[2021] UKFTT 0406 (TC)

TC 08316

VAT – Italian Republic claims for overpaid VAT – claims under Section 80 made in 2003 – Section 85 agreement in respect of those claims in 2006 - further claims made in 2009 for the same vehicles for the same periods but using a different profit margin – repeat claims with something new to say? – yes – were they subject to the Section 85 agreement – yes – res judicata and abuse considered – appeals dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal numbers: TC/2010/13275
TC/2010/07563

BETWEEN

(1) CAMBRIA AUTOMOBILES (SOUTH EAST) LIMITED

(2) INVICTA MOTORS LIMITED **Appellants**

-and-

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

TRIBUNAL: JUDGE NIGEL POPPLEWELL

Hearing conducted in public remotely by video on 11-13 October 2021

Peter Mantle instructed by DMC Partnership Limited for the Appellants

James Puzey instructed by the General Counsel and Solicitor to HM Revenue & Customs for the Respondents

DECISION

INTRODUCTION

1. This case concerns VAT and, in particular, whether HMRC's decision to reject claims made by the appellants in 2009 for overpaid VAT on the sale of demonstrator motor vehicles sold by the appellants between 1973 and 1996, is correct.

2. During the course of the appellants' business between 1973 and 1996, they sold ex demonstrator vehicles and accounted for VAT on the profit margin of those vehicles sold at a profit, in line with HMRC's interpretation of the law at that time. As a result of the European Court of Justice decision in *Commission v Italian Republic C-45/96* HMRC (or as they were then, HM Customs & Excise ("**Customs**")) accepted that the sales of ex demonstrator motor vehicles were exempt from VAT and consequently motor dealers could seek to reclaim overpaid output tax pursuant to Section 80 VAT Act 1994 ("**Section 80**").

3. On 26 June 2003 the appellants brought overpayment claims under Section 80 (the "**2003 claims**"). Customs decided to reject these claims and the appellants appealed against that decision. Those appeals were the subject of an agreement under Section 85 VAT Act 1994 (the "**Section 85 agreement**") which was entered into at the end of March 2006.

4. On 25 March 2009 the appellants brought further overpayment claims under Section 80 (the "**2009 claims**"). HMRC decided to reject those claims and the appellants appealed against that decision. It is these appeals which I have to decide.

5. The issues in a nutshell are these. The appellants say that on the authority of the Court of Appeal decision in *John Wilkins* [2010] EWCA Civ 923 ("*John Wilkins*") that it is possible to bring second or successive overpayment claims under Section 80 provided that those claims have something new to say. The 2009 claims do have something new to say when compared to the 2003 claims. The 2009 claims were not covered by the Section 85 agreement which only covered the 2003 claims, nor are they abusive when tested against the principles set out in the House of Lords decision in *Johnson v Gore Wood* [2002] 2 AC 1 ("*Gore Wood*"). HMRC's view is that even if *John Wilkins* is authority for the foregoing proposition, the 2009 claims do not have anything new to say. Furthermore, the 2009 claims which are based solely on a different method of calculating the overpayment, are covered by the Section 85 agreement and any overpayment claims for the same period and for the sale of the same cars cannot now be reopened. Furthermore, the 2009 claims are abusive when tested against the *Gore Wood* principles.

6. Mr Mantle and Mr Puzey have made clear helpful and eloquent submissions, both orally and in writing. I am grateful for those submissions which have helped me considerably, and I have taken the submissions into account (along with all of the evidence) even though, in reaching my conclusions I have not necessarily referred to each and every argument and item of evidence in detail.

THE LAW

7. There was little dispute about the relevant legislation which is set out below:

(1) Under The Value Added Tax Act 1994:

80 Credit for, or repayment of, overstated or overpaid VAT

(1) Where a person—

(a) has accounted to the Commissioners for VAT for a prescribed accounting period (whenever ended), and

(b) in doing so, has brought into account as output tax an amount that was not output tax due,

the Commissioners shall be liable to credit the person with that amount……..

(4A) Where—

(a) an amount has been credited under subsection (1) or (1A) above to any person at any time on or after 26th May 2005, and

(b) the amount so credited exceeded the amount which the Commissioners were liable at that time to credit to that person,

the Commissioners may, to the best of their judgement, assess the excess credited to that person and notify it to him…**…..**

(6) A claim under this section shall be made in such form and manner and shall be supported by such documentary evidence as the Commissioners prescribe by regulations; and regulations under this subsection may make different provision for different cases.

(7) Except as provided by this section, the Commissioners shall not be liable to credit or repay any amount accounted for or paid to them by way of VAT that was not VAT due to them.

83 Appeals.

Subject to section 84, an appeal shall lie to a Tribunal with respect to any of the following matters—

> (t) a claim for the crediting or repayment of an amount under section 80 an assessment under subsection (4A) of that section or the amount of such an assessment;

85 Settling appeals by agreement.

(1) Subject to the provisions of this section, where a person gives notice of appeal under section 83 and, before the appeal is determined by a Tribunal, the Commissioners and the appellant come to an agreement (whether in writing or otherwise) under the terms of which the decision under appeal is to be treated—

> (a) as upheld without variation, or
>
> (b) as varied in a particular manner, or
>
> (c) as discharged or cancelled,

the like consequences shall ensue for all purposes as would have ensued if, at the time when the agreement was come to, a Tribunal had determined the appeal in accordance with the terms of the agreement (including any terms as to costs)……..(**"Section 85")**

(2) Under the 1995 VAT Regulations (1995/2518):

Claims for recovery of overpaid VAT

37. Any claim under section 80 of the Act shall be made in writing to the Commissioners and shall, by reference to such documentary evidence as is in the possession of the claimant, state the amount of the claim and the method by which that amount was calculated. ("**Regulation 37**")

FINDINGS OF FACT AND EVIDENCE

8. I was provided with a substantial bundle of documents. Miss Estelle Sherlock ("**Miss Sherlock**") who is a director of DMC Partnership Ltd ("**DMC**") and the director responsible for taxation, and who was primarily responsible for dealing with the 2003 claims and 2006 claims gave oral evidence.

The factual background

9. As regards the factual background, there is little dispute between the parties, and I find it to be as follows:

(1) Following the Italian Republic decision, and the subsequent decision in Marks & Spencer which dealt with the illegality of the three-year cap, DMC approached motor dealers for whom they acted with a view to putting together claims for recovery of blocked input tax. The time limit by when such claims had to be submitted was 30 June 2003. DMC submitted claims for a number of motor dealers in respect not only of Italian Republic claims but also claims arising from another ECJ decision, Elida Gibbs. The claims made on behalf of the appellants are the 2003 claims. Those claims included Elida Gibbs claims but I shall only be considering those claims to the extent that they relate to Italian Republic claims.

(2) Cambria's (formerly Dove Group) claims were in respect of volume cars as well as prestige vehicles such as Jaguar, Daimler, Rover, Triumph, Austin-Morris Saab and Ford. Invicta's claim was in respect only of volume vehicles (namely Ford).

(3) Customs had published a number of Business Briefs in 2002 and 2003, before the date on which the 2003 claims were submitted, and which DMC used to compile the 2003 claims. The copies of the Business Briefs which were present in evidence were not dated, but I believe the parties to be agreed that the Business Briefs to which I now refer were in circulation prior to the date of the 2003 claims. In late 2002 or early 2003, HMRC published two Business Briefs. The first talks about there being some degree of complexity and confusion regarding claims by motor dealers and explains how to claim for these. It also says there are separate and more detailed notes on how to make each type of claim "posted with this note".

(4) This first Business Brief explains the Italian Republic case and its implications for recovery of blocked input tax for accounting periods 1973 until 1997 or later and goes on to record that "it is clear that few businesses will have detailed records that cover all of the relevant accounting periods". It goes on to record that Customs had worked with trade bodies and identified a number of factors which make it difficult to quantify claims and had agreed

certain facts and methodologies which will enable claims to be calculated, made and processed more easily.

(5) For Italian Republic claims, a spreadsheet had been prepared which set out typical figures from 1973 to 1996 for tax on the margin. The spreadsheet is divided into three types of vehicle; presti ge, volume and other and this data may be used to quantify claims for the marques held by the trader. The separate note sets out detailed notes on such claims together with the spreadsheet.

(6) This second Business Brief states that it provides detailed guidance on claims to recover VAT paid on the profit margin on cars following the Italian Republic case. It directs that claims should take into account the franchise held at the time that the tax was declared and also changing prices and VAT rates. It sets out the three tables mentioned in the companion Business Brief dealing, respectively, with Prestige vehicles, Volume vehicles, and Other. Each table has a date on the left-hand side which runs from 1996 at the top down to 1973 at the bottom. The next column is entitled "No of eligible cars Sold" and for each year is populated by the number 27 in the prestige cars table and 67 in the volume cars table. The next column is headed "Typical sale Price" in the prestige cars table and is populated by figures which differ for each year and which range from 22,231 for 1996 down to 4,478 for 1973. There are no units but I expect that these are figures in pounds sterling. The next column is headed "Profit per unit" in the prestige table and identifies figures ranging from 1390 in 1996 down to 276 in 1973. Again, there are no units but I anticipate these figures are pounds sterling. The next column in the prestige tables is entitled "VAT Rate" and sets out the VAT rates in force in each of the years 1996 to 1973. The final column is headed "VAT" and sets out a figure which in the prestige table, ranges from 6,488.22 in 1996 down to 736.45 in 1973. Again there are no units but this is likely to be pounds sterling. The tables for volume cars and other are identical in principle save that the headings have been abbreviated and the figures altered. In the table dealing with volume cars, as mentioned above, the number of cars sold for each year is 67. The sale price for volume cars varies from 10,076 in 1996 down to 2030 in 1973, and the profit per unit varies from 665 in 1996 down to 134 in 1973. The final column, for VAT, is obviously different too. The third table, dealing with Other, has similar variations on which I shall not dwell given that it is irrelevant to this appeal. These tables are colloquially known as the Italian republic tables, or the Italian margin tables, or simply the Italian tables or the margin tables.

(7) Paragraph 7 of the Business Brief refers to the table and states that to use it for each franchise site for which a claim is being submitted, the claimant "should" follow certain instructions. Firstly the type of vehicles i.e. whether they are prestige or volume, should be correctly categorised, and then the number of eligible cars that each franchise site operated each year must be estimated using known information. The figures in the tables of 27 in the prestige tables and 67 in the volume tables are simply shown as an example. They indicate that most sites would have a minimum of seven or eight demonstrator cars a year and the tables show a considerable increase over the minimum for a medium-sized business and that if the estimate, for example, for a volume site is 60, then "*you should take 60/67ths of the VAT shown in the final column as your claim for that site in that year."* (emphasis added)

(8) The 2003 claims comprise a covering letter which sets out a summary of claims for each appellant and identifies a number for the VAT which is being claimed in respect of the various (in Cambria's case given there are a number of prestige vehicles) type of cars. For example, the claim is made for £155,356.96 for Prestige A type cars. Accompanying that letter are a number of additional schedules including details of the franchises, the basis of the information on which the claim is made (for example, for Cambria, it reflects "detailed knowledge of the

group general manager, Mr A Blake and of Mr GL Dove who was the group's chairman until 1994 and had a detailed knowledge of that business"). They go on to say that the margin and purchase price values of those which were set out in the aforesaid Business Brief but, for Cambria, which sold Jaguar and Daimler cars, the prestige values had been multiplied by 1.85 to reflect the sale/purchase price and profit per unit of these vehicles. The tables in the schedules then use the table numbers for profit per unit for each of the volume cars and prestige cars.

(9) Senior Officer Khan ("**Officer Khan**") was the individual who dealt with the 2003 claims at Customs. He sought further information from DMC and following submission of that information, on 14 June 2004, he rejected the 2003 claims on the grounds that the appellants were not eligible to make a claim based on the "propensity" condition set out in Business Brief 22/02 i.e. the appellants had to demonstrate that they had discovered the error before 31 March 1997.

(10) This decision was appealed by each of the appellants on 7 July 2004. The appellants sought a review and reconsideration, and whilst that was going on, DMC went through old records at the appellants' premises with a view to finding evidence that the appellants had discovered the error before the relevant date. They summarised this evidence and sent it to the reviewing officer in November 2004. In January 2005 the reviewing officer accepted that both appellants were eligible to make claims and on 27 January 2005, DMC wrote to Officer Khan asking that the 2003 claims should be processed.

(11) Officer Khan did not agree with the calculations which had been submitted by the appellants regarding the number of demonstrators, and further correspondence and meetings then took place in an effort to resolve the issue. On 22 June 2005 Officer Khan notified the appellants of his decision that he did not accept the figures submitted by the appellants but had payment of a lesser amount than that claimed. The appellants appealed this decision on 19 July 2005, Cambria's appeal being given appeal number 05/0761 and Invicta, 05/0762.

(12) The notices of appeal both state that the decision being appealed is "refusal to allow amount as calculated for motor trader Marks & Spencer claims – Italian case margin". The grounds of appeal in both notices state "claim submitted under the Italian republic case [case reference] on 26/06/03 as revised and calculated using available information. C&E have reduced the amount claimed. The appellant maintains that the amount claimed is fair and reasonable and should stand as per the letter dated 3 June 2005 (see attached)".

(13) The main issues of contention were the number of vehicles that formed the basis of the claim, the number of courtesy cars, the classification of certain higher end marques between the prestige and volume categories, and the number of turns of the demonstrator cars. The appellants continued to unearth evidence relating to these issues and presented such evidence and discussed it at a meeting with Officer Khan's line manager, Mr Richard Gelder in August 2005. This was followed up with a letter dated 27 September 2005 from Officer Khan confirming that amendments could be made to the claims and setting out further calculations of the amounts for which he was authorising payment.

(14) In a letter dated 17 February 2006, Mr John Ridings explained to DMC that he had undertaken a review of the cases as an independent officer and member of the appeals team following the impasse in the discussions with HMRC officers in September 2005. That letter dealt with a number of the issues including the number of demonstrators, the turns, the 1.85

uplift for Jaguars and Daimlers and the type of vehicles that should be categorised as prestige vehicles.

(15) On 22 February 2006 Miss Sherlock, in a telephone conversation with Mr Ridings, indicated her disagreement that the 1.85 uplift was incorrect and following that call, sent Mr Ridings by fax, extracts from Glasses Guide which formed the basis of the 1.85 uplift.

(16) Mr Ridings responded in a letter dated 1 March 2006 dealing with a number of points, and in particular the 1.85 uplift. In his view, doubt had been cast on that figure by dint of a schedule compiled by an employee of Invicta in November 1997, and in Mr Ridings view, the whole point of the Italian tables was to identify demonstrators whose sale generated a profit, and the 1997 schedule identified actual margins achieved. When those margins were averaged, and compared to the gross profit per unit for 1997, an uplift of 1.39 looked more acceptable.

(17) The proposals made in Mr Ridings letter were accepted by DMC who responded on 1 March 2006 with revised calculations which were accepted by HMRC on 6 March 2006. In their letter Mr Ridings stated that "on behalf of the Commissioners, I will accept the final revised figures in the sum of £1,423,510.48 in settlement of all aspects of your client's "Marks & Spencer" claim. We will pay statutory interest under section 78 and of the Value Added Tax Act 1994. I will arrange for payment of the balance that remains unpaid as soon as practicable to the accounts previously notified …… My proposal is to draft an agreement signed by both parties under Section 85 of the Act and I will let you have a draft form of words later this week……."

(18) A draft Section 85 agreement was sent to Miss Sherlock by Mr Ridings on 9 March 2006. It made no reference to the possibility that if ongoing litigation was resolved in another taxpayer's favour which related to a claim under Regulation 29 of the VAT Regulations, that the appellants would be entitled to further sums from HMRC. Miss Sherlock stated in her evidence that "I believed that if not specifically referred to as an exception, future repayments in respect of the repayment periods would be prevented by signing a Section 85 agreement. The Regulation 29 matter was a known point of dispute at the time." She raised this with Mr Ridings and the draft Section 85 agreement was amended to include a reference to Regulation 29 claims.

(19) The final version of the Section 85 agreement which is expressed to relate to appeals (relevantly) 05/0761 and 05/0762 was signed and dated on behalf the appellants on 23 March 2006 and on behalf of HMRC, on 29 March 2006. It dealt not only with the Italian Republic claims but also with the Elida Gibbs claims and consequently the global figure set out in the agreement relates to both claims.

(20) The agreement states, relevantly, that the parties agree that: *the appellants' appeal against the Commissioners decision notified in their letter issued on 21 July 2005* (the parties agree that whilst this is the correct date for the Elda Gibbs claim decision, the relevant decision for the Italian Republic claims was 22 June 2005, but nothing turns on this*) refusing part of the appellant's claim (as amended) under section 80 of the Value Added Tax Act 1994 be settled upon the following terms:-*

> *the Respondents will pay the sum of £1,423,510.58 (one million, four hundred and twenty three thousand, five hundred and ten pounds and 58p) in settlement of the Appellant's claim for overpaid VAT……..*

[The agreement then goes on to deal with statutory interest and the agreement by the Commissioners to repay £38,813.27 of a Regulation 29 claim if the ongoing litigation in another case is not resolved in the Commissioner's favour. It also deals with costs and the rights of each party to resile from the agreement within 30 days]

(21) On 21 October 2003 HMRC had released further guidance on the quantum of Marks & Spencer claims in the motor retail sector.

(22) That guidance starts off by dealing with basic concepts. It states that where possible, claims should be based on actual contemporary records but it is appreciated that not many businesses will have records dating back to 1973 and in such cases varying degrees of estimation are required. A business can use any basis of estimation they wish as long as it achieves a fair and reasonable result. Officers are directed that each case should be dealt with on their merits and the methods agreed in respect of one trader's claims should not be automatically accepted as a method for another trader's claims. It deals with scaling, which involves making the necessary adjustments to the estimated numbers of vehicles and average margins to reflect the actual situation of a particular trader. It directs the scaling should be used since otherwise any claim will not be fair and reasonable. It then provides additional guidance on Italian Republic claims. It refers to the existing published guidance and the tables with examples of numbers of cars and margins. It notes that many claims that had been reviewed based directly on those guidance figures (i.e. 67 and 27) and no scaling had been done. It refers to paragraphs in that guidance which requires the claimant to scale for actual numbers of blocked cars which was essential to achieving a realistic claim for the business, and claims using only the guidance numbers are unlikely to be acceptable. It also deals with the average margin per car and again refers to the existing guidance which gives sales and profit margins by way of example. It directs that officers should ensure that the margins used are scaled to the reality of the individual business using whatever information is available and that claims using only the guidance margins are unlikely to be acceptable. It also refers to the abolition of car tax which has been used as an argument by some advisers to justify higher margins than those shown in the tables for periods before 1992. HMRC's records however showed that there was no change in the margin and that the amount of VAT overdeclared did not change.

(23) On 24 May 2006 the VAT Tribunal wrote to the parties indicating that following the notification that the appeals had been settled under the Section 85 agreement, and having heard nothing for a month, the Tribunal was treating the appeals as having been withdrawn.

(24) The 2009 claims were made by letter dated 25 March 2009 by DMC. The covering letter refers to an Italian Republic claim having been made by the respective appellants. They referred to the fact that the appellants have previously made a claim on the basis of HMRC's Italian Republic tables but states that those tables were defective as they did not take into account the impact of car tax and other economic factors for periods prior to November 1992. The letter goes on to say that the claim is for the additional VAT due as a result of adjusting the published table margins to take into account the effects of car tax and other economic factors prior to 1992 when gross profits were higher and is based on evidence held. The claim for Invicta is for the period between February 1973 and November 1992 and is for a further £315,902.82 plus interest calculated at commercial lending rates and on a compound basis applying daily rests. The claim for Cambria is for the same period and is for £415,854.39. Each claim is accompanied by a short schedule which sets out, on a quarter by quarter basis, periods between April 1973 and October 1992, and makes first second and third claims, and a final claim, for principal and interest.

(25) HMRC refused the 2009 claims for Cambria on 31 July 2009 and then again on 11 August 2009, and as regards Invicta, on 24 August 2010. Cambria's appeal against the decision of 31 July 2009 was submitted on 10 August 2009. Invicta's appeal against the decision of 24 August 2010 was made on 21 September 2010.

(26) Those appeals were stayed behind the lead case of Bristol Street Group Limited v HMRC ("**BSG**").

(27) In a letter dated 25 June 2014 to Fiona Fraser of HMRC's Motor Trade Unit of Expertise, Mr Morgan Montgomery, senior VAT manager of Grant Thornton LLP ("**GT**"): Thanked Ms Fraser for a meeting they had had since 28 March 2014; set out the conclusion of the work that they had carried out following a request for review of information to support the level of margins which input tax blocked vehicles would have achieved; set out the workings for those conclusions and the methodological assumptions; stated that GT's analysis indicates an average increase in the published tables of 128% and whilst that varied from year to year at no time for any marque did it fall below the published figures in the Italian tables; set out a graph of margin increases for prestige vehicles for the years between 1973 and 1992 for BMW, Mercedes, together with an average and a similar graph for the same period for volume vehicles, namely Ford and Vauxhall (as well as an average): recorded that for prestige vehicles the average uplift is 192% and for volume vehicles the average uplift is 94%; refers to their records and broader macro-economic factors at play in the period under analysis; suggested that the Italian tables were flawed; stated that there was evidence that in the 1970s used cars were slightly depreciating or even appreciating in value over a 10 month period and so the value of nearly new cars, i.e. demonstrators, would appreciate significantly; stated that this reflects a shift from a demand led market to a supply driven market; opined that any pain caused by economic factors would have been born principally by manufacturers rather than dealers. I shall refer to this as the "**GT methodology**".

(28) On 11 September 2018 Miss Sherlock sent an email to Paul Jarvis of HMRC. This referred to the 2009 claims and explained that GT had been instructed to assist DMC in relation to those claims. The email refers to calculations relating to uplift claims for both appellants, and that the uplift percentage had been based on the GT methodology. These uplift percentages resulted in an additional margin claim for Cambria of £341,889.77 and for Invicta of £257,503.04. It is my understanding that these figures replaced those set out in the original 2009 claims of £415,854.39 and £315,902.82 respectively.

(29) On 21 November 2018 Paul Jarvis sent an email to Miss Sherlock in which he stated that having looked at the claims in detail he had noticed that the M & S claims were settled by way of the Section 85 agreement which would close the entire claims irrespective of any further developments regarding quantum. His policy team had agreed with that analysis and Mr Jarvis had written to his appeals team to suggest that the appeals should be withdrawn (or an application might be made that they should be struck out) and in his view the 2009 claims were invalid as a result of the Section 85 agreement.

(30) Although this is not set out specifically in the 2009 claims, the appellants' notices of appeal (box 7) state that the "sum paid on the Italian claim for the period 1973 to 1992 should be calculated at approximately double the original margin used…….".

Miss Sherlock's oral evidence

10. Miss Sherlock provided a witness statement which she supplemented with some additional evidence in chief. Her evidence was as follows:

(1) She compiled the 2003 claims on the basis of the Customs guidance recognising the statement that few businesses would have detailed records to cover the relevant accounting periods and she followed the instructions in the guidance to put together the claims.

(2) She used the Italian margin tables for prestige and volume cars which gave an average of 6.6% profit margin for volume cars and 6.2% for prestige cars. She believed that there was no alternative to using these tables in the absence of actual records. Where certain marques were not mentioned in the guidance, she used Glasses Guide to scale the sales prices where they were very different to those mentioned in the tables. So whilst there was some flexibility in adjusting the sales prices, the margins used were in the Italian margin tables. The 2003 claims were put together conscientiously and in compliance with the guidance given by Customs.

(3) She reviewed evidence of sales turnover, marques sold, number and mix of models available, the number of staff providing the demonstrators, the number of sites and the required turns of the various manufacturers.

(4) She had conducted interviews with senior members of staff who had the information required to put together claims.

(5) She was first alerted to the fact that another taxpayer was challenging the Italian margin tables, in early 2009, when one of the garage proprietors that DMC had dealt with asked if they had heard about new claims being lodged because of errors in the information in those tables. DMC then became aware from speaking to other advisers that those tables were flawed and had been shown to understate the margins achieved in the periods prior to 1992. The transitional period expired on 1 April 2009, so the 2009 claims were in time to beat this deadline.

(6) When submitting the 2003 claims and subsequently negotiating them and entering into the Section 85 agreement, DMC were unaware that the Italian margin tables were fundamentally flawed. They were aware that the margin in each of the three tables were similar and that the only real variation between the tables was the average sale price. The margin remained the same. So the differences in overpaid VAT were therefore mainly dependent on the sale price of the vehicles. They believed it was prescriptive to use the Italian margin tables in the absence of primary records and did not think it was possible to put a claim together other than by using those tables. They were unaware that the tables were fundamentally flawed and that there was a basis for reaching that conclusion by reference to the abolition of car tax and/or other matters of which they only became aware later.

(7) It was not until approximately September 2017 that DMC became aware that the BSG case had settled even though her understanding was that GT knew of this in 2013-2014. After they became aware of that settlement, they contacted GT who assisted them in revising the 2009 claims.

(8) DMC have successfully settled claims for other taxpayers on the basis of the GT methodology.

11. In cross examination, Miss Sherlock added:

(1) She had used the Italian margin tables, as the basis for the 2003 claims and used the table sales prices for all marques other than Jaguar and Daimler since the sales prices for those, she knew, based on Glasses Guide, were considerably higher than those of the other prestige marques sold by Cambria, and Cambria sold a large number of Jaguars and Daimlers.

(2) She also spoke to Customs officers about what was required to make a claim. They all said that the tables should be used. She used the profit margin set out in the tables. In her view the tables were prescriptive and in the absence of information to the contrary, she had to use the tables. The only variable was the number of cars**.** Those officers were not prepared, at that time, to accept anything other than primary (i.e. documentary) evidence regarding these appellants, and would not have accepted oral evidence from a colleague of hers regarding, for example, the smoothing of profits relating to other traders.

(3) She had used Glasses Guide to check the sales prices for the prestige vehicles. There was no need to do so for the volume cars since their sales prices fitted within those set out in the tables. The greater the sales price, the greater the profit and thus the greater the amount of VAT which had been overpaid.

(4) She accepted that the guidance did not say that a claimant must use the tables, but this was only if that claimant had the relevant records. Customs officers wanted evidence, and they have no other evidence on which to base an alternative profit margin percentage.

(5) Individual businesses were not in a position to challenge the profit margins since they did not have the information. But Customs did have that information. So when they said in their publications that claims were based on average margins, it implied that they had taken into account information from a large number of traders for the entire period and averaged them to ensure that the margins were fair.

(6) She could not explain how car tax worked.

(7) In answer to a question as to whether her claim was based on average margins, she had answered that the figure had been estimated based on Customs guidance figures moderated with detailed knowledge and more recent evidence indicates that the values should be adjusted. She thought that this was an error, and the form in which it had been included was a form which was intended for completion by Customs officers and not by taxpayers. She accepted, however, that this was what she had included in the form. The adjusted values, however, had in fact been to the sales values and not the profit margins.

(8) The information that she was given in 2009 which made her submit the 2009 claims was that the Italian margin tables had been compiled on the basis of information and transactions in 1994-1996. Had she known this at the time in which she submitted the 2003 claims, she would not have accepted the profit margins in the tables. Since HMRC had said these were average margins, she had assumed, as had others, that they took into account information and transactions for the entire period back to 1973 and not just for the period 1994-1996. This information included macro economic factors. It was Deloitte's who confirmed this on a phone call with her in 2009 before she submitted the 2009 claims. Those claims were based on the information which was provided in this phone call as well as that provided by garage proprietor to whom she refers in her witness statement.

(9) Customs guidance recognises that car tax made a difference to Elide Gibbs claims but not to Italian Margin claims. She was in no position to know whether car tax made a difference or not.

(10) Uplifting the sales price of Jaguars and Daimlers reflected the evidence that those vehicles sold for more than the average sale prices set out in the tables for prestige vehicles.

(11) The correspondence with Mr Ridings in March 2006 reflected a settlement based on the figures which she had been discussing with him, and had she known that the tables were inaccurate the appellants would not have signed the Section 85 agreement. If Customs had dug in their heels, then it would have been up to the clients to decide whether to do a deal.

(12) The evidence held, referred to in the covering letter to 2009 claims, was information from Deloitte's that the tables had been built around 1994-1996 information and did not take into account the other economic factors referred to in that letter.

(13) The claims that DMC had settled with HMRC for other traders were not the subject of a Section 85 agreement.

(14) Whilst she knew that the Italian tables did not take into account actual profit margins, she thought that the average margins on which these tables are based had been averaged over the period 1973 to 1996 and not between 1994 1996. She also thought that the impact of car tax must have been taken into account in those tables as HMRC said that as far as Italian margin claims were concerned, car tax made no difference. She had scaled the Jaguars and Daimlers in accordance with the guidance which said that the table values should be scaled to reflect values. But she had no information on the margins and so could not adjust those.

(15) DMC had not prosecuted these appeals until 2018 since they did not learn that the BSG claim had been settled until 2017.

SUBMISSIONS

12. Mr Mantle and Mr Puzey made extensive, eloquent, and comprehensive submissions over the best part of two days, and I can only give a summary of those submissions. In doing this I trust that neither of them thinks I am doing them a disservice.

13. In his written submissions, Mr Mantle submitted:

(1) The 2003 claims were based on the Italian margin tables which were defective and fundamentally flawed.

(2) The 2009 claims were the second successive claims in respect of the same period. *John Wilkins* which approves the VAT Tribunal decision in *Hayward Gill* [1998] V&DR 352 *("Hayward Gill")* is authority for the proposition that second successive claims with something new to say may be brought under section 80. Although *John Wilkins* is a case about section 78 interest whilst in this appeal as in *Hayward Gill*, the issue is about section 80 claims, there is parity of reasoning in making successive claims under both sections. The exception is where there is a repeat claim with nothing new to say. The 2009 claims are based on a different methodology which includes a gross profit uplift of twice that set out in the 2003 claims. It therefore says something new. Applying a new methodology, is, in principle, something new to say. In *Hayward Gill* it was a new method of apportionment. Bringing a second successive claim does not create an unbalanced repayment regime which favours a taxpayer at the expense of HMRC.

(3) The Section 85 agreement should be construed in accordance with familiar principles. What meaning does the document convey to a reasonable person with the available background information which was available to the parties at the time at which they entered into the agreement. Words should be given their natural ordinary meanings and what I should be looking to establish is the objective intention of the parties at the time of making the agreement.

(4) The agreement was to pay just over £1.4 million for "the Appellants' claim for overpaid VAT". That claim is the four claims identified at the top of the agreement which includes the 2003 claims. It does not include other claims which might have accrued to the appellants and which they could bring (including the 2009 claims). HMRC could, on the authority of *Southern Cross* (*HMRC v Southern Cross Employment Agency Ltd* [2015] STC 1933, have entered into a collateral agreement with these appellants in respect of such accrued but un-brought claims but did not do so. The Section 85 agreement does not include terms which bar any further section 80 claims.

(5) Such further section 80 claims can be brought as a matter of law even if they have been the matter of a Tribunal decision (see [50] of *John Wilkins*).

(6) The discussions about the 2003 claims which culminated in the Section 85 agreement were not that extensive and focused on the areas of dispute set out at [9(13)] above.

(7) The 2009 claims and not abusive in the *Gore Wood* sense (I set out these principles later in this decision). HMRC have not been vexed twice in respect of the same matter. The 2009 claims said something new. It is clearly in the public interest that a taxpayer is not overcharged. The margin tables were flawed and the appellants were in no position to challenge the profit margin figures. They were not aware of these flaws in either 2003 or before signing the Section 85 agreement in 2006. Claimants can bring repeat claims under section 80 provided they have something new to say. HMRC did not settle accrued or potential section 80 claims at the same time as entering into the Section 85 agreement. They could have done. Applying the merits based approach which takes into account all of the facts, the appellants have not acted abusively in bringing the 2009 claims. HMRC have not been unjustly harried.

14. In his oral submissions, Mr Mantle added:

(1) The 2009 claims use a different methodology to the 2003 claims. The 2009 claims use profit margins which fluctuate over time and which take into account various factors such as supply and demand, inflation, whether the vehicles were depreciating or appreciating, and the abolition of car tax.

(2) All that the appellants have to show is that these are new claims with something new to say and not that the methodology in the Italian tables was fundamentally flawed. I should focus on what was actually said in the 2003 claims and then what was subsequently said in the 2009 claims rather than focusing on what might have been or could have been said in the 2003 claims.

(3) *John Wilkins* is authority that second successive claims in respect of the same accounting period in the same transactions can be made provided they are not abusive, and repeat claims with nothing new to say are abusive. Proper claims are not confined to those with something new to say on the facts. They may say something new about the method of calculation. Lord Justices Laws and Sullivan endorsed *Hayward Gill* and expressly reached decisions on section 80 claims. In *Hayward Gill* it was a new method of apportionment. There is strong parallel here with these appeals. On the facts and by analogy with the new method adopted in *Hayward Gill*, the 2009 claims said something new.

(4) Prior to the Section 85 agreement, the 2003 claims had been amended. The agreement refers to claim in the singular and claims as they stood rather than which might have been made if they had been amended in the future. The claim for overpaid VAT is in relation to the formal appeals identified by the appeal numbers at the top of the Section 85 agreement and does not

extend to claims that the appellants might have had but which were not made in those appeals. Case law shows that a claim is the claim which is actually made, and even though capable of being amended, that amendment must have been made for it to constitute a claim. It is wrong to treat a claim as having been amended when it has not actually been so. Any ambiguity in the documents should be construed against HMRC. A claim is something which is demanded not something to which the claimant is entitled. It requires not just quantum but also the method by which that quantum has been calculated.

(5) If the Section 85 agreement does not compromise the 2009 claims, then it cannot be abusive to bring those claims. Whilst there should be finality in litigation, that principle needs to be considered in the context of the right to make successive section 80 claims. HMRC have not shown that they have been unjustly harassed. The burden of establishing abuse lies with HMRC. The 2009 claims are legitimate claims and therefore it must be legitimate to appeal against HMRC's decision to the contrary. If the Section 85 agreement does not compromise future claims, then there is nothing preventing the appellants from bringing further section 80 claims and appealing against decisions that they should not be allowed to bring them.

(6) It is clear from Miss Sherlock's evidence that claimants were obliged to use the profit margin set out in the Italian tables, and that is what she did when she made the 2003 claims. Glasses Guide says nothing about profit margins. Whilst it was possible to scale the sales prices, it was not possible to uplift the profit margins in the absence of any contemporaneous records which, generally speaking, traders no longer possessed going back to 1973.

(7) The correspondence which took place between the making of the 2003 claims and the execution of the Section 85 agreement were not an attempt to compromise but merely HMRC attempting to establish the correct amount of VAT due.

(8) The First-tier Tribunal decision in *Rolls Group and Others* [2015] UKFTT 404 ("*Rolls*") records, at paragraph 45 of that decision, that HMRC had settled between 140 and 200 Italian margin claims with claimants subject to acceptance by HMRC that those claimants were entitled to the payment and subject also to finalising quantum. This is evidence that those claims must have had something new to say

(9) The judge's view in paragraph [97] of the First-tier Tribunal decision in *RT Rate Limited and Others* [2020] UKFTT 392 ("*RT Rate*") was based on a concession made by the taxpayer in that case which is not made here, and in any event was made in ignorance of *John Wilkins*.

15. In his written submissions, Mr Puzey submitted:

(1) The 2003 claims were proposed by the appellants and debated at length with both parties ultimately compromising their initial positions. The Section 85 agreement was on its face intended to settle claims for overpaid tax relating to the sale of specific vehicles on a period by period basis.

(2) The 2009 claims seeking further repayments of VAT for those periods and for the same vehicles continue to use the basic methodology set out in the Italian tables save that the profit margins had been increased by approximately 50%. This is notwithstanding that the appellants assert that the Italian tables are fundamentally flawed.

(3) He accepted that *John Wilkins* is persuasive (albeit not binding) authority for the proposition that it is permissible in law to bring successive claims to recover overpaid output tax under section 80 in respect of the same transactions in the same VAT periods. But in these

appeals, the Section 85 agreement settled the claims for overpaid output tax in relation to those transactions; the 2009 claim had nothing new to say about the overpayment of VAT on those transactions; and it is an abuse of the Tribunal's process to bring a further appeal in relation to the transactions which were the subject of the Section 85 agreement.

(4) The judges in *John Wilkins* do not agree that the circumstances in which it would be held that a second successive claim would have nothing new to say. It is not clear whether what is new must be factual or may also be legal. In *Hayward Gill* the second claim was not simply based upon a new method of calculation but relied on new facts.

(5) In order to evaluate the meaning and effect of the Section 85 agreement it is necessary to understand what is meant by "claim" in the context of section 80. If the figures produced in 2009 are simply an attempt to reopen and amend the 2003 claims rather than being new claims, it is harder for the appellants to argue that the Section 85 agreement does not prevent them from seeking further repayments. All that had changed between the 2003 claims in the 2009 claims was that the calculated profit margin had been increased to take into account factors or arguments not previously advanced. This was not a new claim. The appellants were revisiting the claims that had been settled in 2006. He endorsed the meaning of claim set out in *Reed Employment.* He also endorsed the sentiment expressed in that case that an amended claim covers cases where particular items within the category the subject matter of the original claim are unknown or not fully identified at the time of the original claim, and would but for that fact have been included in the original claim, but only subsequently came to light.

(6) The Section 85 agreement was intended to and did compromise the appellant's claims for overpaid output tax on the transactions which the appellant subsequently sought to revisit in 2009. Claims had been made in 2003 in respect of overpaid VAT on the sale of specific vehicles in specific periods. That was what was being referred to in the agreement. After three years of discussion and negotiation those claims were settled in March 2006. The 2003 claims were for all of the overpaid output tax that the appellants believe they were entitled to on the sales of demonstrators between 1973 and 1992. No reservation was included in the Section 85 agreement concerning any potential future claim based upon arguments or facts not then known.

(7) Given this, there was no additional side agreement required to bar future claims under section 80 given that, as far as HMRC are concerned, all such section 80 claims which could have been brought either then or in the future were covered by the Section 85 agreement.

(8) The judges in *Hayward Gill* and *John Wilkins* did not expressly state that a different method of calculation is a new fact. It was apparently viewed as a new fact by Etherton LJ but he did not specifically say so or explain his reasoning. It is also clear that the period of claim differed as did one of the heads of claim. In any event there is a significant difference between a different methodology, on the one hand, and an adjustment to one aspect of an existing methodology on the other, which is the case in the present appeals. The adjustments to the profit margins in the Italian tables were not the result of the discovery of new evidence of primary fact. The material on which those adjustments were based, for example the abolition of car tax and the effects of inflation on the used car market in the 1970s had been known about for years before the 2009 claims and certainly before the Section 85 agreement was entered into.

(9) As distinct from whether the 2009 claims have something new to say, the common law principle of abuse applies to these appeals since HMRC are being vexed twice with the same

matter since the parties had agreed in 2006 a full and final settlement in relation to specific claims for specific transactions.

(10) The making of the section 80 claims was not delayed or hampered by HMRC; the principle of effectiveness has not been breached; the Italian tables were drafted with the assistance of motor industry bodies to assist traders to formulate claims but were not prescriptive and mandatory; the appellants were not obliged to use the Italian tables in the absence of contemporary records; the appellants were in a position to and did challenge the application of certain aspects of the Italian tables prior to entering into the Section 85 agreement (the 1.85 times uplift for Jaguars and Daimlers); the abolition of car tax was well known prior to the 2003 claims and before the Section 85 agreement was entered into; any delay in accepting the 2003 claims is largely irrelevant; it is right that the appellant should be repaid any overpaid output tax, but that any such claim should be carefully scrutinised; HMRC's contention that the claims under appeal were stopped by virtue of the Section 85 agreement as a perfectly proper point.

(11) The Section 85 agreement was entered into after a detailed and lengthy negotiation and represented a mutually acceptable compromise of the 2003 claims. HMRC have every right to believe that the claims for overpaid output tax on the transaction subject to the Section 85 agreement was settled completely since that is what HMRC intended and is what is reflected in the wording of the Section 85 agreement. Three years later the appellant sought to increase the sums previously claimed by approximately 100% and following the completion of the BSG litigation it took five or six years for the appellants to reactivate their appeals. It is now over 15 years since Section 85 agreement was signed. The public interest in the finality of litigation in this case clearly outweighs the interests of the appellants in seeking to increase the figures they had previously accepted. These new appeals and the 2009 claims therefore amount to an abuse of process and unjust harassment of HMRC.

16. In his oral submissions, Mr Puzey added:

(1) Miss Sherlock's evidence shows that the 2003 claims were vigorously proposed and debated at some length, with both parties ultimately compromising on their initial positions. The appellant did not meekly follow the directions of HMRC as to how their claims were formulated. Miss Sherlock had answered a question in an HMRC document which suggests that she moderated the margins. She had clearly scaled the values for Jaguars and Daimlers.

(2) HMRC are not seeking to enlarge the terms of the Section 85 agreement but simply to apply them.

(3) *John Wilkins* does not deal with the effect of a Section 85 agreement and any future claim concerning the same transactions. A repeat claim which has nothing new to say factually or legally will be rejected by the Commissioners as abusive. The concept of "something new to say" is a difficult one. What comprises new facts? Does the expression new facts extend beyond matters of primary fact to deductions or inferences from facts? The judges in *John Wilkins* were not seeking consciously to formulate a new test of abuse in the context of section 80 repeat claims. In *Hayward Gill* the second claim was not simply based upon a new method of calculation. New facts were present there. Simply altering one element of a claim calculation does not amount to saying something new.

(4) An issue in this appeal is whether the claims for further output tax sought in the 2009 claims were attempted amendments of a closed claim or new claims. The claims that were settled under the Section 85 agreement was for all the output tax due on the transactions which

were the subject matter of the 2003 claims. That was the claim for the purposes of section 80. Where a claim has been paid in full the Tribunal has no jurisdiction to address an application to amend the grounds of appeal (see *Ballards of Finchley PLC* v *HMRC* [2018] UKFTT 604).

(5) The Section 85 agreement addressed the entirety of the claims being made for overpaid output tax on specific motor car sales in the specific VAT periods. These were claims for all the output tax that had been unlawfully levied. The appellants were claiming all that they were entitled to. No reservations were made within the agreement for any future revisions of quantum. Both parties acted upon the agreement. HMRC paid out over £1.4 million plus a large sum of interest pursuant to it.

DISCUSSION

17. The parties are agreed that there are essentially three issues which I need to resolve. Firstly, whether the 2009 claims say something new when compared to the 2003 claims and are thus permissible second claims within the meaning set out in *John Wilkins*. Secondly whether the claims to overpaid VAT which were settled by the Section 85 agreement include the 2009 claims. Thirdly whether the bringing of the 2009 claims and appealing against HMRC's decision not to allow them is abusive at common law. These issues were dealt with in this order by the parties and I shall deal with them in the same order in this decision. The parties are agreed, furthermore, that the burden of establishing that the 2009 claims say something new and they are not the subject of the Section 85 agreement lies with the appellants. The burden of establishing that the appellants 2009 claims and their appeals is abusive lies with HMRC.

Repeat claims with nothing new to say?

18. The parties agreed that *John Wilkins* was persuasive, but not binding, authority that it is possible to bring a second or successive claim to recover overpaid output tax under section 80 in respect of the same transactions for the same VAT periods. I agree. The issue in *John Wilkins* concerned a claim for interest which had initially been made for simple interest, and then a second claim for compound interest. However the Court of Appeal considered, in some detail, the decision in *Hayward Gill*, which concerned claims by an optician under section 80 for further VAT repayments following the publication of an HMRC Business Brief specifying a new method of apportionment.

19. At [74] of the decision in *John Wilkins*, Laws LJ, when considering *Hayward Gill*, said "…..as I see it, however, these factual differences do not touch the essential question common to both cases: does s78 (or s80) allow successive claims for the recovery of interest (or capital) in respect of the same period? In the circumstances I regard *Hayward Gill*, which is of course a decision of the specialist Tribunal, as offering, by parity of reasoning, material support to the appellant's position on the issue of repeat claims for the purposes of s78."

20. Furthermore, as Laws LJ observed in his judgment, neither the Tribunal in *John Wilkins*, nor HMRC, nor Etherton LJ in his dissenting judgment sought to say that *Hayward Gill* was wrongly decided.

21. The Tribunal in *Hayward Gill* had held that on the face of the legislation was nothing preventing second or successive claims being made under section 80. However the Court of Appeal in *John Wilkins* imposed limitations on that right. Earlier in [74] Laws LJ commenting on a passage in *Hayward Gill* which states that it would not be open to a taxpayer to bring a second appeal based on the same facts, comments that he does not think it is clear whether in

that passage the Tribunal meant to indicate the repeat claim with no new facts will be barred as a matter of jurisdiction or as a consequence of being abusive. In his view it was because they would be abusive.

22. At [62] of *John Wilkins*, Sullivan LJ, who agreed with the judgment of Laws LJ, thought there was no reason why a claimant who had received an unfavourable letter in response to a claim should not be able to write again to HMRC restating the claim and seeking to explain, by reference, if appropriate, to further facts or to some more recently decided legal authority, why HMRC's letter was wrong.

23. At [65] he went on to say that if repeat claims are permissible in principle, then there is no reason why they must be based on the emergence of some new fact which shows that the decision on the original claim was wrong and may not be based on a new decision of the court. "As Laws LJ says, a repeat claim which has nothing new to say whether factually or legally will be rejected by the Commissioners as abusive."

24. In my judgment, the 2009 claims are not repeat claims which have nothing new to say either factually or legally. In my view they are permissible second claims under section 80. I say this for the following reasons:

(1) The 2003 claims were based on the methodology set out in HMRC's Business Briefs. These set out the Italian margin tables which required the taxpayer to consider three things. Firstly the number of cars sold between 1973 and 1996; secondly the typical sale price of the vehicles, and finally the profit per unit. In the absence of any primary evidence of these items, the amounts for the typical sale price and the profit per unit were those specified in the tables. Mr Puzey has suggested that these amounts were not prescriptive and it was possible for an appellant to use different numbers. And indeed this is what Miss Sherlock did in relation to the Jaguars and Daimlers in that she scaled up the sale price by a factor of 1.85. Clearly the numbers of vehicles needed to be identified by the traders with certainty. But as far as the profit per unit was concerned, I accept Miss Sherlock's evidence that traders no longer had evidence of profit margins, indeed this was the reason why the tables were compiled in the first place. They were intended to provide an approximation to enable traders who had no records to recover overpaid VAT which had been wrongly overcharged by HMRC. And they were obliged to use the profit per unit set out in the tables. The 2009 claims were based on a different profit margin which is effectively twice that used in the 2003 claims. That different profit margin is something new as a matter of language.

(2) It is also new within the legal test set out in *John Wilkins* in that to my mind it is a new fact which has emerged. The word "emergence" used at [65] of that decision is an important one. This new fact emerged because of a telephone conversation which Miss Sherlock had with Deloitte's in the spring of 2009, and also information given to her by garage dealer clients. That information was to the effect that the profit margin percentage in the Italian margin tables had been based on evidence which HMRC held on motor dealers for the period 1994 to 1996, and not for the entire period covered by the tables, namely 1996 to 1973. And I find as a fact given that HMRC did not gainsay Miss Sherlock's evidence and provided no rebuttal evidence, that the Italian margin tables had been based on evidence for the period 1994 to 1996, and that this was indeed the basis of the profit margins in those tables. Although all the information on which the revised profit margin set out in the 2009 claims was in the public domain since 1973 (motor traders knew about the effect of macro economic factors, the price of demonstrators and where they appreciated or depreciated, the effect of car tax etc, i.e. all of those factors which were then taken into account by GT in coming up with their methodology in 2014) what was

not known to the appellants was how that translated into the profit margin numbers in the Italian margin tables. I accept Miss Sherlock's evidence when she said that it was her view that the relevant factors which had been taken into account by Customs was averaged out over the period 1996 to 1973 and not just for the period 1994 to 1996. And so when it emerged the latter was the case, then to my mind that is a new fact within the legal test of *John Wilkins*, and is a justifiable basis for a repeat claim which in this case is the 2009 claims.

(3) So the 2009 claims said something new (the profit margin was to all intents and purposes twice that set out in the Italian margin tables which the appellants had used in the 2003 claims) and was based on the emergence of a new fact (namely that the profit margin in the Italian tables had been based on figures for the period 1994 to 1996 and not for the entire period 1996 to 1973).

(4) Mr Puzey suggests that the 2009 claims say nothing new since they are based on the same methodology as the 2003 claims, and the only difference is the doubling of the profit margin, and Mr Mantle's suggestion that this is a different methodology is incorrect. It is simply tweaking one aspect of the same methodology. To my mind, concentrating on whether this is the same or different methodology is missing the point, as, too, is an examination of whether the Italian margin tables are "fundamentally flawed". All that is required is a consideration of whether the 2009 claims are repeat claims with nothing new to say. And, as I set out above, it is my view that they do say something new.

(5) It seems to me, too, that the hurdle which a claimant needs to overcome in justifying that a repeat claim says something new should be a low one. Firstly, in the context of section 80, this is a claim for recovery of overpaid VAT, and the parties are agreed that a claimant should have an effective remedy to recover such overpaid VAT. No one doubts that the Italian margin tables provided an approximation, and that the profit margins were, effectively, HMRCs "best guess". But it is equally clear that HMRC accepted that if there was better evidence of sales figures or profit margins, a claimant could (and indeed should) use that better evidence when making a claim. The evidence suggests that the profit margins used in the 2009 claims are a better guesstimate of the profit margins for the period 1973 to 1996 than those set out in the Italian margin tables. And it is therefore in the interest of tax justice that more precise numbers are used to enable a taxpayer to be recompensed, more precisely, for the amount of tax overpaid.

(6) Secondly, once a claim has been made, HMRC have extensive powers to enquire into the claim and to discuss it with the claimant. They are not obliged to accept it any more than, in this case, Customs were required to accept the 2003 or 2009 claims. As the evidence shows, the 2003 claims were closely scrutinised by Officer Khan and then discussed at some length between Customs and DMC. The figures which were finally agreed, and set out in the Section 85 agreement, differed from those originally claimed in the 2003 claims. As is set out in [76] of the decision in *John Wilkins*, it is appropriate for the sensible conduct of tax affairs between taxpayer and commissioners for there to be repeat claims responsibly conducted. Laws LJ doubted whether the taxpayer or HMRC would be well served by rigid and inflexible construction of the statute requiring every case that a taxpayer accepts HMRC's first response or appeal. In these appeals there has been a reasonably conventional to-ing and fro-ing between the parties in order to refine the 2003 claims and, as I understand it, the same has happened since 2018, as regards the 2009 claims. If, as has happened in this case (albeit largely because the Section 85 agreement) HMRC do not accept a repeat claim, then they can reject it, and then challenge any appeal on the basis that it is abusive.

(7) Finally, I do not think, nor did Mr Mantle or Mr Puzey, that the judges in *John Wilkins* were seeking to come up with a new definition of abuse over and above that which is set out in *Gore Wood*, even though the case is not referred to in *John Wilkins*. To my mind notwithstanding that there should be finality in litigation, in making the 2009 claims HMRC are not being vexed twice in respect of the same matter. Although both the 2003 claims and 2009 claims are in respect of the same vehicles for the same periods, the profit margin figures are different and in asking HMRC to consider these, I do not believe that the appellants are unjustly harassing HMRC. To my mind the 2009 claims are not repeat claims with nothing new to say and thus liable to be dismissed out of hand as being abusive.

The Section 85 agreement

25. Section 85 is a deeming provision. Where HMRC and a taxpayer come to an agreement under the terms of which the decision under appeal is to be treated (relevantly for these appeals) as upheld without variation or as varied in a particular manner, it is in essence deemed to be a determination by the Tribunal of the appeal in accordance with the terms of the agreement. And the consequences of entering into that agreement are the same as they would have been had the Tribunal so determined the appeal.

26. Mr Mantle made some short submissions about the way in which such an agreement should be construed. In doing this it seems that he was paraphrasing the principles set out by Lord Neuberger in the Supreme Court decision of *Arnold v Britton* [2015] AC1619.

> "Interpretation of contractual provisions
>
> 14 Over the past 45 years, the House of Lords and Supreme Court have discussed the correct approach to be adopted to the interpretation, or construction, of contracts in a number of cases starting with Prenn v Simmonds [1971] 1 WLR 1381 and culminating in Rainy Sky Sa v Kookmin Bank [2011] 1 WLR 2900.
>
> 15 When interpreting a written contract, the court is concerned to identify the intention of the parties by reference to what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean, to quote Lord Hofmann in Chartbrook Ltd v Persimmon Homes Ltd [2009] AC 1101, para 14. And it does so by focussing on the meaning of the relevant words, in this case clause 3(2) of each of the 25 leases, in their documentary, factual and commercial context. That meaning has to be assessed in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the lease, (iii) the overall purpose of the clause and the lease, (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any partys intentions. In this connection, see *Prenn* [1971] 1 WLR 1381, 1384—1386; *Reardon Smith Line Ltd v Yngvar Hansen-Tangen (trading as HE Hansen-Tangen)* [1976] 1 WLR 989, 995—997, per Lord Wilberforce; *Bank of Credit and Commerce International SA v Ali* [2002] 1 AC 251, para 8, per Lord Bingham of Cornhill; and the survey of more recent authorities in *Rainy Sky* [2011] 1 WLR 2900, paras 21—30, per Lord Clarke of Stone-cum-Ebony JSC."

27. I shall adopt these principles, and some further points made by Lord Neuberger when construing the Section 85 agreement.

28. Stripped to their bare essentials, the parties competing positions are these. Mr Puzey says that the Section 85 agreement settled all Italian margin claims for the vehicles and the periods

which were set out in the 2003 claims. This therefore includes the 2009 claims which, albeit using a different profit margin, was simply a claim for the same cars for the same periods. Mr Mantle says that the Section 85 agreement settled only the 2003 claims and could not settle the 2009 claims which had not been made at the time at which the Section 85 agreement was entered into in 2006.

29. I have set out the central elements of the Section 85 agreement at [9 (19)] above. Both parties accept that the crucial words are "refusing part of the appellant's claim (as amended) under section 80……." And "…..the respondents will pay the sum of……. in settlement of the appellant's claim for overpaid VAT……"

30. Unsurprisingly therefore both Mr Mantle and Mr Puzey have concentrated much intellectual fire power on the word "claim" and have cited a number of authorities which they suggest support their respective positions. In simple terms Mr Mantle says that a claim under section 80 and regulation 37 must include an amount as well as an indication as to the way that amount has been calculated. The 2003 claims do include that amount and the method of calculation and that method of calculation used the profit margin in the Italian margin tables. The Section 85 agreement therefore settled that claim, but did not settle the 2009 claims which were based on a different profit margin. The Section 85 agreement simply settles what would otherwise have been determined by a Tribunal and the Tribunal must consider the decision before it. That decision could only have been in relation to the 2003 claims and could not have extended to the 2009 claims. Mr Puzey, on the other hand, says that on the face of it, and in light of the previous correspondence, it is clear that the Section 85 agreement was intended to settle all Italian margin claims whenever brought. A claim is for a sum of money in respect of particular transactions, and those transactions were the sale of the demonstrator vehicles before 1996.

31. These are elegant and subtle arguments and I have not found it easy to choose between them. But it is my judgment, for the reasons given below, that Mr Puzey is right, and the Section 85 agreement settled all Italian margin claims in respect of the vehicles for the periods set out in the 2003 claims.

(1) The 2003 claims, in order to be valid claims, needed to include an amount and an indication of the method used to compute that amount. They clearly did. The Section 85 agreement settled appeals numbers 0761 and 0762 which were brought by the appellants against the decision set out in Officer Khan's letter of 22 June 2005. As can be seen from the facts set out earlier in this decision, that letter followed a number of meetings, exchanges of information, and discussions between the parties and in that letter Officer Khan recalculated the 2003 claims. He did so using the profit margins from the Italian margin tables and the number of vehicles provided by the appellants. The notices of appeal identified that decision as "Marks & Spencer claim – Italian case margin" even though I cannot see that Marks & Spencer is referred to in Officer Khan's letter.

(2) The correspondence which immediately ensued between DMC and initially Richard Gelder of Customs focused on the number of vehicles, the number of turns for the demonstrators and the average sales prices for Jaguars, Daimlers and Prestige British Leyland demonstrator vehicles. In one letter DMC indicated that "we could recommend to our clients that in order to settle matters they allow the amount claimed on these prestige cars to be reduced to the volume values….."

(3) When Jon Ridings became involved, in his letter of 17 February 2006, he explained that he was independent, and was undertaking a review, and that Customs were essentially concerned with establishing the quantum of the Marks & Spencer type claims for VAT overpaid as a result of changes in case law brought about by the Italian Republic decision (amongst other things). In that letter he deals with the number of demonstrators and their turns and the 1.85 uplift for Jaguars and Daimlers. He also considers the upgrading of the British Leyland prestige models. Following that, Miss Sherlock sent Mr Ridings extracts from Glasses Guide to justify her 1.85 times uplift. This uplift was rejected by Mr Ridings in his letter of 1 March 2006 but replaced with a suggestion that 1.39 might be acceptable. In her letter of 1 March 2006 to Mr Ridings, Miss Sherlock agreed various points and enclosed, with that letter, final revised figures incorporating the agreed amendments. She also sought confirmation that the amendments were then agreed. Mr Ridings letter of 16 March indicated that he accepted the final revised figures in the sum of [about 1.4 million] in settlement of all aspects of your client's "Marks & Spencer" claim.

(4) This correspondence shows a number of things. Firstly that DMC were prepared to do a deal on behalf their clients. Secondly it was never made a condition of doing that deal that the Italian margin tables or any element of them, was totally accurate. Indeed both parties knew that the only reason the Italian margin tables had been compiled was because a motor trader seeking repayment had no primary records relating to sales values or profit margins, and that the figures in those Italian tables were simply an estimation in order to enable traders to bring a claim. Thirdly, that as far as HMRC were concerned, the deal that they had struck was payment of a sum of money in settlement of all Marks & Spencer claims. I do not think it is disputed between the parties that those claims were those set out in the 2003 claims. The notices of appeal tie the references to Marks & Spencer therein to the reference in the letter. The 2003 claims related to a certain number of demonstrator vehicles for certain VAT periods. Finally as regards the 1.85 times uplift for Jaguars and Daimlers there was a discussion and subsequent alteration to the appellants' position.

(5) To my mind a reasonable person having all the background knowledge which would have been available to the parties would have understood that the word "claim" in the Section 85 agreement not to bear the highly technical and deconstructed meaning which has been suggested to me by both Mr Puzey and Mr Mantle. At the time at which this deal was struck the evidence shows that the parties simply wanted to conclude a deal on the best possible terms for each of them. Whether this is described as compromise or negotiation does not really matter. It smacks of sensible commercial discussions between two equally sophisticated counterparties. There was no inequality of bargaining position. And when they used the word claim in the Section 85 agreement, they did so in a commercial sense, in the context, of course, that the 2003 claims were claims under section 80 and the decisions against which the appellant appealed related to those claims. It was inevitable therefore that a "claim" was identified as being settled by Section 85. But the reasonable person looking at that agreement now, would have understood it to mean all the Italian margin claims which related to the vehicles for the periods. The reasonable person with the background knowledge would not have thought that it was limited to only those claims which had been brought on the basis of the methodology set out in the 2003 claims.

(6) I do not suspect that either party had given any thought to what might happen if it turned out that the figures set out in the Italian margin tables proved to be wrong. Or rather, it turned out after the settlement had been made, that what appeared to be HMRC's best guestimate of profit margins was incorrect and there were (as things have turned out) better guestimates. Miss Sherlock said that had she known that the tables were incorrect, she would have advised the

clients not to sign up to the Section 85 agreement. This is subjective evidence of the appellant's intentions which I must disregard. In any event I accord it little weight.

(7) Mr Mantle has not challenged the Section 85 agreement on the basis it was in some way invalid because it was based on a misrepresentation or a mistake either unilateral or mutual. It is clear from the evidence that many of the factors which were subsequently used by GT in compiling the GT methodology existed at the time of the 2003 claims. It is just that no one had undertaken the analysis subsequently conducted by GT. It would have been open for DMC or indeed any other advisor in 2003 to have undertaken that analysis, and having done so to understand the theoretical flaws in the Italian margin tables. And so, when entering into any settlement agreement with Customs, to have kept their powder dry or to have dealt with Customs on the basis of preliminary or not finally quantified amounts. But DMC did not do so. I make no criticism of them in this, but I merely make the point that there is nothing to suggest that it was in the contemplation of the parties at the time the Section 85 agreement was made that the appellants might be permitted a second bite at the cherry if it turned out that the Italian margin tables methodology was less accurate than another methodology. As far as Mr Ridings was concerned, as evidenced by the clear and unambiguous terms of his letter of 6 March the settlement was for all aspects of the appellants' claims. And his draft Section 85 agreement was based on that understanding.

(8) That draft Section 85 agreement was not accepted as face value by DMC. As Miss Sherlock explained in her evidence, she was aware of ongoing litigation relating to Regulation 29 and that if that litigation went in another taxpayer's favour the appellants would be entitled to further sums in respect of input tax from Customs. She therefore specifically amended the draft Section 85 agreement to cater for that eventuality. That amendment was accepted by HMRC. So, it was a negotiated document and amendments could have been suggested by DMC to deal with further claims. I have seen no evidence that any such suggestion was made.

(9) Mr Mantle has submitted that it was open to HMRC to enter into a collateral agreement at the time of entering into the Section 85 agreement to deal with possible future claims which the appellants might bring. Mr Puzey's response is that there was no need to do so because the Section 85 agreement covered all Italian margin claims whenever they might be brought. I appreciate Mr Mantle's point, but equally it would have been open to the appellants to amend the draft Section 85 agreement, as Miss Sherlock had done in respect of the Regulation 29 point, to reserve the right to bring further section 80 claims which were outside the scope of the Section 85 agreement should further information come to light which meant that the basis of calculation used for the 2003 claims was incorrect. No such amendments were made, nor, as I have said above, sought.

(10) Mr Puzey has submitted that Mr Mantle's arguments about the extent of the Section 85 agreement are inconsistent with his submissions regarding second or successive claims with nothing new to say. His view is that in order to show that the 2009 claims fall outside the scope of the Section 85 agreement, they need to be new claims, and such new claims are not second or successive claims. And I can see his point. But to my mind the issue is one of contractual interpretation. As I have set out earlier in this decision, my view is the 2009 claims do have something new to say. But equally, it is my view that the Section 85 agreement settled all Italian margin claims i.e. claims to overpayment of VAT on the sale of demonstrator vehicles, for the vehicles identified in the 2003 claim and for the periods identified in that claim. Those vehicles and periods are identical to those in the 2009 claims.

(11) In commercial terms, the appellants have struck what is, with the benefit of hindsight, a bad deal with HMRC. As things turned out, the profit margins in the Italian tables were inadequate and a number of traders have managed to secure additional repayments as a result of using, for example, the GT methodology. My understanding is that none of those traders have been the subject of a Section 85 agreement. Having struck that bad deal, the appellants now want to resile from it and claim the additional overpayments set out in the 2009 claims (as subsequently amended). If I were to deny them this, I can appreciate that the appellants might feel harshly treated. In their view, VAT which was overpaid between 1996 and 1973 has not been repaid in full. They relied on the methodology set out in the Italian margin tables which were published by Customs. They had no option but to use the profit margin in those tables. At the time of making the 2003 claims, it was not apparent to them that the basis on which the profit margins had been calculated was limited to the years 1994 to 1996 rather than for the years 1973 to 1996. The appellants did not have the information which would have enabled them to challenge those profit margins. And I sympathise with these sentiments. But the appellants are commercial organisations of some substance and were professionally represented. They entered into a commercial contract with HMRC to settle their Italian margin claims which had been brought by the 2003 claims. There was nothing in the contract itself (namely the Section 85 agreement) nor in any correspondence that I have seen, which suggested that the settlement was dependent upon the methodology used by the appellants in the 2003 claims being "correct". Or that if a different methodology subsequently became either available or accepted by HMRC, a claim based on that methodology would fall outside the ambit of the Section 85 agreement. It was open to the appellants to include such caveats in the Section 85 agreement but they did not do so. As Lord Neuburger said in *Arnold v Britton*, "a court should be very slow to reject the natural meaning of a provision as correct simply because it appears to be a very imprudent term for one of the parties to have agreed, even ignoring the benefit of wisdom of hindsight. The purpose of interpretation is to identify what the parties have agreed, not what the court thinks that they should have agreed. Experience shows that it is by no means unknown for people to enter into arrangements which are ill advised, even ignoring the benefit of wisdom of hindsight, and is not the function of the court in interpreting an agreement to relieve a party from the consequences of his imprudence or poor advice. Accordingly, when interpreting a contract, a judge should avoid rewriting it in an attempt to assist an unwise party or to penalise an astute property."

32. Unfortunately for the appellants, it is my view that they have entered into an agreement, namely the Section 85 agreement, which is disadvantageous for them. It settled all of their Italian margin claims and did not reserve to them any right to bring further claims should circumstances change. Imprudence is a harsh a word to use in the context of these appeals but it was a bad bargain as things turned out. With the wisdom of hindsight, that was imprudent. But it is not my role to rewrite that contract to protect the appellants from that imprudence.

Abuse and res judicata

33. Section 85 deems the Section 85 agreement to be a determination of the appeals by a Tribunal in accordance with the terms of the Section 85 agreement and that the like consequences shall ensue for all purposes as if it had been such a determination.

34. Having arrived at the conclusion of that the Section 85 agreement comprised a full and final settlement for the Italian margin claims for the periods and the vehicle set out in the 2003 claims, then, in my view, any attempt to relitigate those issues are res judicata, in other words the appellants are not entitled to relitigate the same issue.

35. The cause of action in the appeals against the decisions not to admit the 2009 claims is identical to that in relation to the decisions not to accept the 2003 claims. It thus falls within the principle of cause of action estoppel which arises where the cause of action in the later proceedings is identical to that in the earlier proceedings, the latter having been between the same parties and having involved same subject matter.

36. Mr Puzey has not asked me to strike out these appeals on the basis of res judicata. Instead he has submitted that they are abusive in the *Gore Wood* sense.

37. In *Gore Wood* Lord Bingham at page 31 sets out the following principles which should be considered when considering whether the process of the court is being abused or misused by a party.

> "It may very well be, as has been convincingly argued (Watt, "The Danger and Deceit of the Rule in Henderson v Henderson: A new approach to successive civil actions arising from the same factual matter" (2000) 19 CLJ 287), that what is now taken to be the rule in Henderson v Henderson has diverged from the ruling which Wigram V-C made, which was addressed to res judicata. But Henderson v Henderson abuse of process, as now understood, although separate and distinct from cause of action estoppel and issue estoppel, has much in common with them. The underlying public interest is the same: that there should be finality in litigation and that a party should not be twice vexed in the same matter. This public interest is reinforced by the current emphasis on efficiency and economy in the conduct of litigation, in the interests of the parties and the public as a whole. The bringing of a claim or the raising of a defence in later proceedings may, without more, amount to abuse if the court is satisfied (the onus being on the party alleging abuse) that the claim or defence should have been raised in the earlier proceedings if it was to be raised at all. I would not accept that it is necessary, before abuse may be found, to identify any additional element such as a collateral attack on a previous decision or some dishonesty, but where those elements are present the later proceedings will be much more obviously abusive, and there will rarely be a finding of abuse unless the later proceeding involves what the court regards as unjust harassment of a party. It is, however, wrong to hold that because a matter could have been raised in earlier proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive. That is to adopt too dogmatic an approach to what should in my opinion be a broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before. As one cannot comprehensively list all possible forms of abuse, so one cannot formulate any hard and fast rule to determine whether, on given facts, abuse is to be found or not. Thus while I would accept that lack of funds would not ordinarily excuse a failure to raise in earlier proceedings an issue which could and should have been raised then, I would not regard it as necessarily irrelevant, particularly if it appears that the lack of funds has been caused by the party against whom it is sought to claim. While the result may often be the same, it is in my view preferable to ask whether in all the circumstances a party's conduct is an abuse than to ask whether the conduct is an abuse and then, if it is, to ask whether the abuse is excused or justified by special circumstances. Properly applied, and whatever the legitimacy of its descent, the rule has in my view a valuable part to play in protecting the interests of justice."

38. When tested against the basic principles that should be finality in litigation and that a party should not be twice vexed by the same matter, the 2009 claims and appeals are abusive in that they are an attempt to relitigate the matters that were settled by the Section 85 agreement. That agreement finalised the dispute between the parties relating to the Italian margin claims set out in the 2003 claims, and that by re litigating the issues which were settled in the Section 85 agreement, HMRC are being twice vexed by the same matter. I make no criticism of the appellants for making their 2009 claims since, as I have found, they were valid repeat claims with something new to say. But adopting a broad merits-based approach it is my judgment that the appellants are misusing the process of the court by seeking to raise before it an issue which has already been settled.

39. In *Shiner v HMRC* [2018] 1 WLR, at page 2821 and paragraph 21 of his judgment, Patten LJ stated, when referring to the First-tier Tribunal rules "The 2009 rules are there to enable appeals to be handled quickly and efficiently in accordance with the objectives spelt out in section 22(4) of the TCA 2007. I see no reason in principle why that, cannot comprehend a bar being placed on the relitigation of points already decided against the taxpayer in other relevant proceedings."

40. Judge Kempster in his First-Tier Tribunal Decision in Shiner had said this

> "49. Secondly, in deciding whether to exercise the power of strike out under Rule 8(3)(c) (and it is a power rather than an obligation – unlike, say Rule 8(2)) we have regard to the overriding objective (Rule 2 refers) to deal with cases fairly and justly. We conclude that it would be an abuse of the Tribunal appeal process to allow the art 56 point to stand. It would be relitigation of a point which has already been aired before and concluded on by the Court of Appeal, and we cite without repetition the words of Lord Bingham in Johnson v Gore Wood, quoted at [14(2)] above."

41. It was this striking out under Rule 8(3)(c) which permits the Tribunal to strike out the whole or part of the proceedings if it considers there is no reasonable prospect of the appellant's case or part of it succeeding, which was approved by Patten LJ in the Court of Appeal. I therefore intend to adopt the same approach to these appeals.

DECISION

42. It is my decision that the appellants' appeals are dismissed.

43. I Direct that:

(1) Those appeals should be struck out under Rule 8(3)(c) of the Tribunal Procedure Rules 2009. However this should not take effect immediately given that the appellants have appeal rights which they may well wish to exercise.

(2) Pursuant to Rule 5(3)(l), the foregoing Direction to strike out is therefore suspended pending the determination by the Tribunal or the Upper Tribunal as the case may be, of an application for permission to appeal, a review or an appeal, and it shall only take effect on a date falling seven days after the later of (a) the date on which the appellants have finally exhausted their appeal rights against this decision and (b) the date on which an appeal against this decision or any subsequent appeal against the decision of a higher court has been finally determined in HMRC's favour.

(3) Liberty to apply.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

44. 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.

NIGEL POPPLEWELL
TRIBUNAL JUDGE

Release date: 09 NOVEMBER 2021