[2015] UKUT 468 (TCC)

Appeal number: FTC/11/2014

VALUE ADDED TAX - Edwards v Bairstow - jurisdiction of Upper Tribunal - appeal against refusal of claim for repayment of overpaid VAT - whether FTT entitled not to find or infer that car dealer had accounted for VAT on bonuses paid by manufacturers to dealer on purchase of demonstrator and courtesy cars in claim periods - appeal dismissed

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

WHY PAY MORE FOR CARS LIMITED

Appellant

- and –

THE COMMISSIONERS FOR
HER MAJESTY'S REVENUE AND CUSTOMS

Respondents

Tribunal: The Hon Mr Justice Newey
Judge Greg Sinfield

Sitting in public in London on 8 and 9 June 2015

Andrew Hitchmough QC and Barbara Belgrano, counsel, instructed by KPMG LLP for the Appellants

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

DECISION

Introduction and summary

1. The Appellant ('WPMC') is a car dealer and is the representative member of a VAT group that includes a number of car dealers. As the representative member, WPMC was treated for VAT purposes as making supplies that were made by members of the group and was required to account for VAT on such supplies. This appeal concerns a claim made by WPMC under section 80 of the Value Added Tax Act 1994 ('VATA 1994') for repayment of VAT that WPMC contended was overpaid in various VAT periods between June 1973 and March 1997. In those periods, WPMC accounted for VAT output tax on bonus payments received from certain car manufacturers. WPMC contended that it had overpaid VAT because it had incorrectly assumed that the bonus payments were consideration for a taxable supply of services by WPMC to the car manufacturers. The Respondents ('HMRC') accept that VAT was not due on the receipt of the bonus payments. HMRC refused WPMC's claim for a repayment of VAT because they considered that, on the information available, WPMC had not established, on the balance of probabilities, that it had overpaid VAT. WPMC appealed to the First-tier Tribunal ('FTT').

2. In a decision released on 19 September 2013, [2013] UKFTT 497 (TC), ('the Decision'), the FTT (Judge Blewitt and Mr J Midgley) held that WPMC had failed to show that, on the balance of probabilities, it had overpaid VAT and dismissed the appeal. WPMC appealed against the Decision, with the permission of the FTT, on the grounds that the FTT's analysis and conclusions are flawed. Save as otherwise indicated, paragraph references in square brackets in this decision are to the paragraphs in the Decision.

3. For the reasons set out below, we have decided that WPMC's appeal should be dismissed.

Background

4. The background to the claim by WPMC was not disputed and may be summarised as follows.

5. Car manufacturers supplied demonstrator vehicles and courtesy cars (both referred to simply as 'cars') to WPMC. The cars were supplied by the manufacturer to WPMC either directly or via a third party finance company. If WPMC met certain conditions, which varied from manufacturer to manufacturer, in relation to the cars then the manufacturers would pay WPMC a bonus in respect of each car.

6. Before the judgment of the Court of Justice of the European Communities ('the ECJ') in Case C-317/94 *Elida Gibbs v Customs and Excise Commissioners* [1996] STC 1387 ('*Elida Gibbs*'), HMRC's view was that the VAT treatment of a bonus payment was determined by whether it followed the line of supply. Where the bonus followed the line of supply of the car, ie where a manufacturer (or a finance company in the same VAT group as the manufacturer) supplied a car to a dealer and the manufacturer subsequently paid a bonus to the dealer, the bonus could be treated as a discount. Where the bonus did not follow the line of supply of the car, ie where a manufacturer supplied a car to a finance company (other than a finance company in the manufacturer's VAT group) for onward supply by the finance company to the dealer

and the manufacturer subsequently paid a bonus directly to the dealer, HMRC considered that the bonus should be regarded as consideration for a supply of services by the dealer to the manufacturer and, accordingly, the dealer was required to account for output tax.

7. In *Elida Gibbs*, the ECJ decided that a manufacturer who operated a cash back sales promotion could reduce the value of its taxable supplies to wholesalers or retailers by an amount equal to the amount of the cash back or refund that the manufacturer paid to the consumer. Following *Elida Gibbs*, HMRC accepted that the bonus payments should always have been treated as a discount on the original price of the cars. HMRC invited claims from motor dealers who believed that they had overpaid VAT.

8. A number of motor dealers made claims after *Elida Gibbs* but the claims were subject to a three year cap. In May 2000, WPMC claimed a repayment of £143,024 output tax overpaid during the period from September 1997 to March 2000 on demonstrator and new car sales. The claim included an amount relating to bonuses received from Renault, which followed the line of supply of the vehicles and where a credit note was used as the accounting document. HMRC paid the amount claimed to WPMC.

9. Between 2002 and 2006, HMRC, using information gathered from their own records and in consultation with motor manufacturers and dealers or their representatives, drew up a table, ('the Elida Table'), intended to facilitate claims by dealers who had overpaid VAT on bonus payments. The Elida Table set out the periods and manufacturers in respect of which evidence was available to show that VAT had been accounted for on bonus payments made by manufacturers. The Elida Table was compiled by HMRC on the basis of direct evidence in relation to manufacturers' accounting practices over the relevant years. The original version of the Elida Table was updated in June 2003 and again in December 2003 and October 2006. HMRC stated that they would be willing, in principle, to accept claims from dealers for the periods indicated in the Elida Table.

10. WPMC made a further claim in June 2003, which covered the period 1973 to 1996 and included VAT overpaid on bonus payments by Renault between 1994 and 1996. HMRC was satisfied, on the information shown in the Elida Table, that WPMC had overpaid VAT and repaid £25,680 to WPMC in respect of the *Elida Gibbs* part of the claim.

11. The Elida Table was not exhaustive. In particular, there were periods in respect of which no entry appears on the table ('silent periods') because, although bonuses may have been paid in those periods, HMRC did not have specific evidence that dealers had accounted for VAT on the receipt of such bonuses. The claim with which this appeal is concerned was made by WPMC in 2009. The claim was for VAT overpaid on bonuses received from various car manufacturers in silent periods between June 1973 and March 1997. WPMC did not produce any direct evidence as to its VAT treatment of bonuses during the silent periods and, due to the passage of time, there were only limited contemporaneous documents relating to its business. WPMC contended that it should be repaid VAT in relation to the silent periods because, where the Elida Table accepted that VAT had been accounted for on bonuses paid by a particular manufacturer for a particular period or periods, the only reasonable inference was that VAT had also been accounted for on bonuses received from the same manufacturer in the silent periods.

12. HMRC refused WPMC's claim in part in a letter dated 7 October 2010. HMRC considered that where the Elida Table was silent and there was no or insufficient information to reach a conclusion that, on the balance of probabilities, WPMC had accounted for VAT incorrectly on bonuses paid in a particular period, it should be assumed that the bonuses were paid without VAT and/or that VAT had been correctly accounted for so that there could be no claim for overpaid VAT. WPMC appealed to the FTT against HMRC's decision dated 7 October 2010.

13. The 2009 claim included bonuses paid by Renault between 1989 and 1999 ('the Renault Claim'). In the letter dated 7 October 2010, HMRC rejected the Renault Claim on the grounds that the Renault bonus payments followed the line of supply. On review, however, HMRC accepted the Renault Claim in part. In a letter dated 22 December 2010, HMRC stated that the claims in relation to Renault made by WPMC in 2000 and 2003, in conjunction with the Elida Table, provided evidence from which it could be inferred that WPMC had also accounted for VAT on Renault bonuses between 1992 and 1997. Accordingly, HMRC allowed the Renault Claim to that extent.

The Decision

14. The FTT set out WPMC's claim and the background to it at [9] - [31] and outlined the parties' submissions at [33] - [61]. The FTT then addressed the evidence given by two witnesses, Mr Robert Lewis for HMRC at [62] - [93] and Mr John Ireland of KPMG for WPMC at [94] - [124]. The FTT found both witnesses credible, professional and helpful but they preferred the evidence of Mr Lewis as he had direct knowledge of the practices in HMRC and the motor industry at the relevant times.

15. Before the FTT, WPMC put forward three arguments in support of its contention that it had overpaid VAT on bonuses paid by car manufacturers in the silent periods. WPMC also contended that, if it succeeded, it was entitled to interest on any re-payment under section 78 VATA 1994.

16. WPMC's primary argument was that, at the relevant time, it was the practice of HMRC to treat all bonus payments as consideration for a supply of services and require dealers to account for VAT on them irrespective of whether the bonus payments followed the line of supply of the car. The FTT did not accept this submission. The FTT found as a fact that HMRC did make a distinction between bonuses that followed the line of supply of the car and those that did not. Accordingly, the FTT were not satisfied that dealers accounted for VAT on bonuses irrespective of the line of supply. WPMC has not appealed against the FTT's decision on this issue.

17. There were two other alternative submissions before the FTT, namely that:

> (1) where the Elida Table recognises that dealers accounted for VAT on bonuses received from a specific manufacturer in a particular period or periods, it can be inferred that WPMC accounted for VAT on bonuses received from the same manufacturer in other periods for which there is no entry in the Elida Table ('the silent periods issue'); and
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> (2) irrespective of the guidance contained in the Elida Table, it can be inferred that WPMC accounted for VAT on the disputed bonus payments ('the VAT accounting issue').

18. In relation to the silent periods issue, the FTT declined to draw any inference as to the practices of the car manufacturers in the silent periods on the evidence available to them and the particular facts of the case. At [148] and [149], the FTT set out their reasons for refusing to infer that WPMC had charged and accounted for VAT on bonuses received from particular manufacturers in the silent periods on the ground that it was shown to have done so in periods shown in the Elida Table.

> "148. Our concern in respect of the Appellant's first alternative argument was that the approach regularly taken by manufacturers was not only inconsistent with each other but also varied over different periods within individual manufacturers. For those reasons we agree with the submission on behalf of HMRC that the Elida Tables provide 'snapshots' of information which consistently changed.
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> 149. Whilst we accept Mr Hitchmough's contention that information was available in respect of some manufacturers which covered a number of years, given the fact that we know from the Elida Table that manufacturers changed their practices, we could not be satisfied on the balance of probabilities that any continuity existed or that it was a safe or proper inference to draw, that where VAT had been accounted for in one period, it had also been accounted for during the silent periods."

The FTT then gave examples of such group inconsistency and individual variation and continued:

> "154. Whilst we considered the manufacturers individually, we took the view that to reach an inference purely on that basis would be an artificial exercise which ignored the context of industry practices as a whole. For those reasons we conclude on the balance of probabilities that it would be unsafe to view a manufacturer in isolation and to infer that even where a manufacturer appeared to maintain a certain system for a period of time, it had done so in the silent periods."

19. The FTT rejected WPMC's submissions on the VAT accounting issue for similar reasons as they had given in relation to the silent periods issue, namely the absence of any direct evidence that WPMC had accounted for VAT and the inconsistent approaches of manufacturers during the relevant period. Having described the evidence that showed that there were circumstances in which WPMC would not have accounted for VAT, the FTT stated in [160]:

> "We found as a fact that the documents before us could not and did not provide a complete or accurate picture upon which we could be satisfied on the balance of probabilities that the Appellant had accounted for VAT in the silent periods."

20. The FTT then considered whether the evidence in relation to WPMC's earlier Renault claims led to a different conclusion, at least in relation to bonuses paid by Renault. The FTT referred to the letter dated 22 December 2010 from HMRC giving the outcome of a review of HMRC's initial refusal of WPMC's 2009 Renault Claim. The FTT then concluded at [162] as follows:

> "In light of the explanation set out above, which in the absence of any challenge we accept as an accurate reflection of the position, we conclude that we cannot be satisfied on the balance of probabilities that the Appellant had accounted for VAT. Whilst we acknowledge that the

> Appellant had evidenced its accounting for VAT in its 2000 claim for the period 1997 onwards, the second claim was not evidenced and related to earlier periods. The current claim dates back even further which in our view provides more scope and a higher likelihood for the Appellant having changed its practices between 1989 and 1991 (the current claim) and 1997 (the 2000 claim). Taken together with the fact that we do not know what evidence the Appellant provided in respect of the 2000 claim, the fact that in 2003 no evidence was available in support of its claim and the absence of any direct evidence from someone who had examined the evidence in 2000 we are not satisfied that the Appellant has discharged the burden of proof in respect of the silent periods."

21. In the light of their conclusions on the three issues, the FTT did not make any findings or come to any conclusion on whether HMRC were liable to pay statutory interest under section 78 VATA 1994.

Grounds of appeal against the Decision

22. WPMC appeals against the Decision on the ground that the FTT erred in law in:

> (1) failing to find that where the Elida Table acknowledges that VAT will have been accounted for on bonuses received from a particular manufacturer in a particular period or periods, it should be inferred that VAT would have been accounted for on bonuses received from that same manufacturer in silent periods; and
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> (2) deciding that it could not be satisfied on the balance of probabilities that WPMC had accounted for VAT on bonuses received in the periods and from the manufacturers relevant to its claim.

If the Appellant succeeds on either of the above issues, it further contends (as it did before the FTT) that interest is due on any re-payment to which it is entitled pursuant to section 78 of the VATA 1994.

23. Mr Andrew Hitchmough QC, who appeared with Ms Barbara Belgrano for WPMC, accepted that WPMC's grounds of appeal challenge conclusions of the FTT that were factual in nature. He submitted that this was one of the (comparatively rare) cases where the Upper Tribunal may properly interfere with what appears at first sight to be a multi-factorial evaluation by the FTT. He contended that the Upper Tribunal is able and obliged to interfere on the basis described by the House of Lords in *Edwards v Bairstow* [1956] AC 14 because the only true and reasonable conclusion on the evidence is at odds with the conclusion reached by the FTT. He submitted that the only tenable view open to the FTT was that WPMC had mistakenly accounted for VAT on the receipt of the bonuses that are the subject matter of its claim.

Approach to challenges to findings of fact by the FTT

24. The appeal to the Upper Tribunal is on a point of law arising from the FTT's decision (section 11 Tribunals, Courts and Enforcement Act 2007 ('TCEA 2007')). If the Upper Tribunal finds that the making of the FTT's decision involved the making of an error on a point of law, it may set aside the FTT's decision and, if it does so, must either remit the case to the FTT with directions for its reconsideration or re-make the decision (section 12(2) TCEA 2007). In re-making the decision, the Upper Tribunal may make any decision that the FTT could make if the FTT were re-making the

decision and may make such findings of fact as it considers appropriate (section 12(4) TCEA 2007).

25. The fact that an appeal against a decision of the FTT must be on a point of law means that, generally, findings of fact by the FTT cannot be the subject of an appeal. As *Edwards v Bairstow* shows, findings of fact by the FTT, whether primary facts or factual inferences, can be challenged where the finding is one that the FTT was not entitled to make, eg where the FTT failed to take account of relevant evidence or took account of irrelevant material.

26. On the day after the hearing before us in this case, the Supreme Court issued its judgments in *Pendragon Plc v HMRC* [2015] UKSC 37 ('*Pendragon*'). In response to our invitation, the parties made written submissions on the relevance of the decision to this appeal. In *Pendragon*, Lord Carnwath, with whose judgment the other Justices of the Supreme Court agreed, made some comments on the role of the Upper Tribunal in an appeal against a decision of the FTT. As Lord Carnwath acknowledged at [51], the Upper Tribunal's jurisdiction to intervene had to begin from a finding of an error of law. He noted that there were no significant issues of primary fact in *Pendragon* and the differences between the FTT and the Upper Tribunal related to the understanding of the principle of abuse of law and their evaluation of the facts in the light of that understanding.

27. Unlike the taxpayer in *Pendragon*, WPMC in this appeal challenges the refusal by the FTT to draw inferences from the evidence before them. In the light of *Pendragon*, we consider that WPMC's challenges to findings of fact by the FTT can only succeed on the basis set out in *Edwards v Bairstow*. In that case, Viscount Simonds said, at page 29, that a finding of fact should be set aside if it appeared that the finding had been made "without any evidence or upon a view of the facts which could not reasonably be entertained". Lord Radcliffe said, at page 36, that a finding of fact would be an error of law where the facts found were "such that no person acting judicially and properly instructed as to the relevant law could have come to the determination under appeal" or, in a formulation which he said he preferred, "the true and only reasonable conclusion contradicts the determination". It seems to us that, following *Pendragon*, the proper approach in a case such as this one remains as described by Evans LJ, who gave the only judgment, in the Court of Appeal in *Georgiou and another (trading as Mario's Chippery) v HM Customs and Excise* [1996] STC 463 at 476:

> "... the nature of the factual inquiry which an appellate court can and does undertake in a proper case is essentially different from the decision-making process which is undertaken by the tribunal of fact. The question is not, has the party upon whom rests the burden of proof established on the balance of probabilities the facts upon which he relies, but, was there evidence before the tribunal which was sufficient to support the finding which it made? In other words, was the finding one which the tribunal was entitled to make? Clearly, if there was no evidence, or the evidence was to the contrary effect, the tribunal was not so entitled.
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> It follows, in my judgment, that for a question of law to arise in the circumstances, the appellant must first identify the finding which is challenged; secondly, show that it is significant in relation to the conclusion; thirdly, identify the evidence, if any, which was relevant to that finding; and, fourthly, show that that finding, on the basis of that evidence, was one which the tribunal was not entitled to make. What is

> not permitted, in my view, is a roving selection of evidence coupled with a general assertion that the tribunal's conclusion was against the weight of the evidence and was therefore wrong."

28. *Pendragon* shows that, where an error of law has been established (whether on the application of the *Edwards v Bairstow* principle or because of some other kind of error of law), the Upper Tribunal may exercise its power under section 12 of the TCEA 2007 to re-make the decision of the FTT. In doing so, the Upper Tribunal may make such findings of fact as are necessary. Although the Upper Tribunal should respect the FTT's findings of fact, it is not bound by them and can either make its own findings, if it has sufficient information to do so, or remit the case to the FTT if does not.

Silent periods issue

29. Mr Hitchmough submitted that the FTT should have inferred from the presence of the relevant car manufacturers in the Elida Table that WPMC had accounted for VAT on bonuses paid by those manufacturers in the silent periods. The FTT's conclusion, at [149], that they could not be satisfied, on the balance of probabilities, that it was safe to infer that, where VAT had been accounted for in one period, it had also been accounted for during the silent periods was not open to them in the light of the evidence for two principal reasons.

30. First, the FTT had erred in treating the inconsistencies between manufacturers in their VAT treatment of the bonuses as the single most important reason for rejecting the Appellant's submissions on this issue. Mr Hitchmough submitted that such inconsistencies are irrelevant. The Elida Table itself was compiled on the assumption that the question whether VAT was accounted for on bonus payments must be considered on a manufacturer-by-manufacturer basis. He said that this was supported by the evidence of Mr Lewis (for HMRC) who said that that different manufacturers gave dealers different accounting instructions. Mr Hitchmough accepted that there is a value judgment to be made in relation to each manufacturer shown in the Elida Table as to whether the information is sufficient to allow the inference to be drawn. He contended that [154] showed that the FTT only viewed the issue in the context of the practice of the industry as a whole by comparing manufacturers rather than looking at each manufacturer in isolation. He submitted that the FTT should not have taken the inconsistency of approaches between manufacturers into account and it caused the FTT to reach the wrong conclusion on this issue.

31. We do not accept this criticism of the Decision. In our view, it is clear from [150] - [154] that the FTT considered the manufacturers individually as well as taking account of industry practices as a whole. We consider that the FTT were entitled, in the circumstances of this case, to consider that it would be unsafe to view each manufacturer in isolation outside the context of the VAT treatment of bonuses by manufacturers generally which informed the FTT's evaluation of the evidence in relation to the individual manufacturers whose bonuses were the subject of WPMC's claim.

32. Mr Hitchmough's second point on this ground was that the FTT were wrong to be concerned that the approach taken by individual manufacturers varied over different periods. Mr Hitchmough accepted that whether a manufacturer adopted a consistent approach to bonuses throughout a period was a relevant consideration. The FTT, in

[149], decided they could not infer that, where VAT had been accounted for in one period, it had also been accounted for during the silent periods because individual manufacturers had changed their practices. Mr Hitchmough submitted that the FTT were wrong to view this as a cause for concern. He contended that the FTT had not considered whether the changes in the practice of the manufacturer would have led to any change in whether the dealers continued to account for VAT. Insofar as the dealers would have continued to account for VAT, changes by the individual manufacturers were irrelevant. Mr Hitchmough referred to evidence that Fiat continued to account for VAT even when the accounting documentation changed. Mr Hitchmough also relied on the evidence of Mr Lewis and submitted that the FTT had failed to take it into account. Mr Lewis' evidence was that HMRC would have expected the dealer to account for VAT where the manufacturer raised a self-billed invoice regardless of the line of supply. Mr Hitchmough said that showed that the line of supply was irrelevant to the question of whether VAT would have been accounted for by the dealer when a self-billed invoice was raised by the manufacturer. He also referred to the evidence of Mr Lewis, recorded by the FTT at [75], that where a dealer raised an invoice for a bonus payment showing VAT then HMRC would have expected the dealer to account for VAT regardless of the line of supply.

33. The changes in practice in the case of some manufacturers and the lack of information in the case of others described by the FTT in [150] - [153], show that the there was no consistency in the VAT treatment of the bonus payments by manufacturers. In our view, Mr Hitchmough may be right to say that some changes had no effect on whether or not dealers accounted for VAT on bonuses but there is nothing in that evidence to compel the FTT to conclude that the dealers did account for VAT. Mr Lewis' evidence, as is clear from the Decision, was about what should have happened and what HMRC expected to happen. It was not evidence of what actually happened in individual cases or even in the majority of cases. We consider that the FTT were entitled to take the view, in [149] and [154], that changes in practice by individual manufacturers made it unsafe to infer that VAT had been accounted for in a silent period from the fact that it had been accounted for in another period.

34. In his skeleton argument and before us, Mr Hitchmough set out what he submitted should be the proper approach to WPMC's claim in the light of the evidence in relation to each manufacturer for which the Elida Table contained silent periods. On the basis of that approach, he submitted that the only reasonable inference open to the FTT in respect of all these manufacturers was that VAT will also have been accounted for on bonuses received from the manufacturers in silent periods. It is not necessary to go through each example as they all rely on the points made about the FTT's reliance on a lack of consistency or on "Mr Lewis' clear evidence" described above. As we have stated, the FTT were entitled to refuse to draw the inference that WPMC had accounted for VAT on the bonus payments in the silent periods and the evidence of Mr Lewis did not compel the FTT to conclude that WPMC had accounted for VAT.

35. The FTT decided that they were not satisfied that the fact that the Elida Table showed that VAT was accounted for on bonuses paid by a manufacturer in one period meant that, on the balance of probabilities, VAT was also accounted for during the silent periods. That conclusion was based on the FTT's evaluation of the evidence and we do not consider that WPMC has shown that the FTT's evaluation was flawed in the *Edwards v Bairstow* sense. In conclusion, we consider that the FTT were entitled to

decline to infer that WPMC had accounted for VAT on bonuses paid during the silent periods.

VAT accounting issue

36. Mr Hitchmough also submitted that the FTT erred in their approach to the VAT accounting issue. Mr Hitchmough contended that, irrespective of the guidance contained in the Elida Table, the only reasonable inference on the facts of this case was that WPMC had accounted for VAT on all the bonus payments received by it that form the subject matter of these proceedings.

37. Mr Hitchmough referred to the well known dicta of Walton J in *Jonas v Bamford* (1973) 51 TC 1 (at 25), [1973] STC 519 (at 540) in relation to the presumption of continuity to show that, in the absence of direct evidence in relation to an issue, the courts have been willing to draw inferences in the light of all the circumstances of the case. In *Jonas v Bamford*, Walton J observed that once an inspector comes to the conclusion that, on the facts which he has discovered, the taxpayer has additional income beyond that which he has so far declared, then the usual presumption of continuity will apply. The situation will be presumed to go on until there is some change in the situation, the onus of proof of which is clearly on the taxpayer. Such a presumption is not the exclusive preserve of HMRC but is also available to taxpayers. It is, however, only a presumption and may be rebutted. We agree with the observations of the FTT in *Dr I Syed v HMRC* [2011] UKFTT 315 (TC) on this point at [38] that:

> "In our view this quotation [from *Jonas v Bamford*] expresses no legal principle. It seems to us that it would be quite wrong as a matter of law to say that because X happened in Year A it must be assumed that it happened in the prior year. An officer is not bound by law and in the absence of some change to make or to be treated as making a discovery in relation to last year merely because he makes one for this year. This tribunal is not bound to conclude that what happened this year will happen next year. It seems to us that Walton J is instead expressing a commonsense view of what the evidence will show. In practice it will generally be reasonable and sensible to conclude that if there was a pattern of behaviour this year then the same behaviour will have been followed last year. Sometimes however that will not be a proper inference: there will be occasions when the behaviour related to a one off situation, perhaps a particular disposal, or particular expenses; in those circumstances continuity is unlikely to be present."

38. The FTT in this case stated at [155]:

> "155. We considered the authorities cited by the parties and we agreed with the principles set out therein. In particular we adopted the sentiments set out in *Dr I Syed v HMRC* that *Jonas v Bamford* expressed no legal principle but rather a common sense approach which must be applied to the specific facts of a case. In the cases relied upon by the Appellant, there was direct evidence from the Appellants upon which the Tribunal felt able to draw inferences. No such evidence was available in this case and on the particular facts of this case and the evidence available to us, we do not feel able to draw what we believe would be an

> improper and sweeping inference as to the practices of manufacturers in the silent periods."

39. Mr Hitchmough focussed most of his submissions on the Renault Claim. He submitted that the FTT erred in misconstruing or failing to take account of the letter dated 22 December 2010, which showed that HMRC had accepted that, on the balance of probabilities, WPMC had accounted for VAT on all bonuses received from Renault between 1992 and March 2000. Mr Hitchmough stated that, in 2000, WPMC had made a claim, based on actual records, for repayment of VAT overpaid on bonus payments received between September 1997 and March 2000. The bonuses followed the line of supply of the vehicle and WPMC used a credit note as the accounting document. Mr Hitchmough emphasised that this was the situation in which a dealer would be least likely to have accounted for VAT, but HMRC were nevertheless satisfied on the evidence provided that WPMC had accounted for VAT on those bonus payments. Mr Hitchmough also referred to the claim made by WPMC in 2003 which included Renault bonus overpayments for the years 1994 to 1996. Although there was no documentary evidence for the claim, HMRC accepted and paid the claim on the basis that the earlier claim in 2000 was based on actual records (although the letter dated 22 December 2010 states that HMRC's records did not confirm that the 2000 claim was based on actual records). Mr Hitchmough also relied on the fact that, following WPMC's claim in 2009, HMRC ultimately accepted that WPMC had accounted for VAT on Renault bonuses received between 1992 and 1997. Mr Hitchmough submitted that the FTT erred and reached a conclusion that was not open to them in the light of the evidence before them. He contended that, in the circumstances, the only reasonable inference open to the FTT was that WPMC had accounted for VAT on Renault bonus payments in the claim period (March 1989 to December 1991).

40. We reject Mr Hitchmough's criticism of the FTT's conclusion in relation to WPMC's claim for repayment of VAT on Renault bonus payments between March 1989 and December 1991. We consider that the FTT were entitled to place little or no weight on the 2000 claim and the 2010 letter in relation to Renault bonuses for the period subject to appeal. The fact that HMRC had accepted the 2000 claim, which related to the period September 1997 to March 2000 and for which it seems there may have been documentary evidence, does not compel the conclusion that WPMC accounted for VAT on bonuses received from Renault in March 1989 to December 1991. Further, the fact that HMRC accepted that, on the basis of the 2000 claim, WPMC probably accounted for VAT on Renault bonuses received between 1992 and 1997, does not alter the position. The FTT were entitled to conclude, as they did in [162], that they were not satisfied that WPMC had shown that it had accounted for VAT on bonuses received between 1989 and December 1991. There were obvious reasons for the FTT's doubts about WPMC's claim, namely the absence of any documentary evidence in relation to any period other than between 1997 and 2000 and the distance in time between that period and the one which is the subject of this appeal.

41. Mr Hitchmough also criticised the FTT for finding, in relation to other manufacturers, that there was evidence that WPMC had not accounted for VAT on bonuses. Mr Hitchmough said that the FTT were wrong, in [157], to rely on a possibility that WPMC might have purchased cars on hire purchase ('HP'). Where a dealer purchased a car on HP, it would buy the car from the manufacturer then sell it to the finance company and buy it back on HP. The dealer would be entitled to recover all the input tax incurred on the purchase of the car from the manufacturer. If the dealer

accounted for VAT on a bonus received from the manufacturer in respect of such a car, any subsequent repayment of such output tax would be cancelled out by a reduction in the input tax originally claimed which would have been lower if the bonus been correctly treated as a discount. The FTT referred to a report of a visit by HMRC in 1995 that recorded that Nissan cars were purchased on HP. WPMC's witness, Mr Ireland, accepted that where a dealer bought a car, sold it to a finance company and leased it back on HP, no bonus claim would fall to be made or paid for the reason explained above. Mr Hitchmough pointed out that Mr Ireland had also said that HP arrangements for the cars were extremely rare. It is clear, however, that the FTT had the relevant evidence in mind. They expressly referred to it in the last sentence of [157], where they stated as follows:

> "Whilst we noted Mr Ireland's evidence that the latter situation [ie buying cars on HP] was not the Appellant's common practice and the fact that the visit report post-dates the Appellant's claim, the fact remains that there was no evidence before us upon which we could be satisfied as to the extent of such a practice or the period of time which it covered."

It is also apparent from this sentence that the FTT considered that the evidence before them was not such as to enable them to be satisfied as to the extent of the practice or the period it covered. We consider that the FTT were entitled, on the evidence, to take that view. We cannot see that the FTT's approach to this part of the evidence shows any error in the FTT's conclusion that they were not satisfied, on the balance of probabilities, that WPMC had accounted for VAT on the disputed bonuses.

42. Mr Hitchmough contended that the FTT, in [158], were wrong to take account of a letter from Saab to its dealers in May 1994 stating that its bonus payments would be prepared on credit notes and outside the scope of VAT. Mr Hitchmough submitted that the FTT should not have used the letter as the basis for refusing to draw an inference that WPMC accounted for VAT in the period of the claim (June 1973 to June 1978) because the letter related to a later period (January 1993 to January 1996) and the Elida Table showed that, from 1979 to 1993, Saab's accounting document was either an invoice or a self-billed invoice. Mr Hitchmough accepted that the letter was a relevant factor but criticised the FTT for giving it too much weight when it was an isolated example. We consider that the FTT were entitled to rely on the Saab letter as evidence that there were circumstances in which Saab dealers did not account for VAT on bonuses even where they had done so previously. Such evidence shows that Saab did not invariably apply the same VAT treatment to bonuses and casts doubt on the continuity of its practice between the period covered by the Elida Table (1979 to 1993) and the period of the disputed claim (1973 to 1978) for which there was no evidence.

43. Finally on this issue, Mr Hitchmough submitted that the FTT erred in their approach to WPMC's earlier claim in 2009 in relation to Honda. At [159], the FTT discounted the claim, which was paid by HMRC save for the silent period of 1978 to 1980, on the basis that there was no evidence about the records that substantiated the claim. Mr Hitchmough contended that the FTT failed to give proper weight to the fact that HMRC had accepted that, on the balance of probabilities, WPMC had accounted for VAT on Honda bonus payments for a period of 16 years, even though the accounting document used was a credit note which, unlike an invoice or self-bill invoice, did not lead to an expectation that WPMC would have accounted for VAT on the bonus payments. While we are prepared to assume that the fact that HMRC had accepted that WPMC had accounted for VAT on Honda bonuses between 1981 and 1997 is relevant, we do not accept that it means that the FTT

were not entitled to conclude that WPMC had not shown on the balance of probabilities that it had accounted for VAT on Honda bonuses between 1978 and 1981. In the absence of evidence about the basis of the 2009 claim, it seems to us, as it did to the FTT, that the mere acceptance of a claim by HMRC is not sufficient to establish that the disputed claim (which was rejected by HMRC) should also have been accepted.

Statutory interest

44. The FTT did not deal with the issue of interest because they did not need to. We find ourselves in the same position and, for the same reasons, make no decision in relation to whether statutory interest would have been payable in the event that we had reached a different conclusion.

Disposition

45. For the reasons given above, WPMC's appeal against the Decision is dismissed.

Costs

46. Any application for costs in relation to this appeal must be made within one month after the date of release of this decision. As any order in respect of costs will be for a detailed assessment, the party making an application for such an order need not provide a schedule of costs claimed with the application as required by rule 10(5)(b) of the Tribunal Procedure (Upper Tribunal) Rules 2008.

The Hon Mr Justice Newey

Greg Sinfield
Judge of the Upper Tribunal

Release date: 8 September 2015