst College [2014] UKUT 0046 (TCC)