[2020] UKFTT 0091 (TC)

TC07585

VALUE ADDED TAX – claim for repayment of output tax – fleet purchaser of motor vehicles – bonuses received from manufacturer – whether appellant has established that it overpaid output tax – whether appellant has established the amount of output tax overpaid – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2010/02324

BETWEEN

BRAMMER UK LIMITED **Appellant**

-and-

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

TRIBUNAL: JUDGE JONATHAN CANNAN

Sitting in public in Manchester on 29 October 2019

Mr Nigel Gibbon of Nigel Gibbon & Co for the Appellant

Ms Laura Free of HM Revenue and Customs' Solicitor's Office and Legal Services for the Respondents

DECISION

INTRODUCTION

1. This appeal concerns a claim for repayment of VAT in connection with the business of Brammer UK Limited ("Brammer"). By letter dated 30 March 2009 Brammer made a claim for repayment of VAT pursuant to s80 Value Added Tax Act 1994. The claim included an amount of £233,302 ("the Claim") said to be VAT overpaid in the period 1 June 1988 to 30 September 1996 ("the Period"). The Claim was made pursuant to the extended time limits for such claims following the litigation in *Fleming v HM Revenue & Customs* [2008] UKHL 2. The Claim was rejected by HMRC on 4 December 2009 on the basis that there was no evidence to support it. Thereafter, KPMG who were then representing Brammer provided further evidence and asked for a review of HMRC's decision to reject the Claim. By letter dated 1 February 2010 a formal review upheld the original decision to refuse the Claim.

2. The present appeal was notified to the Tribunal on 25 February 2010. Since then, the appeal has been stayed behind various other appeals concerning the same or similar issues. In May 2016, KPMG provided further evidence in support of the Claim. By the time of the hearing the amount of the Claim had been reduced to £183,677 following various amendments.

BACKGROUND

3. Brammer is part of a multinational group supplying machine parts and maintenance services to manufacturing industries. At all material times it operated a large number of branches throughout the UK. The Claim arises from the way in which it is said that Brammer accounted for incentives or bonuses provided by manufacturers on purchases of fleet vehicles. The Claim relates to what were described as "non-commercial vehicles". The parties used this term as shorthand for cars which were available for private use by employees such that the business was not able to recover input tax on purchasing those vehicles. In contrast, commercial vehicles would include vans and pool cars. Brammer contends that it incorrectly accounted for output tax on bonuses paid in respect of non-commercial vehicles as though they were consideration for a supply of services made by Brammer to the manufacturers.

4. HMRC explained their policy in relation to such incentives in a letter dated 30 October 1987 to the Society of Motor Manufacturers. The letter was headed "VAT LIABILITY OF INCENTIVE PAYMENTS BY VEHICLE MANUFACTURERS TO HIGH VOLUME PURCHASERS". The policy was that manufacturer incentive payments received by businesses on the purchase of motor vehicles were not discounts from the price paid, but consideration for a supply of services by the business to the manufacturer, so that output tax was due ("the 1987 Policy"). This was because the payments were generally subject to certain conditions, such as volume requirements. The 1987 Policy applied to incentives paid by the manufacturer to a customer who purchased through an authorised dealer, in other words to someone other than the manufacturer's direct customer. Such payments are sometimes described as "not following the line of supply". The letter ends as follows:

> "It would be advisable if manufacturers, when negotiating the payments, clearly explained to the customers that tax is due from them on the amounts paid."

5. The 1987 Policy did not apply to incentives paid which followed the line of supply, that is where the manufacturer supplied the customer direct. In those cases, incentives had always been treated as reducing the consideration and not giving rise to any liability to output tax.

6. The decision of the European Court of Justice in *Elida Gibbs Ltd v Customs & Excise Commissioners* C-317/94 ("Elida Gibbs") led to a change in HMRC's policy. The effect of Elida Gibbs was that bonuses paid to businesses who were not direct customers of the

manufacturer fell to be treated as discounts on the purchase price and output tax was not due on the bonuses (see *HMCE Business Brief 16/1997*).

7. The position in the context of bonuses paid to motor dealers was described by the Upper Tribunal in *Why Pay More For Cars Limited v HM Revenue & Customs* [2015] UKUT 468 (TCC) at [6] as follows:

> "6. Before the judgment of the Court of Justice of the European Communities ('the ECJ') in Case C-317/94 Elida Gibbs v Customs and Excise Commissioners [1996] STC 1387 ('*Elida Gibbs*'), HMRC's view was that the VAT treatment of a bonus payment was determined by whether it followed the line of supply. Where the bonus followed the line of supply of the car, ie where a manufacturer (or a finance company in the same VAT group as the manufacturer) supplied a car to a dealer and the manufacturer subsequently paid a bonus to the dealer, the bonus could be treated as a discount. Where the bonus did not follow the line of supply of the car, ie where a manufacturer supplied a car to a finance company (other than a finance company in the manufacturer's VAT group) for onward supply by the finance company to the dealer and the manufacturer subsequently paid a bonus directly to the dealer, HMRC considered that the bonus should be regarded as consideration for a supply of services by the dealer to the manufacturer and, accordingly, the dealer was required to account for output tax.
>
> 7. In *Elida Gibbs*, the ECJ decided that a manufacturer who operated a cash back sales promotion could reduce the value of its taxable supplies to wholesalers or retailers by an amount equal to the amount of the cash back or refund that the manufacturer paid to the consumer. Following *Elida Gibbs*, HMRC accepted that the bonus payments should always have been treated as a discount on the original price of the cars. HMRC invited claims from motor dealers who believed that they had overpaid VAT."

8. Following Elida Gibbs there was the potential for motor traders, and others such as fleet purchasers, who had received bonuses and had accounted for output tax on those bonuses to make claims for repayment of VAT going back many years. HMCE as it then was recognised that due to the passage of time it was unlikely that evidence to support such claims would still be held. HMCE worked with trade bodies, industry representatives, manufacturers, and dealerships and in relation to claims by motor dealers prepared what is known as the "Elida Table".

9. The Elida Table was based on industry-wide averages relating to the level of manufacturers bonuses paid by certain manufacturers. It provided a template pursuant to which motor dealers who wished to make claims for overpaid VAT were able to lodge what HMCE and latterly HMRC would consider to be fair and reasonable claims. Claims could therefore be made without much of the supporting documentary material which would otherwise be expected to establish such claims. Where a motor trader considered that it had a higher claim than the Elida Table would suggest, it was open to the trader to make a higher claim and to support it by reference to specific evidence justifying the higher claim. In cases where a trader argued that it had a higher claim than the Elida Table the burden remained with the trader to establish whether and to what extent VAT had been overpaid.

BURDEN OF PROOF IN THIS APPEAL

10. It is common ground that the burden is on Brammer to establish that it has overpaid VAT, and also the amount of VAT which it has overpaid. HMRC contend that Brammer has not adduced sufficient evidence to establish, on the balance of probabilities either that it has overpaid VAT or the amount of VAT which it has overpaid. Those two issues can be broken down further.

11. On the question of whether Brammer can establish that it has overpaid VAT, HMRC contend that it has not established on the evidence that it accounted for output tax on bonuses

received from manufacturers in the Period. In particular, HMRC say that Brammer has not adduced sufficient evidence to establish:

(a) that it purchased vehicles through franchised dealers rather than directly from manufacturers. In other words, it has not established that the 1987 Policy was applicable to its fleet purchases; or

(b) if the 1987 Policy applied to its fleet purchases, that it correctly applied that policy.

12. Even if Brammer can establish both those matters, HMRC say that it has not established the amount of VAT, or a minimum amount of VAT which it overpaid in the Period. In particular, HMRC say that Brammer has not adduced sufficient evidence to establish:

(a) the number and cost of vehicles purchased in the Period; or

(b) the proportion of those vehicles which were non-commercial vehicles and in respect of which VAT was overpaid; or

(c) which manufacturers supplied those vehicles.

13. It is common ground that only output tax accounted for on bonuses relating to non-commercial vehicles is recoverable. I understand this is because input tax credit would have been available on the purchase price of commercial vehicles without reduction for the bonus. Any output tax accounted for on the bonus would have been offset by a corresponding input tax credit available on the purchase.

14. The identity of the manufacturer is significant because not all manufacturers paid bonuses to high volume purchasers, certain manufacturers may have paid bonuses in some years but not others, and manufacturers paid bonuses at different rates.

15. Mr Gibbon, on behalf of Brammer made various submissions as to how I should assess the evidence, and in particular how I should approach the burden of proof. He relied on the EU law principle of effectiveness, and submitted that any requirement which has the effect of making it virtually impossible or excessively difficult to secure a repayment would be incompatible with EU law. He referred to various authorities in this regard.

16. Firstly, the decision of Henderson J (as he then was) in *The Prudential Assurance Co Ltd v HM Revenue & Customs* [2013] EWHC 3249 (Ch) at [111]. I have included [110] for the purpose of some context:

> "110. HMRC did not require Ms Hine to attend for cross-examination, but Mr Barker was briefly cross-examined by Mr Baldry. When questioned about Ms Hine's work, he accepted that there was no way of telling whether the particular companies from whom Prudential had received dividends were actually liable for tax at the nominal rate listed in her tables, for example because the company might have been subject to a special rate of tax, or some of the income which it received may have been exempt from tax. Mr Barker agreed that the only way to be sure would be to ask the company concerned, though whether they would be willing to impart such information to an external portfolio investor was another matter.
>
> 111. I am satisfied on the evidence that Prudential has made reasonable efforts to obtain the necessary information, and in my view the figures in Ms Hine's tables should be adopted subject to any adjustments which may be agreed with the Revenue. Given the scale and historic nature of the enquiry, and the fact that the need to grant a credit based on nominal rates has only emerged as a result of FII (ECJ) II in 2012, I do not think it would be reasonable to expect perfect accuracy; and if there are any minor imperfections in the tables, it would in my judgment better accord with the EU principle of effectiveness to use the flawed figures rather than reject them entirely or insist on yet further investigations. For similar reasons, I think that if HMRC wished to challenge any of the rates for the kinds of reason instanced by Mr Baldry, it was incumbent on them to do so in

particular instances, and not just to rely on the possibility that such cases might exist as a reason for discrediting the entire exercise."

17. In that case, an exercise had been conducted to evidence foreign nominal rates of tax, including various assumptions made to deal with minor problems in the exercise. Henderson J held that HMRC could not discredit the entire exercise simply by raising the possibility of minor issues. I bear that in mind when considering the issues and the evidence on this appeal.

18. Secondly, the decision of Lord Tyre sitting in the Upper Tribunal in *Lothian NHS Health Board v HM Revenue & Customs* [2015] UKUT 264 (TCC) at [4]:

> "4. The onus of establishing a claim for recovery of historic input tax rests upon the claimant. However, the judgment of the Court of Justice in *Amministrazione delle Finanze dello Stato v SpA San Giorgio* [1983] ECR 3595 makes clear that any requirement of proof which has the effect of making it virtually impossible or excessively difficult to secure the repayment of recoverable input tax would be incompatible with community law. This is an application of the principle of effectiveness. In *Test Claimants in the FII Group Litigation v HMRC* [2012] STC 1362, Lord Sumption (at paragraph 146) construed this principle as prohibiting the imposition of "onerous collateral conditions or disproportionate procedural requirements" for the enforcement of community law rights. It is accordingly necessary to bear in mind the principle of effectiveness when applying any rule of substantive law or procedure concerning the quality of evidence required to substantiate a claim for recovery of input tax relating to a period many years into the past."

19. I note at this stage that in the present appeal there is no rule of substantive law or procedure which HMRC rely on as limiting the evidence which may be adduced by Brammer, or as limiting the weight to be attached to any particular type of evidence. Lord Tyre went on to describe the approach a tribunal should take in relation to a claim to recover historical input tax at [21]:

> "19. …The onus of proving that "an amount" of input tax has been paid and not recovered rests upon the claimant. The standard of proof is the balance of probabilities. At the conclusion of a hearing, it is open to a Tribunal to hold that the claim fails for either of two reasons: (a) because the Tribunal is not satisfied, on the balance of probabilities, that there is any unrecovered input tax; or (b) because the Tribunal, although satisfied that there is unrecovered input tax, is unable to find, on balance of probabilities, that any particular – even a minimum – amount of input tax can be ascertained as having been paid and not recovered. In the latter alternative the Tribunal does not function as a detective with a duty to fix a figure – even a minimum figure – for input tax paid but not recovered, regardless of the quality of the evidence placed before it by the claimant."

20. That is the approach I shall adopt in this appeal. I was referred by Ms Free for HMRC to the Upper Tribunal decision in *HM Revenue & Customs v Vodafone Group Services Ltd* [2016] UKUT 0089 (TCC). That case was concerned with the distinction between amendment to an existing claim and a new claim. Subject to one point mentioned below it does not really take matters further in relation to the present issues.

21. I was also referred to observations made in a number of First-tier Tribunal decisions in relation to the principle of effectiveness in the context of claims for historic overpayments of VAT. Mr Gibbon referred me to what was said in *Perenco Holdings v HM Revenue & Customs [2015] UKFTT 65 (TC)*:

> "5. It is a characteristic of many *Fleming* claims that, because the claims relate to VAT periods many years and sometimes decades ago, documentary evidence tends to be sparse. Often the relevant tax invoices and VAT returns will no longer exist or, as in this case as regards VAT returns, are no longer retrievable. The personnel involved in the original transactions may have long since moved on and, in any event, after so many years memories will have faded.

> 6. It is, of course, the duty of this Tribunal to establish the facts and to make findings of fact where possible, recognising that perfection may not be attainable. This can be particularly challenging in *Fleming* claims where contemporaneous documentation is scanty or non-existent and inferences must be drawn as best they can from surrounding circumstances. Against this background, it is hardly surprising that questions of the burden of proof, both legal and evidential, loom large. Furthermore, the principle of effectiveness means that domestic procedural law must not make it impossible or excessively difficult to enforce rights derived from EU law, such as the right to obtain a deduction for input tax by credit or repayment. Thus, the principle of effectiveness requires HMRC to give an effective remedy to a taxpayer who has wrongly overpaid VAT or been incorrectly denied an input tax credit. Again, this case raises questions concerning the principle of effectiveness and its application to the exiguous evidence available in *Fleming* claims."

22. In the context of Brammer's case that it would have applied the 1987 Policy because it was a compliant taxpayer, Ms Free referred me to what was said in *WMG Acquisition Co UK Ltd v HM Revenue & Customs* [2013] UKFTT 215 (TC) at [29] and *KDM International Ltd v HM Revenue & Customs* [2013] UKFTT 315 (TC) at [70]:

> "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.'"
>
> WMG Acquisition Co UK Ltd
>
> "70. We have already mentioned the limitations of Mr Spilling's evidence. We do not consider that it goes to the heart of the matter, which is what the Appellant actually did, rather than what it knew to be the right thing to do…"
>
> KDM International Ltd

23. None of these cases indicate that the standard of proof is lower in claims for repayment of historic overpayments of VAT than the ordinary civil standard of proof. Requiring facts to be proved by reference to the evidence is consistent with the principle of effectiveness and Mr Gibbon did not suggest otherwise. I must find facts by reference to the ordinary civil standard of proof, on the balance of probabilities. However, it does seem to me that in assessing the evidence I should not expect to see documentation which, for good and obvious reasons, no longer exists. Brammer should not be expected to have retained documentation which would no doubt have existed during the Period and for a time after the end of the Period, but which it would now be unreasonable to expect given the passage of time. Further, I should not expect to see perfect explanations for matters which go back many decades. Having said that, I am not required to accept oral evidence at face value, even where there is no evidence to the contrary. I must take into account that memories are fallible, especially where witnesses are being asked to recall details going back many years. In weighing the evidence that is available, I must still be satisfied on the balance of probabilities before I can find facts relevant to the issues in this appeal.

24. I was also referred to HMRC's published internal guidance as to what evidence may be sufficient to establish a claim such as this. That is strictly a matter for this tribunal so I shall not set out that guidance in detail. However, I do note that HMRC accept in their guidance that

the relationship between manufacturers and dealers is "dictatorial", in the sense that dealers would effectively be required to accept the terms offered by specific manufacturers. That is the basis on which the Elida Table was agreed. Further, unless there is evidence to the contrary, HMRC will assume that compliant taxpayers operated in accordance with HMRC's view of the law at the time.

THE EVIDENCE

25. I heard evidence from Ms Barbara Eastwood and Ms Geraldine Hunt on behalf of Brammer. Ms Eastwood is employed by Brammer in its transport department and Ms Hunt is a business support services manager.

26. Ms Eastwood commenced employment with Brammer in 1991 and in 1993 moved to work in the transport department as a transport assistant. In that role she was responsible for aspects of administration, including dealing with the renewal of tax discs, road traffic claims, fuel cards and mileage report forms. Ms Eastwood swore an affidavit on behalf of Brammer on 22 September 2017 in which she set out various facts and matters in support of the Claim. It is not clear why this was done in the form of an affidavit, possibly because HMRC's guidance in this context at one stage refers to a claim being supported by a signed affidavit. Ms Eastwood's evidence in the affidavit may be summarised as follows:

(1) Her recollection was that in the early 1990s Brammer had a fleet of roughly 300 vehicles, both vans and cars. Vehicles were purchased outright. She was not sure what the proportion was between vans and cars.

(2) The fleet was split between estates, hatchbacks and vans. General management had a choice between an estate or a hatchback, branch managers had estates, sales people had hatchbacks and assistant managers had vans.

(3) She was not "100% sure" but the vehicles would have been Fords or Vauxhalls. Later they were Peugeots. As a matter of policy, only a single make was purchased at any one time.

(4) All new vehicle orders were placed by the transport manager. It would have been the responsibility of the transport manager to negotiate the terms on which vehicles were purchased.

(5) Her responsibilities included logging new vehicles into a fleet database, which was a book. The fleet database included details of the vehicle, driver and cost centre. It also included the cost of the vehicle and the date on which a manufacturer's bonus was received.

(6) As far as she recalled, bonuses were paid by the manufacturer quarterly and the bonus for each vehicle purchased would vary depending on the model.

(7) A copy of paperwork from the manufacturer, including paperwork showing the bonus was given to the accounts department. The original was filed in the transport department.

(8) The transport manager negotiated terms with manufacturers, signed off all purchase invoices and checked manufacturer bonuses.

(9) Vehicles were replaced every 3 years or 90,000 miles.

27. On 25 April 2019 Ms Eastwood made a witness statement. The witness statement set out the evidence she intended to give and also explained certain differences between that evidence and her previous affidavit. She stated that when she swore the affidavit she had not received any help from anyone at Brammer or KPMG who were then acting for Brammer. She said that

she now realised that she did not express herself very well on occasion and that on further investigation certain facts stated in the affidavit were not correct. The principal differences were as follows:

(1) It was not just a matter of recollection that fleet vehicles were purchased outright. She was absolutely certain that was the case.

(2) She was absolutely certain that in 1993 Brammer purchased Ford vehicles. In about 1994 it purchased Vauxhall vehicles. In 1997 it was Peugeot vehicles and by 2000 it was Vauxhall again.

(3) It was not just a matter of recollection that bonuses were received quarterly. She knows that they were received quarterly.

28. In her witness statement and her oral evidence Ms Eastwood added to what she had said in the affidavit. In particular she said:

(1) The number of fleet vehicles rose from roughly 300 in the early 1990s as the business expanded through the purchase of other businesses.

(2) She produced a "Fleet Sheet" which was the fleet database referred to in the affidavit. This was a spreadsheet for the period 2000-01 and is the earliest version she has been able to find. I refer to this in more detail below.

(3) Vehicles were replaced every 3 years or 70,000 miles, whichever came sooner.

(4) Written details of the support terms from the manufacturer were received by post and these details were entered in the fleet database.

(5) Examples of documentation provided by the manufacturers from April 2000 were produced.

29. The Fleet Sheet exhibited to Ms Eastwood's witness statement lists every vehicle in the fleet between April 2000 and April 2001. There are 505 vehicles listed, comprising 377 cars and 128 vans. The first vehicle on the list was purchased on 3 April 1996 and sold on 27 June 2000. The last vehicle on the list was purchased on 11 April 2001 and had not been sold. The oldest vehicle on the list which remained in the fleet in April 2001 had been purchased on 10 March 1997. The Fleet Sheet shows 407 vehicles in the fleet as at April 2001.

30. The Fleet Sheet produced was in use up to April 2001. Ms Eastwood's evidence was that she would work on the Fleet Sheet every day entering details of vehicles being purchased and sold. She said that the proportion of cars to vans would have been similar in 1993 when she joined the transport department. The reason she could say this was that the structure of the business had remained the same. Each branch manager had a car and each branch had a van. Having said that, she acknowledged that the proportion of cars to vans was not 50:50. She said that this was because there would be some larger branches with more vehicles and there was a national distribution centre.

31. Ms Eastwood said that input tax was recovered on the purchase of vans which were "commercial vehicles" and she would record the amount of VAT paid on such vehicles. None of the cars were used as commercial vehicles, so input tax was not recovered on cars. Vans would be used for deliveries, and would all have side opening doors so that pallets could be placed in the back using a forklift truck. The cars could not be used in the same way.

32. The documentary evidence included a credit note from Vauxhall to Brammer dated 7 April 2000 in the sum of £94,754. Ms Eastwood said that this was the quarterly rebate from Vauxhall. It had a reference "Fleet Customer: GB8484". There was also a corresponding confirmation from Vauxhall dated 10 April 2000 of a bank transfer to Brammer in the same

amount. This had a reference "Dealer Code: GB8484" An accompanying schedule showed details of 33 vehicles to which the rebate related and the amount of rebate in relation to each vehicle. The schedule was dated 7 April 2000 and includes the reference "Fleet Customer Support Programme Commercial Company – Alt Terms – BSL Ltd – Regs 01/01/00 – 30/06/01".

33. There were similar documents in evidence for rebates paid on 10 July 2000, 10 October 2000 and 10 January 2001. Ms Eastwood said that there was no earlier documentation because there had been an office move and paperwork had been cleared.

34. Ms Eastwood accepted that she could not give evidence as to what happened in the transport department prior to joining in 1993, or as to how Brammer accounted for VAT in relation to manufacturer bonuses on non-commercial vehicles.

35. Ms Eastwood's affidavit and witness statement referred only to the transport manager negotiating terms with the manufacturers. There was no reference to purchasing new vehicles through dealers. She was asked in her oral evidence whether vehicles were purchased direct from manufacturers or through franchised dealers. Initially Ms Eastwood said that vehicles were purchased direct from the manufacturers, but then qualified this and said that they would be ordered through a dealership with a rebate coming from the manufacturer. Rebates were negotiated directly with the manufacturer by reference to a commitment to purchase a certain volume. There was no documentary evidence to show the involvement of franchised dealers, but Ms Eastwood said that when Brammer purchased Ford vehicles it placed the order through a dealer called Evans Halshaw. Later she also referred to a dealer called Quicks.

36. It appears from the Fleet Sheet that Brammer was mainly purchasing Ford vehicles in 1996 and 1997 There are instances of a small number of Renault, Peugeot, Rover, and Volkswagen vehicles being purchased in those years.

37. Ms Hunt had not been asked to make a witness statement but I permitted Brammer to adduce her oral evidence. She started working for Brammer in 1978, as a trainee. In the early 1980s she moved to an engineering subsidiary working in sales and then in quality and health and safety. She stayed there until 2001 when she moved to a role as a business services manager. That role included responsibility for all buildings and the fleet of vehicles. She has worked in that role since 2001. Ms Hunt had no involvement in fleet purchases in the Period and no knowledge of the VAT treatment of fleet vehicles.

38. The only relevant evidence Ms Hunt could give was that she was first given a company car in 1994, and it was a Ford Mondeo. She said that the business purchased Ford vehicles prior to that. She knew this because in the late 1980s or early 1990s she could recall her engineering workshop manager having a Ford Escort van, the sales office manager having a Ford Escort estate and the director having a Ford Granada. However, there was no evidence as to when those vehicles had been purchased. Ms Hunt's evidence was essentially that Brammer operated Ford vehicles in the fleet at some time in the late 1980s or early 1990s.

39. HMRC accept that it is likely that a fleet operator such as Brammer would have received bonus payments from a manufacturer where that manufacturer had a policy of making bonus payments.

FINDINGS OF FACT AND DISCUSSION

40. I now consider the various factual issues on this appeal

41. HMRC say that there is no evidence that Brammer declared output tax on manufacturer bonuses in the Period. In particular, Brammer have not established that the 1987 Policy applied to any payments they received, or if it did apply that Brammer applied the 1987 Policy.

42. The first question is whether Brammer purchased vehicles in the Period through franchised dealers or directly from the manufacturers. There was no evidence before me as to whether, as a matter of commercial practice, one scenario was more likely than the other.

43. The respondents say that what evidence there is in relation to this question is inconsistent and leaves the position unclear. KPMG in a letter dated 12 May 2016 stated in terms as follows:

> "Motor vehicles would have been bought from manufacturers, and not from finance companies or motor dealers."

44. The source of KPMG's information appears to have been Ms Eastwood, about a year before she swore her affidavit. The affidavit itself and Ms Eastwood's witness statement made no reference to who supplied the motor vehicles to Brammer. I have mentioned above how Ms Eastwood dealt with the question in her oral evidence. I am left with the impression that Ms Eastwood's recollection as to whether vehicles were supplied directly by the manufacturers or through franchised dealers is not reliable. I am not satisfied on the balance of probabilities that Brammer purchased vehicles in the Period through dealers rather than directly from the manufacturers.

45. On the basis of that finding, Brammer has not satisfied me that it accounted for output tax on bonuses received from manufacturers. If vehicles were supplied directly by manufacturers then it is likely bonuses were treated as a discount and no output tax would have been accounted for on such bonuses. That is sufficient to determine the appeal against Brammer. However, I shall go on to consider the other factual issues.

46. If Brammer did purchase fleet vehicles through dealers, the question is then whether Brammer followed the 1987 Policy and accounted for output tax on manufacturer bonuses. Brammer says that as a diligent and compliant taxpayer it would have applied the 1987 Policy correctly. Further, the 1987 Policy advised manufacturers when negotiating incentives to clearly explain to customers that tax would be due from them on the amounts paid. Mr Gibbon says that Brammer was a diligent taxpayer and I should assume that it applied the 1987 Policy. He submitted that there was no evidence that Brammer was non-compliant in relation to VAT.

47. There was evidence in the form of an HMRC summary document as to how certain manufacturers, including Vauxhall and Ford, treated non-dealer fleet bonus payments in the years 1973 to 1996. This was produced by HMRC's Motor Trade Unit of Expertise and was dated 2 November 2004. It appears from the summary and I accept that Ford and Vauxhall both treated bonuses as outside the scope of VAT until 1988, and as standard rated thereafter. I accept that was the case, and I infer that Vauxhall from 1 July 1988 to 1996 and Ford from sometime in 1988 to 1996 would have expected to recover input tax on non-dealer fleet bonus payments where vehicles were supplied by a dealer. In order to do so they would have required VAT invoices identifying VAT on the bonus payments. It is not clear on the evidence whether manufacturers might have used "self-billed" invoices for this purpose or required customers such as Brammer to produce VAT invoices. The 1987 Policy itself refers to the possibility of self-billing and appears to discourage that practice as follows:

> "… we are aware of case where manufacturers have, of their own volition, regarded these payments as consideration for taxable supplies and have consequently self-billed the VAT. This represents a possible loss to the revenue if no output tax is accounted for by the customer."

48. Mr Gibbon relied on the acknowledged dictatorial relationship between manufacturers and dealers, and submitted that the same relationship would have existed between manufacturers and fleet purchasers. I do not accept that is the case and I am not prepared to make such an inference. Fleet purchasers would be in a different bargaining position to dealerships. However, even without the so-called dictatorial relationship, manufacturers would have required a VAT invoice in relation to bonus payments. On balance, I am just about

satisfied that it is likely there would have been discussions between the manufacturers and high volume purchasers such as Brammer as to the need for a VAT invoice and the requirement for Brammer to account for output tax on bonus payments. In all the circumstances I am satisfied that it is likely a compliant trader would have accounted for the VAT on bonus payments.

49. The question then is whether Brammer in those circumstances would have accounted for output tax on bonus payments received. In other words, was it a compliant trader? Ms Free submitted that the burden was on Brammer to show that it was a compliant trader, and not on HMRC to show that it was not a compliant trader. It is difficult to know how either party in a case such as this could go about showing that Brammer was generally compliant or non-compliant in the Period. There is no direct evidence and Ms Eastwood accepted that she could not give any evidence as to Brammer's VAT function. However, knowing that HMRC had a specific policy for manufacturer bonuses and given that manufacturers would be likely to have discussions with high volume purchasers, I am satisfied on the balance of probabilities that Brammer would have accounted for output tax on bonus payments. Put another way, it is unlikely that a large business such as Brammer would not have declared the output tax.

50. Overall, I am satisfied on the balance of probabilities that if Brammer had purchased from dealers throughout the Period it would have been aware of the requirement to account for VAT and would have done so.

51. The next question, if I had been satisfied that Brammer accounted for VAT on bonuses in accordance with the 1987 Policy, is whether I am satisfied as to the amount of VAT, or at least the minimum amount of VAT which was overpaid.

52. Brammer's case and its calculations of the amounts said to have been overpaid are not based on the number and actual cost of non-commercial vehicles purchased by Brammer in the Period. Instead, its starting point is the value of vehicles purchased in the Period. Brammer uses data from management accounts to identify additions to fixed assets (motor vehicles) in the period 1989 to 1994 and in 1996. The 1988 and 1995 figures are based on averages from that data. The data for 1996 was referred to in correspondence from KPMG to HMRC in 2009, but is apparently no longer available. Mr Gibbon therefore submits that if HMRC do not accept the figure for 1996 then the same averaging exercise could be carried out for that year.

53. HMRC do not really dispute the total figures for additions to fixed assets in those years, but do say that the figures used by Brammer will include VAT where input tax has been blocked, that is in relation to non-commercial vehicles. They also say that Brammer's case relies on an apportionment of the value of vehicles purchased between commercial and non-commercial vehicles. Brammer's apportionment is based on the ratio of vans to cars in April 2000-01. Ms Free submitted that involves too broad a brush. It uses the ratio from April 2001 whereas the Period is from 1988 to 1996. It assumes that vans and cars are similarly priced. Ms Free submitted that the cost of a Ford Granada was likely to be much more than the cost of a Ford van. It also assumes that none of the cars purchased were pool cars where input tax was recovered.

54. There is some force in Ms Free submission on this point. The question is whether I consider that these are minor issues at the margin, such that the approach of Henderson J in Prudential Assurance Co can be applied, consistent with the principle of effectiveness. On balance, I do not consider that these are minor issues. It seems to me that Brammer's assumptions for the purpose of calculating the amount of VAT overpaid give rise to a significant margin for error, especially applying a ratio from April 2001 to the Period which commenced in 1988. The calculations may well be the best assessment that can be made on the material available, but I cannot say that they result in a figure that is likely to be the amount of VAT overpaid by Brammer, or that is likely to be the minimum sum that has been overpaid.

55. HMRC also criticise other assumptions made by Brammer in calculating the amount of VAT which it is said was overpaid. I do not need to describe the precise basis of Brammer's calculation other than in relation to two estimates that are in issue. Brammer takes the value of non-commercial vehicles it says were purchased and grosses this up for a dealer discount of 8.11% off the gross list price. This is said to be the discount a dealer would have given to Brammer. VAT is then deducted at the rate in force as well as car tax in certain years to give a net price. A manufacturer's bonus rate of 15% is then applied to give the bonus payment received and the output tax included in that bonus is calculated.

56. HMRC say there is no reliable evidence as to the 8.11% dealer discount or the 15% manufacturer's bonus.

57. The 8.11% dealer discount was identified by KPMG and apparently derives from a Competition Commission Report in March 2000 which identifies a weighted average fleet discount given by leading manufacturers between 1994 and 1998. There is a table in that report (Table 7.3) which identifies in what I shall call Part A, the percentage discounts from 4 manufacturers (described as suppliers) and dealers to fleet purchasers. In what I shall call Part B, it identifies the percentage discounts from 6 manufacturers only to fleet purchasers. The identity of the manufacturers has been redacted by the Competition Commission, presumably because of commercial sensitivity.

58. Mr Gibbon carried out an exercise to calculate the average manufacturer and dealer discount in Part A, which was 23.14%, and the average manufacturer only discount in Part B, which was 14.65%. The difference gives a figure 8.49% for the average dealer discount, but Mr Gibbon said that it was "broadly supportive" of KPMG's figure of 8.11%.

59. The basis of the manufacturer bonus figure of 15% is a statement of KPMG in a letter dated 30 March 2009 to HMRC that:

> "…it is recognised throughout the fleet industry that fleet bonus support has stayed at a consistent percentage … throughout [the Period]…The percentage has been calculated by using known values of bonus payments from the main suppliers … and we believe an average of 15% is fair and reasonable and consistent with HMRC's views"

60. There is no direct evidence before me as to the rate of manufacturer bonus paid to fleet customers in the Period. Brammer relies on what is said by KPMG in that letter, and also on the Competition Commission Report which suggests that the average manufacturer discount in the period 1994 to 1998 was 14.65% with a range of 9.7% to 19.3%

61. Ms Free submitted that taking averages in this way is too speculative. What would be required would be evidence that specific manufacturers gave specific dealer discounts and paid specific bonuses in specific years. Some measure of averaging may be acceptable, but not to the extent Brammer seeks to employ.

62. I accept Ms Free's submission that Brammer's exercise is too speculative. The evidence of manufacturer discounts in the Competition Commission Report refers only to 6 unidentified manufacturers. In other sections of the report 10 manufacturers are identified. I do not know whether the figures in Table B relate to Ford, Vauxhall or Peugeot which are the vehicles Ms Eastwood says were purchased at various times in the Period. The range of discounts is wide. In theory, I could take lowest discount of 9.7%. However, 2 of the manufacturers in Table B have the notation n/a in some of the years. That could mean that information was not available, or it could mean that it was not applicable because that manufacturer did not pay a bonus in that year. In my view the exercise is simply too speculative.

63. The same can be said of Brammer's calculation of the average dealer discount. The range in Table A which shows the combined discount is 16.3% to 35% for 4 unidentified manufacturers.

64. It seems likely that Ford and Vauxhall both paid bonuses to high volume purchasers in the Period, I say that because HMRC produced a summary showing how they treated such bonuses in the period 1973 to 1996. I do not know whether Peugeot paid such bonuses at any time in the Period. However, the evidence as to which makes of vehicle Brammer purchased during the Period was not clear. In her affidavit, Ms Eastwood thought that Ford and Vauxhall vehicles were purchased earlier in the Period and Peugeot vehicles later in the Period. In her witness statement she was certain that Fords were purchased in 1993, Vauxhalls in about 1994 and Peugeots in 1997, which was outside the Period. However, the Fleet Sheet shows Fords being purchased in 1996 and 1997 and Peugeots in 1997 and 1998. Given the passage of time I do not consider that Ms Eastwood's evidence is reliable as to the identity of the manufacturer at any given time. Ms Hunt's evidence does not take matters much further, save to say that in 1994, Ford vehicles were being purchased and Fords were also purchased at some stage prior to that.

65. Save that Ford Vehicles were being purchased in 1994 and 1996, I cannot be satisfied whether the vehicles being purchased at any other times in the Period were Ford, Vauxhall, Peugeot or indeed any other make.

66. Looking at the evidence as a whole I am not satisfied as to the amount of VAT which Brammer might have accounted for in relation to manufacturer bonuses, or that there is a minimum amount I can be satisfied would have been accounted for.

67. Mr Gibbon somewhat half-heartedly pointed out that the Respondents are able to make VAT assessments using averages and assumptions when there is a lack of records. In my view that is quite different. The Value Added Tax Act 1994 specifically permits HMRC to make assessments to best judgment. Ms Free pointed out that the Upper Tribunal in Vodafone Group Services Limited specifically distinguished the evidence required by a trader to support a repayment claim and the position of HMRC in making an assessment. In the words of the Upper Tribunal: "…it is not possible to treat a repayment claim as the mirror image of an assessment".

CONCLUSION

68. For the reasons given above I am not satisfied that Brammer accounted for and overpaid VAT on manufacturer bonuses. If it did so, I am not satisfied as to the amount or any minimum amount of VAT that would have been accounted for. In the circumstances I must dismiss the appeal.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

69. 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.

JONATHAN CANNAN
TRIBUNAL JUDGE

RELEASE DATE: 17 FEBRUARY 2020