FIRST DIVISION, INNER HOUSE, COURT OF SESSION

[2020] CSIH 60
XA18/19, XA83/19 & XA85/19

Lord President
Lord Malcolm
Lord Doherty

OPINION OF THE COURT

delivered by LORD DOHERTY

in the appeals under section 13 of the Tribunals, Courts and Enforcement Act 2007

by

DCM (OPTICAL HOLDINGS) LIMITED

Appellant

against

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS

Respondents

against

a decision of the Upper Tribunal (Tax and Chancery Chamber)

and by

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS

Appellants

against

DCM (OPTICAL HOLDINGS) LIMITED

Respondent

against

a decision of the Upper Tribunal (Tax and Chancery Chamber)

Appellant and Respondent (DCM (Optical Holdings) Limited): Ghosh QC, Welsh; Harper Macleod LLP
Respondent and Appellant (HMRC): D M Thomson QC, R G Anderson; Office of the Advocate General

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8 September 2020

Introduction

[1] The main part of the business of DCM (Optical Holdings) Limited ("DCM") is the sale of spectacles. The supply of spectacle frames and lenses is standard rated for the purposes of Value Added Tax ("VAT"), but the provision of eye tests and dispensing services is an exempt supply.

[2] Between 26 and 30 September 2016 the First-tier Tribunal (Tax Chamber) ("the FTT") (Judge Scott and Ms Sumpter) heard six appeals by DCM against decisions and assessments of the Commissioners for Her Majesty's Revenue and Customs ("HMRC"). Appeal 1 related to assessments issued to DCM on 20 October 2005 for the prescribed quarterly accounting periods 10/02 to 04/05. Appeals 2 to 5 related to repayment returns (ie where input tax claimed exceeded output tax due) which DCM submitted for the periods 07/05, 01/06, 04/06, and 07/06. HMRC had rejected parts of DCM's claims and had "amended" the returns to reflect that. Appeal 6 related to a decision by HMRC on 3 June 2013 to reduce VAT credits payable to DCM for specified periods between 07/05 and 12/08.

[3] On 23 March 2017 the FTT issued its decision, and on 30 October 2017 the decision was amended pursuant to rule 41 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules (SI 2009/273) (*DCM (Optical Holdings) Ltd* v *Revenue and Customs Commissioners* [2017] UKFTT 785 (TC), [2018] SFTD 333). The FTT refused all six appeals. For present purposes it is sufficient to note three of the issues which it decided. In relation

to appeals 2 to 6 it determined that HMRC had been entitled to reduce the sums which DCM had claimed as input tax in the relevant repayment returns and to "amend" those returns accordingly ("the amendment issue"). In relation to appeals 2, 3, 5 and 6 it accepted HMRC's allocation of discounts on DCM's charges between chargeable supplies and exempt supplies ("the discounts issue"). In relation to appeal 1 it held that HMRC's assessments of 20 October 2005 were not timebarred ("the timebar issue").

[4] An appeal from the FTT to the Upper Tribunal ("the UT") requires the permission of the FTT or the UT and is only on a point of law (Tribunals, Courts and Enforcement Act 2007, s 11(1) to s 11(4)). On 13 February 2018 the FTT granted DCM permission to appeal to the UT.

[5] DCM appealed to the UT (Lord Tyre and Judge Dean). On 8 - 10 October 2019 the UT heard the appeal, and on 5 December 2018 it issued its decision (*DCM (Optical Holdings) Ltd* v *Revenue and Customs Commissioners* [2018] UKUT 409 (TCC), [2019] STC 147). The UT refused the appeal on the amendment issue and the discounts issue. However, it allowed the appeal on the timebar issue.

[6] An appeal from the UT to the Court of Session requires the permission of the UT or of the Court of Session and is only on a point of law (Tribunals, Courts and Enforcement Act 2007, s 13(1) to s 13(4)). The UT refused DCM permission to appeal on the amendment issue and the discounts issue and it granted HMRC permission to appeal on one aspect of timebar issue (the interpretation issue) but refused it permission on another aspect (the evidence of facts issue). However, the Court of Session granted DCM permission to appeal and it granted HMRC permission on the evidence of facts issue (*Commissioners for Her Majesty's Revenue and Customs v DCM Optical Holdings) Limited* [2019] CSIH 38, 2019 SLT 1369).

Relevant statutory provisions

[7] The Value Added Tax Act 1994 ("VATA") provides:

"**PART 1**
THE CHARGE TO TAX

…

19. — Value of supply of goods or services

…

(4) Where a supply of any goods or services is not the only matter to which a consideration in money relates, the supply shall be deemed to be for such part of the consideration as is properly attributable to it.

...

25. — Payment by reference to accounting periods and credit for input tax against output tax.

(1) A taxable person shall—

(a) in respect of supplies made by him, and

(b) in respect of the acquisition by him from other member States of any goods,

account for and pay VAT by reference to such periods (in this Act referred to as 'prescribed accounting periods') at such time and in such manner as may be determined by or under regulations and regulations may make different provision for different circumstances.

(2) Subject to the provisions of this section, he is entitled at the end of each prescribed accounting period to credit for so much of his input tax as is allowable under section 26, and then to deduct that amount from any output tax that is due from him.

(3) If either no output tax is due at the end of the period, or the amount of the credit exceeds that of the output tax then, subject to subsections (4) and (5) below, the amount of the credit or, as the case may be, the amount of the excess shall be paid to the taxable person by the Commissioners; and an amount which is due under this subsection is referred to in this Act as a 'VAT credit'.

…

26. — Input tax allowable under section 25.

(1) The amount of input tax for which a taxable person is entitled to credit at the end of any period shall be so much of the input tax for the period (that is input tax on

supplies, acquisitions and importations in the period) as is allowable by or under regulations as being attributable to supplies within subsection (2) below.

(2) The supplies within this subsection are the following supplies made or to be made by the taxable person in the course or furtherance of his business—

(a) taxable supplies;

(b) supplies outside the United Kingdom which would be taxable supplies if made in the United Kingdom;

(c) such other supplies outside the United Kingdom and such exempt supplies as the Treasury may by order specify for the purposes of this subsection.

…

PART IV

ADMINISTRATION, COLLECTION AND ENFORCEMENT

…

73. — Failure to make returns etc.

(1) Where a person has failed to make any returns required under this Act (or under any provision repealed by this Act) or to keep any documents and afford the facilities necessary to verify such returns or where it appears to the Commissioners that such returns are incomplete or incorrect, they may assess the amount of VAT due from him to the best of their judgment and notify it to him.

(2) In any case where, for any prescribed accounting period, there has been paid or credited to any person—

(a) as being a repayment or refund of VAT, or

(b) as being due to him as a VAT credit,

an amount which ought not to have been so paid or credited, or which would not have been so paid or credited had the facts been known or been as they later turn out to be, the Commissioners may assess that amount as being VAT due from him for that period and notify it to him accordingly.

…

(4) Where a person is assessed under subsections (1) and (2) above in respect of the same prescribed accounting period the assessments may be combined and notified to him as one assessment.

…

(6) An assessment under subsection (1), (2) or (3) above of an amount of VAT due for any prescribed accounting period must be made within the time limits provided for in section 77 and shall not be made after the later of the following—

(a) 2 years after the end of the prescribed accounting period; or

(b) one year after evidence of facts, sufficient in the opinion of the Commissioners to justify the making of the assessment, comes to their knowledge,

but (subject to that section) where further such evidence comes to the Commissioners' knowledge after the making of an assessment under subsection (1), (2) or (3) above, another assessment may be made under that subsection, in addition to any earlier assessment.

…

77. — Assessments: time limits and supplementary assessments.

(1) Subject to the following provisions of this section, an assessment under section 73, 75 or 76, shall not be made—

(a) more than 4 years after the end of the prescribed accounting period or importation or acquisition concerned. …

…

PART V

REVIEWS AND APPEALS

…

83. - Appeals.

(1) Subject to sections 83G and 84, an appeal shall lie to the tribunal with respect to any of the following matters—

…

(b) the VAT chargeable on the supply of any goods or services. …

(c) the amount of any input tax which may be credited to a person;

…

Schedule 11

ADMINISTRATION, COLLECTION AND ENFORCEMENT

1. - The Commissioners for Her Majesty's Revenue and Customs shall be responsible for the collection and management of VAT;

…

4. —(1) The Commissioners may, as a condition of allowing or repaying input tax to any person, require the production of such evidence relating to VAT as they may specify.

..."

[8] The Value Added Tax Regulations 1995 ("VATR") provide:

"**34.** — (1) Subject to paragraph (1A) below, this regulation applies where a taxable person has made a return, or returns, to the Controller which overstated or understated his liability to VAT or his entitlement to a payment under section 25(3) of the Act.

(1A) Subject to paragraph (1B) and (1C) below, any overstatement or understatement in a return where—

(a) a period of 4 years has elapsed since the end of the prescribed accounting period for which the return was made; and
(b) the taxable person has not (in relation to that overstatement or understatement) corrected his VAT account in accordance with this regulation before the end of the prescribed accounting period during which that period of 4 years has elapsed,

shall be disregarded for the purposes of this regulation; and in paragraphs (2) to (6) of this regulation "overstatement" , "understatement" and related expressions shall be construed accordingly.

…

(1C) Where paragraph (1B) above does not apply, any overstatement or understatement in a return shall be disregarded for the purposes of this regulation where the prescribed accounting period for which the return was made or required to be made ended on or before 31st March 2006.

(2) In this regulation—
(a) 'under-declarations of liability' means the aggregate of—
(i) the amount (if any) by which credit for input tax was overstated in any return, and
(ii) the amount (if any) by which output tax was understated in any return;
(b) 'over-declarations of liability' means the aggregate of—
(i) the amount (if any) by which credit for input tax was understated in any return, and
(ii) the amount (if any) by which output tax was overstated in any return.

(3) Where, in relation to all such overstatements or understatements discovered by the taxable person during a prescribed accounting period, the difference between—

(a) under-declarations of liability, and

(b) over-declarations of liability,

does not exceed £50,000, the taxable person may correct his VAT account in accordance with this regulation. But if Box 6 of the taxable person's return for the prescribed accounting period must contain a total less than £5,000,000, the difference must not for these purposes exceed 1% of that total unless the difference is £10,000 or less. (Box 6 must contain the total value of sales and all other outputs excluding any VAT - see regulations 25 and 25A and the relevant forms specified in a notice published by the Commissioners.)

(4) In the VAT payable portion—

(a) where the amount of any overstatements of output tax is greater than the amount of any understatements of output tax a negative entry shall be made for the amount of the excess; or

(b) where the amount of any understatements of output tax is greater than the amount of any overstatements of output tax a positive entry shall be made for the amount of the excess.

(5) In the VAT allowable portion—

(a) where the amount of any overstatements of credit for input tax is greater than the amount of any understatements of credit for input tax a negative entry shall be made for the amount of the excess; or

(b) where the amount of any understatements of credit for input tax is greater than the amount of any overstatements of credit for input tax a positive entry shall be made for the amount of the excess.

(6) Every entry required by this regulation shall—

(a) be made in that part of the VAT account which relates to the prescribed accounting period in which the overstatements or understatements in any earlier returns were discovered,

(b) make reference to the returns to which it applies, and

(c) make reference to any documentation relating to the overstatements or understatements.

(7) Where the conditions referred to in paragraph (3) above do not apply, the VAT account may not be corrected by virtue of this regulation.

35. - Where a taxable person has made an error—

(a) in accounting for VAT, or

(b) in any return made by him,

then, unless he corrects that error in accordance with regulation 34, he shall correct it in such manner and within such time as the Commissioners may require. ”

HMRC's appeal: the timebar issue

Introduction

[9] We find it convenient to consider HMRC's appeal first. The timebar issue concerns appeal 1. It relates to the assessments made on 20 October 2005. DCM maintains that the assessments were not made until more than one year after HMRC had knowledge of facts which were sufficient in their opinion to justify the making of the assessments (VATA, s 73(6)(b)).

[10] The assessments assessed DCM as being liable to pay more VAT than it had declared in the relevant returns. The under-declaration of liability arose because there had been understatement of output tax due and overstatement of allowable input tax. The understated output tax arose because HMRC considered that DCM had incorrectly apportioned the charges it had received between the chargeable supplies and the exempt supplies. The overstated input tax arose because HMRC considered that DCM had incorrectly apportioned residual input tax between chargeable and exempt supplies.

Output tax

[11] HMRC's VAT Information Sheet 08/99 contained consolidated guidance on the apportionment of charges for supplies of spectacles and dispensing by opticians. It set out two methods of apportionment which were open to opticians, namely Full Cost Apportionment ("FCA") and Separately Disclosed Charges ("SDC").

[12] Between 1998 and 2003 DCM and HMRC had been in negotiation with a view to reaching agreement on the apportionment of charges. In 2003 a settlement was reached ("the 2003 Settlement"). For the VAT quarters between April 1998 and January 2001 36% of charges was attributed to chargeable supplies and 64% was attributed to exempt supplies. It

was agreed that for the VAT quarters between January 2001 and April 2003 DCM would voluntarily disclose any output tax under-declared having regard to the agreed apportionment. HMRC made it clear that for periods after April 2003 "a fairer and more reasonable method to calculate the dispensing costs for the optometrist" was expected. Notwithstanding DCM's undertaking to make voluntary disclosure of output tax under-declared no such disclosures were made.

[13] The parties reached agreement in relation to an SDC method of apportionment with effect from 1 February 2004. However DCM and HMRC disagreed as to whether DCM had put in place an acceptable SDC method before that date.

Residual input tax

[14] Where VAT on an input is clearly attributable to a taxable supply or an exempt supply there is no difficulty in deciding whether or not the input is recoverable. However, where VAT on inputs cannot be directly attributed to either type of supply it is known as residual input tax and the standard method is to apportion it between taxable and exempt supplies in proportion to their respective values (VATR, reg 101). Reg 102 provides that HMRC may approve an alternative method. DCM did not use the standard method for apportioning residual input tax. It used an alternative method of apportionment which HMRC had not approved. That alternative method apportioned a larger proportion of residual input tax to chargeable supplies than the standard method would have, which gave rise, in HMRC's view, to the overstatement of input tax.

The FTT's findings

[15] So far as the apportionment of residual input tax is concerned, the FTT found ([65], [72], [73]) that DCM and its tax advisors, PricewaterhouseCoopers ("PwC"), told HMRC that

DCM was using the standard method. The FTT found ([81]) that it was not until HMRC examined DCM's records on 31 August 2005 that they discovered that the standard method was not being used.

[16] In relation to output tax the FTT found ([77]) that on 29 January 2004 HMRC's Officers O'Pray and Boyle met with DCM to discuss SDC, and that the meeting ended in "deadlock" because HMRC stated that DCM required to have FCA in place from 1 May 2003 (ie for the quarter ending 07/03) until SDC could be agreed. DCM's stance was that there was an SDC method in place and that HMRC were only proposing minor changes. At a further meeting on 31 August 2005 the officers were given copies of DCM's VAT account for the periods 07/02 to 01/04 from which it became evident that the percentage of charges which had been attributed to chargeable supplies had been 31% in 07/02, 38% in 10/02, 30% in the following five periods and 28% for all the periods thereafter ([82]). The FTT continued:

> "191. Officer Boyle was very clear that it was the information uncovered at the visit [on 31 August 2005] which enabled, and caused, her to calculate the figures underpinning the assessment. We accept that.
>
> 192. It was argued that at the time of the 2003 Settlement, and going forward, HMRC must have been aware that DCM were not using a percentage split agreed by them. Certainly HMRC expected, and got, further discussion on percentages until 2008 but, in our view, they would reasonably have been expected to assume that there would be adherence to the 2003 Settlement. In the period thereafter DCM were repeatedly told that, in the absence of an agreed SDC, FCA would have to be in place. It was not and we do not accept that HMRC could have known what DCM were doing without seeing their records.
>
> 193. We do not accept the argument that the fact that no voluntary disclosures were made by DCM should have led HMRC to decide that the appellant had resiled from the 2003 Settlement. We agree with HMRC that a far more obvious conclusion would be that there was no under-declaration of output tax. …
>
> …

> 199. We are wholly unable to see any material fact which was known to HMRC prior to 31 August 2005 which would have justified making the assessment earlier. Accordingly, we find that Officer Boyle acted appropriately and quickly and HMRC certainly were not perverse in not raising an assessment earlier, not least because of the recent PwC letters. The assessment is in time. "

The UT's decision

[17] The UT decided ([79]) that the assessments were not timebarred in so far as they assessed DCM to take account of the fact that input tax had been overstated, but that they were timebarred in so far as they assessed DCM to take account of the fact that output tax had been understated. DCM had discovered material facts relating to the overstated input tax on 31 August 2005, but it had known all material facts relating to the understated output tax since 29 January 2004. The UT continued:

> "[79] … The argument for HMRC was founded upon the proposition that an assessment is a unitary demand for tax, so that the reference in section 73(6) to 'the assessment' is to the particular total or net amount brought out at the end of the calculation as due by the taxpayer. In our opinion this proposition is unsound. It is inconsistent with the terms of section 73(4) which states as follows:
>
> > 'Where a person is assessed under subsections (1) and (2) above in respect of the same prescribed accounting period the assessments may be combined and notified to him as one assessment.'
>
> It is apparent from this provision that the word 'assessment' can be used, according to context, to mean either a component part of an overall assessment or, alternatively, the aggregation which produces the total or net amount due for a particular period. In any event, it could not, in our view, be said as a matter of ordinary language that evidence of facts coming to the knowledge of the Commissioners in relation to one matter can be utilised to justify the whole of an assessment that also seeks to recover VAT due as a consequence of another or other matters to which those facts have no relevance. Indeed, we would regard it as a somewhat startling proposition.
>
> 80. Senior counsel for HMRC sought to derive support from the analysis by Arden LJ in *BUPA Purchasing Ltd* v *C&E Commrs* … of the meaning of the term 'assessment'. That judgment is, however, concerned with different matters, including in particular whether an assessment must be for an amount of VAT due, and whether an assessment includes the underlying reasoning. It does not provide relevant guidance in relation to the point arising in the present proceedings.

81. We therefore conclude that the FTT erred in law in treating facts coming to HMRC's knowledge in relation to input tax as relevant to the question whether the assessment in so far as relating to underdeclared output tax was out of time. We turn therefore to consider whether the FTT's findings relating to output tax entitled it to conclude that the assessment was in time. Again it is helpful to draw together the findings in fact made by the tribunal:

- No voluntary disclosures were ever made in relation to output tax (70).
- HMRC considered that SDC was not in operation as at 27 October 2003 (75)
- At the meeting on 31 August 2005, Officers Boyle and O'Pray were given copies of the VAT account which disclosed the output tax percentages used for all periods from 7/02 onwards. For the four periods subject to the assessments under appeal, the percentages were 38, 30, 30 and 30 respectively (82).
- DCM was immediately told that as approval for SDC had not been in place, periods 7/03 to 1/04 would have to be recalculated (83).
- The following day the officers noted that the 2003 settlement had not been honoured (84).
- It was the information uncovered at the August visit that enabled and caused Officer Boyle to calculate the figures underpinning the assessment (191).
- After 2003 DCM was repeatedly told that in the absence of an agreed SDC, FCA would have to be in place. It was not, but HMRC could not have known what DCM was doing without seeing their records (192).

82. The fact that DCM was not operating a FCA method did not come as news to the officers at the August 2005 meeting. DCM had never represented that it was in use and HMRC had never proceeded on the basis that it was. As at January 2004, Officer O'Pray had been aware that DCM was not operating a FCA method. He was further aware that DCM was not yet operating a SDC method that was acceptable to HMRC, and that the method that DCM was operating went back prior to period 07/03. The only new information obtained in August 2005 was the percentage splits used by DCM to calculate taxable outputs for the periods from 10/02 onwards.

83. What, then, was the last piece of the puzzle that rendered the evidence sufficient, in the opinion of the Commissioners, to justify the making of the assessment? The FTT found in fact that it was the information uncovered at the August 2005 visit that enabled, and caused, Officer Boyle to calculate the figures underpinning the assessment. That, however, is not a conclusive answer to the statutory question. We have already noted that, in our view, the FTT erred in regarding information obtained in relation to input tax as relevant to whether the assessment was in time as regards output tax. The FTT's finding in fact does not distinguish between the two. It is clear, moreover, that calculation of the output tax underdeclaration did *not* depend upon figures obtained at the August 2005 meeting. This calculation consisted of the difference between (a) the amounts which had been declared by DCM in its VAT returns, and (b) the amount of output tax due on the

> basis of the 64/36 percentage split which Officer Boyle applied, in exercise of best judgment, because that had been the split agreed for earlier periods. The fact that different percentages had in fact been used by DCM was not therefore material to the calculation of the amount of output tax due.
>
> 84. The contemporaneous correspondence (Officer Boyle's letter of 7 September 2005 and the reconsideration letter of 25 January 2006) indicates unequivocally that what prompted the assessment so far as output tax was concerned was the fact that HMRC had never accepted that SDC was being correctly operated prior to 1 February 2004. That fact was known to HMRC by at least January 2004. The assessment made by Officer Boyle in October 2005 could have been made at any time thereafter; on the basis of the correspondence and the FTT's findings, no further evidence of relevant facts came to the Commissioners' knowledge. It follows, in our opinion, that the last piece of the puzzle which was thought to justify the assessment as regards output tax was in place more than one year before October 2005. The assessment was therefore out of time in relation to the periods in issue. "

Counsel's submissions

[18] Senior counsel for HMRC submitted that the UT erred in law. What a trader had to account to HMRC for was VAT on outputs less VAT on inputs. An assessment was a unitary demand for tax. It could involve a reassessment of both input tax and output tax. Where HMRC became aware within a year of an assessment of material facts sufficient in HMRC's opinion to make an assessment to recover overstated input tax, it was also open to them to use the assessment to recover additional VAT where output tax had been understated for the same prescribed accounting period. The UT had fallen into the error which the Court of Appeal had had to correct in *BUPA Purchasing Ltd* v *Customs & Excise Comrs (No 2)* [2008] STC 101, Arden LJ at [62]-[63].

[19] In any case, the UT had not been entitled to reach a different conclusion to the FTT as to when in Officer Boyle's opinion there were sufficient facts to justify the making of an assessment to recover the additional output tax which ought to have been declared. The UT had been wrong to find that calculation of the output tax due did not depend upon figures obtained at the meeting on 31 August 2005. The calculation was based on the VAT account

figures obtained at that time. The UT's description of how the output tax due had been calculated was also wrong. It was not the difference between (a) the amounts which had been declared by DCM in its VAT returns, and (b) the amount of output tax due on the basis of the 64/36 percentage split. DCM was the representative member of a VAT group of 10 corporate members (FTT, [3]). Mixed supplies of spectacles and dispensing services were not the only supplies which DCM made (FTT, [187]). In those circumstances an assessment based on the figures in the VAT returns would not have been to best judgment. It was not possible to tell from the figures in the returns how DCM had apportioned consideration between chargeable and exempt supplies. In fact the figures used in the assessment differed from the figures used in the returns. The aggregate of the outputs in the returns for the periods 10/02, 01/03, 04/03, 07/03, 10/03 and 01/04 was £9,378,145.62 higher than the aggregate of the outputs which had been obtained from DCM's records and which had been used in the assessments.

[20] It was the subjective opinion of the officer making the assessment which was important. As Dyson J put it in *Pegasus Birds Ltd* v *Commissioners of Customs and Excise* [1999] STC 95, at p 101-2:

> "4. The correct approach for a Tribunal to adopt is (i) to decide what were the facts which, in the opinion of the officer making the assessment on behalf of the Commissioners, justified the making of the assessment, and (ii) to determine when the last piece of evidence of these facts of sufficient weight to justify making the assessment was communicated to the Commissioners. The period of one year runs from the date in (ii): …"

An officer's decision that the evidence of which he had knowledge was insufficient to justify making an assessment, and accordingly, his failure to make an earlier assessment, could only be challenged if it was perverse or wholly unreasonable (*Pegasus Birds Ltd* v *Commissioners of Customs and Excise, supra,* pp 101-2, 104; *Rasul* v *Revenue and Customs*

Commissioners [2017] STC 2261, [9]-[13], [16]). Dyson J's decision in *Pegasus Birds Ltd v Commissioners of Customs and Excise* was upheld on appeal (*Pegasus Birds Ltd* v *Commissioners of Customs and Excise* [2000] STC 91), the Court of Appeal agreeing with his decision and with his reasons ([23] - [25]).

[21] In the present case Officers O'Pray and Boyle had been entitled to hold the view that, notwithstanding the discussion at the meeting on 29 January 2004, further information should be obtained before assessments were made. The FTT accepted that. The UT was not entitled to decide otherwise.

[22] Senior counsel for DCM submitted that the UT had been entitled to decide the timebar issue in the way it had. He defended its decision and its reasoning. He submitted that HMRC's appeal should be refused. Section 73(6) required to be read in light of the observations of Aldous LJ in the Court of Appeal in *Pegasus Birds Ltd* v *Commissioners of Customs and Excise* [2000] STC 91, at [15]:

> "15. … An opinion as to what evidence justifies an assessment requires judgment and in that sense is subjective; but the existence of the opinion is a fact. From that it is possible to ascertain what was the evidence of facts which was thought to justify the making of the assessment. Once that evidence has been ascertained, then the date when the last piece of the puzzle fell into place can be ascertained. …"

It was for the FTT and the UT to look at the content of the assessments and determine, in light of that content, when the last piece of material information came to the attention of HMRC.

[23] The UT had been right to conclude that new information relating to overstated input tax could justify an assessment. However, it had also been right to decide that that new information could not justify making an assessment for under-declared output tax where all the material facts necessary to make an assessment for that output tax had been known by

HMRC for more than a year. If that were not so the time limits in s 73(6) could easily be elided. That could not have been Parliament's intention.

[24] Here, all the material facts concerning under-declared output tax were known by the time of the meeting on 29 January 2004. No new material facts relating to that issue came to light thereafter. At the end of the meeting Officers O'Pray and Boyle could have made best judgment assessments for the additional output tax due. As Arden LJ observed in *BUPA Purchasing Ltd* v *Customs and Excise Comrs (No 2), supra,* at [58], it is implicit in s 73(1) that an assessment to best judgment ought to be made as soon as is reasonably practicable. If there was any inconsistency between that observation and the reasoning of Dyson J in *Pegasus Birds Ltd* v *Commissioners of Customs and Excise,* Arden LJ's view ought to prevail.

HMRC's appeal: decision and reasons

[25] In our opinion the FTT found that during the year before 20 October 2005 (i) HMRC obtained knowledge of material facts relating to under-declared output tax; and (ii) HMRC obtained knowledge of material facts relating to overstated input tax.

[26] The FTT accepted that it was the information uncovered during the visit on 31 August 2005 which enabled and caused Officer Boyle to calculate the figures underpinning the assessments ([191]). For the reasons which it explained at [192] the FTT did not accept that HMRC could have known whether DCM was using FCA or not without seeing the VAT records. There had been no voluntary disclosures of under-declared output tax. The FTT did not think that HMRC ought to have inferred from that that DCM was not adhering to the 2003 Settlement. It considered that a far more obvious conclusion was that there was no under-declaration of output tax. It concluded ([199]) that it was wholly unable to see any material fact which was known to HMRC prior to 31 August 2005 which would

have justified making the assessments earlier. It found that Officer Boyle acted appropriately and quickly and that HMRC certainly were not perverse in not raising assessments earlier.

[27] In our view it is not possible to reconcile those findings with the contention that HMRC had all the facts required to make assessments for the output tax under-declarations more than a year before 20 October 2005. We turn then to examine the basis upon which the UT upheld that contention.

[28] The UT considered whether the FTT's findings in relation to output tax supported the FTT's conclusion that the assessments to recover additional output tax were in time. It discussed that issue at [81] - [84]. In our opinion it is clear that, rather than considering whether the FTT's findings were findings which the FTT was entitled to make, the UT was swayed by its own assessment and evaluation of the evidence. In particular, it drew conclusions from the discussions at the meeting on 29 January 2004 which Officer Boyle had not drawn and which the FTT did not draw. In our view those conclusions are not compatible with the FTT's findings. Contrary to the suggestion at [83] of the UT's judgment, it is clear from the FTT's findings that the information uncovered on 31 August 2005 related to both output tax and input tax, and that both items of information enabled and caused Officer Boyle to calculate the figures underpinning the assessment. The UT's suggestion that HMRC's calculation of the output tax under-declaration did not depend on figures obtained at that meeting is contradicted by the FTT's findings. Moreover, it is also clear that the explanation which the UT gave as the basis for that suggestion proceeded on the erroneous assumption that Officer Boyle's calculation used the outputs which had been declared by DCM in its VAT returns. It did not. It used figures from DCM's records.

[29] In our view the UT was not entitled to conclude that more than a year before 20 October 2005 HMRC had knowledge of all the material facts sufficient in their opinion to justify making assessments for the additional output tax which was due. The FTT was the fact finder, and on the evidence it was entitled to make the findings which it did. It was not open to the UT to make findings in relation to output tax which were at odds with the FTT's findings. In making such findings the UT erred in law. Accordingly, in our opinion HMRC's appeal is well founded.

[30] Since it was not until 31 August 2005 that HMRC had knowledge of all the material facts sufficient in their opinion to justify making assessments to recover additional output tax which was due, it would be academic to opine on the question whether the time limits in s 73(6) and s 77 ought to be applied separately to the elements of the assessments attributable to recovery of (i) additional output tax; and (ii) VAT due because of the overstatement of input tax. In those circumstances we prefer to reserve our opinion on the question of construction which lies at the heart of that issue until a case arises where its determination is necessary.

DCM's appeal: the amendment issue

Introduction

[31] The amendment issue relates to repayment returns which DCM submitted for the periods 07/05 to 12/08 (under exception of the period 10/05). HMRC did not pay the returns when they were submitted because they were not satisfied that the amounts of output tax shown were correct. They placed "an inhibit" on DCM's account which prevented repayments being made. On 1 February 2013 HMRC issued decisions in relation to the returns (there was earlier procedure but it is common ground that that procedure was

superseded by the decisions of 1 February 2013). In all but one case the decision reduced the sum repayable but left a balance payable to DCM. In one case the repayment claim was reduced to nil. The parties referred to this aspect of their dispute as the "amendment" issue because in addition to adjudicating upon the repayment claims HMRC amended the sums claimed in the repayment returns to reflect their decisions on the claims.

The FTT's decision

[32] The UT provided a convenient summary of the FTT's decision on this ground:

> "20. The FTT accepted that when a repayment return was submitted, HMRC had the right to refuse it in whole or in part. HMRC were under a duty to conduct a reasonable and proportionate investigation into the validity of claims for repayment, and to take a reasonable time to do so. What was reasonable depended upon the facts of a particular case: *R (UK Tradecorp Limited)* v *C&E Comrs* [2005] STC 138. In the present case the delays were in very large part attributable to DCM's failure to respond to requests for information. The remedy lay in DCM's hands: it could provide information or, alternatively, seek judicial review of HMRC's decision to inhibit repayment. The officers concerned had acted proportionately against the background of DCM's lack of co-operation.
>
> 21. The FTT further accepted HMRC's submission that there was no need to raise an assessment where no tax was due. The time limits in section 73(6) could only start to run where an error in a return gave rise to a debt due *by* the taxpayer. The officers had acted correctly in intimating their decisions as to the amount repayable. Those decisions were appealable, as had occurred. As there were no assessments, no issue of time bar arose. "

We also draw attention to para [209] of the FTT's judgment:

> "[209] [Counsel for HMRC] agued very persuasively that Officers Boyle and Little in making their decisions were simply acting, as they should have done, in accordance with their statutory obligation to ensure that returns are correct. That obligation which is both a power and a duty to investigate and consider repayment claims is implicit in s 25 VATA. There is no explicit power to do so but, of course, HMRC have that power. "

The UT's decision

[33] On appeal to the UT DCM submitted:

> "[24] The correct statutory analysis was as follows:

- The VAT return evidenced a *prima facie* entitlement to be credited by way of repayment.
- Whilst HMRC could dispute and investigate the sum claimed, there was no authority for the proposition that they could do so for an unlimited period of time: they were obliged to act proportionately and to respect relevant statutory time limits.
- If HMRC found some aspect of a return objectionable, they had to follow the statutory requirements, ie make an assessment under section 73 or require the taxpayer to make a correction pursuant to reg 35 of the VAT Regulations 1995, SI 1995/2518. Both of these powers were subject to time limits.
- There was no statutory power to amend a taxpayer's VAT return and accordingly no legal basis for "reducing" a VAT credit. "

[34] The UT noted ([31]) that it was common ground that HMRC were not bound to make immediate repayment of a sum claimed in a repayment return without taking reasonable and proportionate measures to verify that the sum was properly due. It observed that neither party took issue with any of the observations of Lightman J at paras [18], [24] and [25] of *R (Tradecorp Ltd)* v *Customs and Excise Comrs*, *supra*. It acknowledged ([33]) that the question whether HMRC had acted reasonably and proportionately in delaying and ultimately refusing to meet the repayment claims in full was not the issue before it; and that, in any case, the FTT had made a finding in fact that HMRC had acted proportionately and that there was no basis upon which it was entitled to disturb that finding. The UT continued:

> "[34] … We accept HMRC's submission that the power to refuse to pay a sum claimed in a repayment return in full is implicit in the taxpayer's entitlement, in section 25(3) of the 1994 Act, to payment of a 'VAT credit', ie to the excess of allowable input tax over output tax due from him, which calculation assumes that each component has been correctly calculated, and in HMRC's care and management powers in para 1 of Sch 11 to the 1994 Act. It is true that there is no statutory power to amend a return, but there is undoubtedly, in our view, a power to decide to refuse to pay a sum claimed in full, and to pay a lesser sum (or nil) instead. Reduction of the net sum reclaimed in the return is merely the arithmetical means of giving effect to the operative decision. If the taxpayer disagrees with the decision to pay a lesser sum, a right of appeal to the FTT is available. "

The UT held (at [35]) that the assessment provisions in s 73 VATA apply where an amount is due by the taxpayer to HMRC but that there is no provision for assessment where a net balance is due to the taxpayer (*BUPA Purchasing Ltd* v *Customs and Excise Comrs (No 2)*, Arden LJ at [38]). The UT concluded (at [37]) that the FTT had been correct to hold that the timebar provisions in s 73(6) had no application to the decisions to reduce the amounts of the repayments claimed. It added:

> "[37] … It follows that no formal time limits apply to the power to investigate and decide whether a repayment claim falls to be paid in full. We see no unfairness or absurdity in this. Parliament could have chosen to impose a time limit in circumstances other than assessment but has not done so. Instead, it is settled by the case law to which we have referred that the power to investigate the validity of a repayment return and, consequently, to decline to make immediate payment of the sum claimed, must be exercised reasonably and proportionately, and that it is subject to judicial control. It would be unsatisfactory if, hypothetically, a taxpayer who had made an excessive repayment claim could shield it from investigation by refusing to respond to requests for information, with a view to asserting eventually that it was protected by time bar. "

Counsel's submissions

[35] Senior counsel for DCM submitted that the FTT and the UT had erred in law. He accepted that HMRC had been entitled to investigate the repayment claims proportionately. However, if HMRC wanted to refuse to pay or to reduce a sum claimed they could only do that by exercising a statutory power. Neither s 25(3) nor Sched 11, para 1 of VATA expressly empowered HMRC to amend repayment returns. Nor, on a proper construction, was it necessary to imply such a power in either provision. Reference was made to *R (Morgan Grenfell)* v *Special Commissioners* [2003] 1 AC 563, Lord Hobhouse at [45]. The suggested implied power would be contrary to the principle that tax authorities ought not to differentiate between the treatment of payment traders and repayment traders (*Marks and Spencer plc* v *Revenue and Customs Comrs* [2008] STC 1408 at [48], [51-[54]). The observations

of Arden LJ in *BUPA Purchasing Ltd* v *Customs and Excise Comrs (No 2), supra,* and of the First Division in *University Court of the University of Glasgow* v *Commissioners of Customs and Excise* 2003 SC 355 were of no assistance to HMRC. In each of those cases the issue had concerned the proper construction of s 73(1) of VATA.

[36] HMRC were not without statutory remedies. Where as a consequence of an incorrect repayment claim there was a sum due by the taxpayer HMRC could issue an assessment (s 73(1), (2)) within time limits (s 73(6), s 77). Where the error resulted in a reduced repayment being due to the taxpayer HMRC could use the power in reg 35 of VATR to direct the taxpayer to correct the VAT return and the VAT account, again within time limits (HMRC VAT Notice 700/45; *Infinity Distribution Ltd* v *HMRC* [2010] EWHC 1393 (Ch), [35] - [37] and [42] - [46]; *R (Capital Accommodation (London) Ltd (in liquidation))* v *HMRC* [2012] UKUT 276 (TCC)). Whether a taxable person had made "an error" within the meaning of reg 35 involved an objective test (*R (Capital Accommodation (London) Ltd (in liquidation))* v *HMRC, supra,* at [30]). If HMRC established that the input tax in the returns was overstated then that would be such an error. In such circumstances HMRC had a discretion whether to exercise the reg 35 power (provided the exercise would be within the time limits set out in VAT Notice 700/45). If (as here) they chose not to do so that would not be a decision which was appealable - the only redress would be judicial review (*R (Capital Accommodation (London) Ltd (in liquidation))* v *HMRC, supra,* at [17]). However, if HMRC made a reg 35 direction to reduce the input tax claimed in a return that would be an appealable decision because it would be a decision on "the amount of any input tax which may be credited to a person" (VATA, s 83(1)(c); *Benridge Care Homes Ltd* v *HMRC* [2012] STC 1920, at [27]-[28]).

[37] Senior counsel for HMRC submitted that HMRC had been entitled to verify a repayment return before deciding whether to accept it. There was no statutory time limit

within which verification required to be completed, but HMRC had to act reasonably and proportionately. The power to verify would be pointless if, irrespective of the conclusion reached, the return required to be accepted. Accordingly, it must be implicit in s 25(3) and in the care and management provisions in Sched 11, paras 1 and 4, that HMRC are empowered to reject any claim for input tax in whole or in part. Such empowerment was necessary if the verification process was to work, just as it had been necessary in *BUPA Purchasing Ltd* v *Customs and Excise Comrs (No 2), supra,* ([33]-[34]) and *Court of the University of Glasgow* v *Commissioners of Customs and Excise, supra,* ([13]-[17]) to construe s 73(1) of VATA as including certain powers in order to make VATA work. It was clear from *BUPA* that the power to make an assessment included power to alter both the output tax and the input tax elements of a return. In the *University of Glasgow* the power to make an assessment was held to include the power to make alternative assessments. It would be incongruous if although HMRC had power to alter both the output tax and the input tax elements of a return when making an assessment, they had no such power where no assessment was necessary because no sum was due by the taxpayer (*Benridge Care Homes Ltd* v *HMRC, supra,* [27], [39]-[40]).

[38] The principle of construction which Lord Hobhouse outlined in *R (Morgan Grenfell)* v *Special Commissioners, supra,* at [45] had been modified in *R (Black)* v *Secretary of State for Justice* [2018] AC 215, Lady Hale at [36](3) and (4). Statutory provisions had to be construed having regard to their purpose as well as their context. The principal statutory purpose here was that the trader paid the correct amount of VAT (*BUPA Purchasing Ltd* v *Customs and Excise Comrs (No 2), supra,* [64]).

[39] It was not accepted that making an assessment or using the reg 35 power were the only ways for HMRC to challenge the output tax or input tax amounts stated in a return. As

for the availability of the reg 35 remedy, it was not conceded that the present case had been one of a "taxable person making an error". On the contrary, DCM's position was that it was entitled to the repayments which it claimed. Since reg 35 was only available where the taxable person had made an error it was perhaps unsurprising that a decision by HMRC to exercise the reg 35 power was not appealable (s 83; *R (Capital Accommodation (London) Ltd (in liquidation))* v *HMRC, supra,* [17]). The only means of redress was judicial review. In contrast, the decision to exercise the implied power was appealable under s 83(1)(b) or (c) (*Benridge Care Homes Ltd* v *HMRC*, *supra,* at [27]). Reg 35 was available in the case of a taxpayer error whether VAT was due by the taxpayer to HMRC or whether a repayment to the taxpayer was due by HMRC. However, in the former case the pragmatic course for HMRC would usually be to collect the VAT tendered with a return even though the return was incorrect and then issue an assessment to deal with the error.

Decision and reasons: amendment

[40] We think it only fair to observe at the outset that the focus of the argument before us differed from the focus of the argument before each of the tribunals. The thrust of DCM's submissions before the FTT and the UT was that HMRC ought to have made an assessment. There is no indication that reg 35 featured at all in the appeal to the FTT, and only passing mention seems to have been made of it in the appeal to the UT. It comes as no surprise therefore that the FTT and the UT do not discuss reg 35.

[41] It is common ground that HMRC are not bound to accept and give credit for a claim for input tax (*R (Tradecorp Ltd)* v *Customs and Excise Comrs*, *supra*, Lightman J at [18], [24] and [25]). Before deciding whether to accept a claim HMRC are entitled to scrutinise it and to

subject it to a process of verification, notwithstanding the fact that s 25(2) and (3) and Sched 11, paras 1 and 4 do not make express provision to that effect.

[42] As we understand DCM's position, it is that s 73 of VATA and reg 35 of VATR provide ways of giving effect to a decision not to accept an input tax claim. If as a result of such a decision VAT is due by the taxpayer, HMRC can make an assessment in terms of s 73(1). On the other hand if the upshot is that a VAT repayment is due to the taxpayer HMRC's remedy would be to make a reg 35 direction requiring the taxpayer to correct the errors in the return and in the VAT account. Since the power of assessment or the reg 35 power (as the case may be) may be used where an input tax claim is not accepted (or not accepted in full), DCM maintain that it is not necessary in order to make s 25 and Sched 11 paras 1 and 4 work that any of those provisions be construed as including power to reject a claim in whole or in part and to amend the return and VAT account accordingly.

[43] While DCM stressed that the only power which HMRC could use to direct the formal amendment of returns was that contained in reg 35, in our opinion formal amendment of the returns is not the critical issue. Rather, the crux is whether HMRC have the power to refuse to accept (in whole or in part) a sum claimed as input tax. We agree with the FTT and the UT that it is clear that HMRC do have that power. In our opinion, just as it is implicit in s 25(2) and (3) and Sched 11, paras 1 and 4 that the allowance of an input tax claim is conditional upon the claim's verification, it is also implicit in those provisions that HMRC may accept or reject the claim in whole or in part. The fact that the input tax which is claimed and the input tax which is in fact allowable may differ is self-evident - that is why the process of verification and adjudication is necessary. The fact that the input tax claimed and the input tax allowed may differ is also recognised elsewhere in VATA (eg in s 79(2)(c)).

[44] In our opinion HMRC duly exercised their power to adjudicate upon the input tax claims in the returns. They did not accept them in full. They were entitled to do that. The FTT and the UT were right to hold that the input tax claims in the returns had been rejected to the extent indicated in the decision of 1 February 2013, and that DCM is not entitled to repayment of those parts of the claims which HMRC did not accept.

[45] That is sufficient to dispose of this ground of appeal. While we heard submissions relating to the construction and scope of reg 35, we do not think it is necessary to express a view on those matters. In our judgment their resolution is not essential to the determination of this ground of appeal. Moreover, we are conscious that, because of the very different way in which DCM argued this aspect of the case before the tribunals, we do not have the benefit of the tribunals' views on those issues. Once again, in the whole circumstances we prefer to reserve our opinion on the issues until a case arises where it is necessary to adjudicate upon them.

DCM's appeal: the discounts issue

The appeal to the FTT

[46] The evidence before the FTT ([107]-[108]) was that HMRC had repeatedly asked DCM for data relating to the allocation of its charges to customers and the allocation of discounts, but that it was not until 11 December 2008 that DCM supplied four bundles of raw data relating to the period 10/05. Despite repeated requests no data was ever supplied by DCM for the periods 01/06, 04/06, or 07/06. The 10/05 data suggested to HMRC that output tax had been under-declared by 50%.

[47] Very shortly before the FTT appeal hearing commenced DCM produced for the first time twelve copy order confirmations dated between August 2003 and February 2004 and

two further copy order confirmation documents dated February and December 2004. Some of the copy order confirmations bore to show that three separate discounts amounting to £46.50 in total were applied to a supply of spectacles and dispensing services. Those discounts were allocated in the VAT analysis to the taxable supply of goods. They were described collectively as a "discount (on goods)". At [169] of its judgment the FTT observed:

> "[169] DCM certainly have a problem with the discounts before the implementation of SDC [in February 2004] in that, as we can see from the receipts, the customer certainly thought that the transaction involved free eye tests, albeit if the customer analysed the VAT part of the receipt that was not reflected there. We have no information as to the detail of the transactions thereafter other than in regard to DCM's VAT treatment of discounts. "

[48] The FTT accepted evidence from DCM's company secretary, Mr Murdoch, that there were seasonal variations with different promotions, but there was no evidence that the period 10/05 had more or less discounts than other periods. The FTT did not regard Mr Murdoch's assertion that discounted healthcare was not an attractive marketing message as a sufficient basis for attributing all discounts to goods, especially as DCM offered discounted sight tests.

[49] Using the 10/05 data HMRC made a best judgment assessment for VAT due for the period from 01/06. The assessment proceeded on a pro rata apportionment, applying the data for the period 10/05 and the percentages which had been used in the 2003 Settlement. At [170] to [173] the FTT concluded:

> "170. We agree with Officer Boyle's point that if DCM establish that a discount is wholly attributable to goods then that should be the VAT treatment. That has not happened historically.
>
> 171. Unfortunately, the only information available is that furnished for 10/05. That may not be a typical period, if there is such a thing, but it is the only information that DCM have chosen to provide.

> 172. In our view, the words 'properly attributable' in s 19(4) VATA imply an objective test which is appropriate, fair and reasonable. We do not think that the attribution of all discounts to goods, particularly goods intrinsically linked to the dispensing services and sight tests, is appropriate. It is arbitrary and falls clearly into the circumstances envisaged in *C R Smith* [*CR Smith Glaziers (Dunfermline) Limited* v *Customs and Excise Commissioners* [2003] 1 WLR 656, paras 17-18]. The reality is that a free sight test is just that, as is a 2 for 1 offer.
>
> 173. We find therefore that the approach adopted by HMRC following the submission of the 10/05 data is a proper attribution in terms of the legislation and is to best judgment. "

The appeal to the UT

[50] Before the UT DCM argued that it had been free to allocate discounts as it saw fit. Reference was made to *Lex Services plc* v *Customs and Excise Commissioners* [2004] 1 WLR 1, per Lord Walker at [18] - [23]. The order confirmations were clear evidence of the allocation. The FTT had erred in law in applying an objective test rather than a subjective test when it considered the allocation of discounts.

[51] The UT refused the appeal on the discounts ground. It reasoned as follows:

> "62. The only reference in the FTT's reasoning to the order confirmations now relied upon by DCM is in paragraph 169, quoted above. The FTT stated that it had no information as to the detail of transactions thereafter (ie after implementation of SDC in February 2004) other than in regard to DCM's VAT treatment of discounts. We understand the FTT to mean by this that although the order confirmations showed how discounts had been treated by DCM for VAT purposes, they did not of themselves constitute evidence that that treatment had been correct.
>
> 63. The FTT did not assemble in one place its findings in fact in relation to discounts. We can however identify the following relevant findings (references are to paragraph numbers in the FTT decision):
>
> - DCM always had ongoing promotions on its optical products, eg 2 for 1 spectacles and money-off vouchers, but not all sales would have been discounted (90).
> - DCM's computer systems were not set up to identify discount information (90).
> - In the earliest example of a receipt, dated 2 August 2003, there is no indication of the allocation of the discount from the pre-promotion price (95).

- A customer who had a sight test would have thought that that had been discounted (100).
- HMRC eventually received data for period 10/05 on 11 December 2008. Despite repeated requests no data were provided for any other periods since 04/04 (107, 108).
- DCM offered discounted sight tests (165).
- The customer thought the transaction involved free eye tests (169).
- A free eye test is just that (172).

64. We consider that there is force in some of the criticisms made by DCM of the discussion in the FTT's decision. At paragraph 164, the FTT stated that it had difficulty with the argument that if an allocation was agreed with a customer then that dictated the VAT treatment. On one reading, paragraph 172, set out above, might suggest that the FTT considered that an objective test should be applied generally in attributing discounts in a fair and reasonable manner. Such an approach would, in the light of the authorities, constitute an error of law.

65. In the end, however, it does not appear to us that the FTT reached the conclusion it did because it misunderstood the law in relation to use of the parties' subjective apportionment for VAT purposes. The tribunal expressly agreed (at paragraph 170) with Officer Boyle's acceptance that if DCM established that a discount was wholly attributable to goods then that should be the VAT treatment. But the tribunal clearly did not accept that the order confirmations produced during the hearing afforded persuasive evidence of the terms of the parties' agreement. We have noted the express findings of fact that, contrary to what the order confirmations might suggest, VAT- exempt eye tests were free and must therefore have been discounted. It was noted that in the August 2003 documents, no allocation was made of the discount from full price. In short, the FTT concluded that DCM had failed to prove that throughout the period at issue in appeals 1 to 6, the contractual arrangements which it entered into with its customers provided for all of the discounts to be applied only to goods. Having so concluded, the FTT did not, in our view, err in law in holding that HMRC had been entitled to proceed on the basis that a pro rata apportionment, applying the data supplied for period 10/05 and the percentages used in the settlement agreement for earlier periods of account, constituted a proper attribution for the purposes of s 19(4). We accordingly find no reason to interfere with the decision of the FTT on this ground of appeal. ”

Counsel's submissions

[52] Senior counsel for DCM submitted that the UT had erred in law. In having regard to some form of “appropriate objectivity” (FTT [168], [171], 172]) the FTT had applied the wrong test. The consideration for a supply was a subjective matter (*Staatssecretaris van Financiën* v *Association coopérative "Coöperatieve Aardappelenbewaarplaats GA"* [1981] ECR 445).

The appropriate value was the value agreed by the parties to the contract in the course of their dealings (*Lex Services Plc* v *Customs and Excise Commissioners, supra,* at [19]). The FTT wrongly substituted some form of objective test instead of looking to what the parties had agreed. That was a fundamental error of law. In finding ([102] and [170]) that Officer Boyle would have respected DCM's discount allocation had DCM "established" that allocation, the FTT had clearly used the term "establish" as meaning establish for the purposes of section 19(4) having regard to some sort of objective criterion. Had it adopted the correct approach the FTT ought to have found on the basis of the order confirmations that the contracting parties agreed that the whole discount was to be applied to the chargeable supply. Having identified the FTT's erroneous objective approach the UT ought to have held that the finding made in para [170] could not stand. It ought to have remade the decision and found on the basis of the order confirmations that the contracting parties agreed that the whole discount was to be applied to the chargeable supply; failing which it ought to have remitted the case to the FTT to permit it to make further findings in light of the correct test.

[53] Senior counsel for HMRC accepted that the allocation of discounts was a matter which the contracting parties had been entitled to agree. Had such an agreement been proved it would have been determinative. In so far as the FTT suggested otherwise that had been an error. However it had not been an error which had affected the outcome. Officer Boyle and the FTT had approached the issue on the basis that if the parties had in fact agreed to allocate discounts to goods that would have been decisive. The fact of the matter was that the FTT had not been satisfied that the evidence demonstrated that there had been any such agreement. It was not persuaded that the order confirmations showed that there had been such agreement between DCM and its customers during the periods with which

the appeals were concerned (which periods post-dated the order confirmations). The FTT made several findings which were inconsistent with the suggested agreement. The UT had been right to conclude that on the evidence the FTT was entitled to decide as it had, and that the FTT's error in suggesting that the approach was objective rather than subjective had not in fact been material to its decision.

Decision and reasons: discounts

[54] In our opinion the UT did not err in law. It recognised, correctly, that the FTT had erred in law in so far as it had suggested that some form of objective approach was appropriate. However, we agree with the UT that that error did not in fact have a material bearing on the FTT's decision.

[55] Evaluation of the evidence was a matter for the FTT. The FTT was not satisfied that DCM had proved that during the relevant periods DCM and its customers had agreed that discounts should be allocated only to the goods which were supplied. Indeed, the FTT made (and they had been entitled to make) a number of findings which suggested that exempt services were discounted.

[56] In our judgment in the whole circumstances the FTT was entitled to accept HMRC's approach to the discounts - which was a best judgment assessment using the data supplied for period 10/05 and the percentages used in the Settlement Agreement. In our opinion the UT did not err in law in refusing this ground of appeal.

Disposal

[57] We shall allow HMRC's appeal on the evidence of facts issue. The effect is to reinstate the assessments of 20 October 2005. We have found it unnecessary to determine

HMRC's appeal on the interpretation issue. We shall refuse DCM's appeal. We shall reserve meantime all questions of expenses.