[2017] UKFTT 288 (TC)

TC05764

Appeals numbered: EDN/06/04, EDN/07/82, EDN/09/17, EDN/09/24, TC/2009/13140 and TC/2014/00132

VAT – Granted - partial strike out applications – granted – leave to lodge a late appeal – refused – VAT Information Sheet 08/99 – Separately Disclosed Charges – attribution of discounts – Section 19(4) VATA – unadjudicated claim – time bar – assessment – evidence of facts – appeals dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

DCM (OPTICAL HOLDINGS) LIMITED **Appellant**

- and -

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

TRIBUNAL: JUDGE ANNE SCOTT
MEMBER: EILEEN SUMPTER

Sitting in public at George House, Edinburgh on Monday 26 September to Friday 30 September 2016

Mr Roderick Cordara, QC and Mr Andrew Legg of counsel, for the Appellant

Mr Martin Richardson of Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. The respondents have previously been known as HM Customs and Excise and are referred to throughout herein as "HMRC".

2. The appellant ("DCM") consists of 151 stores in four countries. It is principally an optical business, specialising in the sale of dispensed spectacles and the provision of refractive eye surgery.

3. DCM (formerly known as David Moulsdale Holdings Limited until 7 November 2001) is registered in a Value Added Tax ("VAT") group with ten corporate bodies accounting for VAT under a single registration number. DCM acts as the representative member.

4. DCM is a partially exempt business for VAT purposes. The taxable income relates to the supply of frames, lenses, accessories, EC despatches of laser equipment, cosmetic dental kits and Careplan. The exempt supply is that of dispensing services, eye tests and laser surgery. As a result of making both taxable and exempt supplies, any input tax incurred by DCM is recovered by reference to a partial exemption method.

5. Fortunately there was no dispute about the basic VAT principles and we do not require to rehearse the statutory provisions at length in this decision. It is settled law[1] [2]that an optician makes two distinct supplies. Of course the customer pays for both at the same time so Section 19(4) Value Added Tax Act 1994 ("VATA") comes into play. That requires VAT to be properly attributed (or apportioned to each supply).

6. HMRC's VAT Information Sheet 08/99 consolidates guidance on the "Apportionment of charges for supplies of spectacles and dispensing by opticians". 08/99 sets out the two methods of apportionment open to opticians, namely Full Cost Apportionment ("FCA") and Separately Disclosed Charges ("SDC"). If the requirements for SDC are not met then FCA is the only other alternative. We annex at Appendix 1, Annex B from 08/99 which describes SDC and sets out what HMRC view as their relaxation of the strict statutory position. It is not legally binding but Mr Richardson agreed that it does bind HMRC.

8. This hearing is in respect of six appeals, all arising from output tax related issues connected to the operation by DCM of its chain of opticians' stores throughout the UK. The input tax related issues have been the subject of past appeals and are now settled. There was one previous output tax appeal which settled.

9. These appeals have a long history and have been subject to extensive case management.

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[1] EC

[2] Leightons

10. The six appeals were not consolidated but were heard together as there are a number of common themes in the appeals. The issue for the Tribunal was to make decisions in principle and not to address the precise quantum.

Preliminary and procedural issues

Strike out applications and application to lodge late appeal

11. On 15 August 2016, HMRC had lodged three strike-out applications in respect of portions of Appeals 3, 4 and 5. Those were opposed by DCM. By agreement, at the outset of the hearing, it was agreed that those applications be considered in the course of the hearing once evidence had been heard. On the fourth day of the hearing, it was agreed that the only extant strike out application that was opposed was that for Appeal 4. On hearing HMRC's argument on that application, Mr Legg sought leave to lodge an application for admission of a late appeal.

12. We granted HMRC's applications and refused that for DCM. Our reasons for those decisions are to be found at the Footnote to this Decision.

Late admission of evidence relating to customer facing documents

13. At 5.30pm on Friday 23 September 2016, DCM had produced to HMRC copies of what were described as 12 additional "receipts", two of which carried no corporate logo and were dated August and September 2003 and the remaining ten of which carried the "Optical Express" logo and covered dates between 10 October 2003 and 17 December 2004. They were in a different format to the specimen "receipts" in the previously produced bundle. There was no reference to them in any witness statement or skeleton argument.

14. In paragraph 6 of the skeleton argument for Appeal 1 HMRC had stated: "It is also notable that the Appellant, has not produced any evidence of the actual sales documentation from prior to this date (01/02/04) which properly disclosed separate charges to customers". HMRC opposed their introduction and relied on Rule 2 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ("the Rules") and referred to *D C Allan v HMRC*[3].

15. It was argued that the "receipts" were of "dubious provenance" and therefore of limited probative value, that there was prejudice to HMRC in terms of time and costs in having to investigate such "receipts" at such a late date and that the receipts should not be admitted. In the event that the "receipts" were to be admitted in evidence, whether on a reserved basis or not, HMRC sought a discharge of two of the dates set down for this hearing to enable them to instigate investigations. It was argued that they were entirely new evidence after a decade of litigation.

16. For DCM it was argued that these were contemporaneous "receipts" and therefore both interesting and helpful. They had been found in the Cumbernauld store and, if required, a witness could be called to speak to their origin.

[3] 2016 UKFTT 571 (TC)

17. We reserved our decision on whether or not the "receipts" should be admitted, pointing out that perhaps any application for their admission should be restructured with an explanation as to their provenance and also production of the originals. Since they covered a large period, an explanation as to why those particular "receipts" had been chosen might be appropriate.

18. We were not prepared to consider discharging two days of the hearing.

19. On day four of the hearing, of consent, DCM sought leave to lodge a second witness statement of Mr Murdoch speaking to the provenance of the "receipts" and it, and they, were admitted into process.

20. In fact, although in the first paragraph of his said witness statement he referred to them as receipts, since that is how they were referred to in argument, he correctly identified some of them thereafter as "sales order confirmation forms" which, we understand, were given to customers with their receipts. The customers signed these, hence their retention. We have produced two at Appendix 2 which we have anonomised by removal of the signatures. We refer to all receipts and sales order confirmation forms hereafter as receipts.

Late admission of copy VAT Returns

21. HMRC sought leave to lodge copies of the VAT Returns for the periods 10/02 to 07/05 and 01/06 to 12/07 in paper form and evidence of electronic submission for period 03/08 to 12/08. DCM did not oppose that application and they were admitted of consent. On day three, DCM sought leave to lodge an analysis of those VAT Returns. It was factually accurate (other than in the numbering of the rows) and was admitted.

Late admission of print outs extrapolated from HMRC's archives and associated papers

22. DCM sought leave to lodge what was described as a "clip" of documents all bar one of which were derived from Bundle 1. The first seven pages were a copy of documents 499.5 to 499.13 but some entries had been highlighted and an unknown hand had handwritten various figures thereon. In the event those handwritten figures were never explained and were ignored by the Tribunal. The final page was a table referencing some of the highlighted entries to the various VAT Returns. The "clip" was admitted in evidence of consent.

23. HMRC sought to lodge an extract from HMRC's archives which covered a longer period than the documents already in evidence. That was opposed and the application was withdrawn.

Expenses

24. The parties agreed that no expenses should be sought or awarded in any of the appeals.

Arithmetical analysis of financial impact of decisions in dispute

25. At the end of closing submissions, Mr Cordara sought leave to lodge this analysis. After debate, since Mr Richardson had had no previous notice, it was decided that the papers in question would be lodged with the Tribunal, sight unseen, and the parties would later jointly intimate whether or not it should be admitted. Nothing further transpired and we are dealing with points of principle only so it has been disregarded.

Appellant's Note in response on SDC

26. In Closing, Mr Cordara handed up "Appellant's Note in response on SDC" and spoke to it. Mr Richardson did not object and responded verbally.

Commentary on DCM's witness evidence

27. After the conclusion of the Hearing, DCM lodged by email with the Tribunal and HMRC, a written summary entitled "Appellant's Note of DCM's Key Unchallenged Evidence". No objection was taken.

The law

28. Two Joint Bundles of Authorities were lodged together with a further three Authorities from the appellant and one from HMRC. We annex at Appendix 3 the composite List thereof. In fact, very few of the Authorities were referred to in the course of the Hearing and those that were are highlighted in bold.

The evidence

29. At paragraph 12 of DCM's skeleton argument it was stated that "the main source of evidence in the case will be documentary". We had an extensive bundle of documents in addition to a bundle of the formal documentation such as Notices of Appeal, Statements of Case, etc.

30. We heard evidence for DCM from Graeme Murdoch who is the company secretary of both DCM and its subsidiary companies.

31. We also heard evidence from Mr Shaun King who has been a VAT adviser to DCM since August 2008, albeit he had been employed by the previous VAT adviser PriceWaterhouseCooper ("PwC"). HMRC lodged a formal objection to Mr King's evidence to the extent that it was proffered as an opinion. Mr King was not an expert witness and most of his evidence, albeit well meaning, amounted to opinion evidence and therefore was excluded. We also had opinion evidence from most of the other witnesses and that too has been excluded.

32. For HMRC we heard from Officers Boyle, O'Pray and Little.

33. On the final day of the Hearing the parties lodged Statements of Agreed Facts and those, as amended, are annexed at Appendix 4.

Overview of the issues

DCM

34. DCM had one overarching Skeleton Argument which addressed what was described as the "core group of issues" and they were:-

(a) *Discounts*

The issue is how, in a mixed supply such as of a pair of spectacles, a discount offered to a customer on that supply is allocated between the taxable and exempt parts of that supply. Does the split shown on the customer facing documentation suffice?

(b) *Time bar*

DCM rely on Sections 73(6) and 77(1) Value Added Tax Act 1994 ("VATA") in arguing that the assessment(s), and decisions were out of time on the basis that:-

(i) If the assessment/decision is outside the three, or (from 1 April 2009) four, year "drop dead" time limit it is bad, irrespective of knowledge.

(ii) In terms of Section 73(6) an assessment can only stand if it was made within either

1. two years from the end of the prescribed accounting period, and/or
2. 12 months from knowledge of the facts material to the making of the assessment (*Pegasus*)

and it was argued that HMRC were in possession of all material facts long before the issue of assessments and/or decisions.

(c) *Quasi assessments*

HMRC had denied that, with the exception of Appeal 1, the decisions were assessments. Accordingly, DCM say that the question is whether or not HMRC had the power to issue a decision which had the effect of amending the Returns in question, thereby altering the financial position stated therein, by any mechanism other than the assessment provisions enshrined in statute.

35. In addition, it was indicated that there might be other smaller issues which may or may not arise for decision depending on the outcome of the principal issues.

36. In Closing Submissions, Mr Cordara stated that DCM's position was now that there was no longer any argument on whether decisions were assessments and it was accepted that with the exception of Appeal 1 the appeals relate to disputed decisions issued by HMRC. He challenged the validity of those decisions.

HMRC

37. At the outset of the hearing, in making an argument opposing the late admission of evidence of the receipts, it was argued for HMRC that one of the issues before the

Tribunal was the implementation date of "SDC" and so it transpired since it impacts on the calculation of output tax.

38. Unlike DCM who had one over-arching skeleton argument, HMRC had a skeleton argument for each appeal and identified the issues in each. We identify the specific issues raised for each appeal in the overview of the appeals.

Overview of the six appeals

Appeal 1 - EDN/06/04

39. The disputed decision is a decision communicated by HMRC to DCM by letter dated 25 January 2006 to maintain a disputed assessment for under-declared VAT. That assessment was issued to DCM on 20 October 2005 for VAT periods **10/02 to 04/05.**

40. In fact, only periods **10/02 to 01/04** are in issue in this appeal since they are the only periods where there is an alleged under-declaration of output tax.

41. A penalty liability notice was also issued on 20 October 2005. It was latterly agreed that the penalty liability notice was no longer a matter for the Tribunal.

42. The issues were:-

(a) Was the assessment covering periods 10/02 to 07/03 in time because it was made after the expiry of two years? HMRC argue that the material facts were only discovered on 31 August 2005, and

(b) Whether that part of the assessment that dealt with the implementation of SDC was flawed in that there is an argument as to whether or not DCM had complied with 08/99 at an earlier date than 1 February 2004?

Appeal 2 - EDN/07/82

43. The disputed decision is a communication by HMRC to DCM dated 30 July 2008 reducing the VAT credit due to DCM for the period **07/05**.

44. The issues were:-

(a) At the time, as was the case for Appeals 3, 4 and 5, HMRC described that decision as an "assessment" but now argue that it was not an assessment but rather simply a decision by HMRC to reduce only the VAT credit. DCM argued that it should be characterised as an assessment and was out of time. HMRC argue that it was a decision taken in the course of verification of the Return and not a *"quasi"* assessment.

(b) If it is to be characterised as an assessment, HMRC argue that it was only following provision of information for period 10/05 on 11 December 2008 that material facts came to light to enable HMRC to amend the figures returned by the appellant.

(c) The allocation of discounts.

Appeal 3 - EDN/09/17

45. The disputed decision is a communication by HMRC to DCM by letter dated 16 January 2009 reducing the VAT credit due by HMRC to DCM for the period **01/06.**

46. The same issues arise as in Appeal 2.

47. There was another decision for this period (see Footnote to Decision) that related to Careplan but it does not now form part of this appeal.

Appeal 4 - EDN/09/24

48. The disputed decision is a communication by HMRC to DCM dated 15 January 2009 reducing the VAT credit due by HMRC to DCM for the period **04/06**. The rationale was an under-declaration of output tax in relation to Careplan but that was not pursued. The only remaining issue was in regard to whether the decision was an assessment and therefore out of time.

49. There was another decision for this period (see Footnote to Decision) that related to discounts and it does not now form part of this appeal.

Appeal 5 - TC/2009/13140

50. The disputed decision is a communication from HMRC to DCM by letter dated 16 July 2009 described as a "protective assessment" because of the impasse on discounts. That reduced the VAT credit due by HMRC to DCM for the period **07/06**.

51. The same issues arise as in Appeal 2.

52. There was another decision for this period (see Footnote to Decision) that related to Careplan but it does not now form part of this appeal.

Appeal 6 - TC/2014/00132

53. The disputed decision is a review decision communicated by HMRC to DCM dated 3 June 2013 which upheld decisions amending amounts in the VAT Returns for the following periods and which had had the effect of reducing DCM's VAT credits for VAT periods **07/05, 01/06, 04/06, 07/06, 10/06, 01/07, 04/07, 07/07, 09/07, 12/07, 03/08, 06/08 and 12/08**. Those decisions had originally been communicated to DCM by individual letters for each period, all issued on 1 February 2013.

54. The said letter of 3 June 2013 also upheld a decision of 25 September 2012 to assess DCM in the sum of £171,170 in relation to dental supplies in VAT period **09/08** but that is not under appeal.

55. The same arguments on assessments and time bar as in Appeal 2.

56. DCM argue that HMRC had no statutory power to make adjustments to Returns on 1 February 2013 for periods that they allege were closed.

57. The issue was whether the decision is flawed in upholding the earlier decisions insofar as it failed properly to characterise those decisions as assessments and, if so, to argue that the decisions are out of time. HMRC state in Closing Submissions that

there was no substantive challenge in this appeal, only a challenge to the "type" of decision ie whether these were "*quasi* assessments".

General

58. In the course of the hearing it became very clear that there were overlapping issues, namely:

(a) At all material times there had been two running themes for DCM in relation to output tax and they were Careplan and discounts. That is evident from the decisions debated in the strike out applications. Ultimately DCM advanced no arguments on Careplan and Mr Murdoch conceded that HMRC's treatment of Careplan payments was correct.

(b) SDC was a core issue and specifically the question as to when it had been implemented.

(c) HMRC's treatment of Returns and "adjustment" thereof in the context what were described as "assessments".

Background

59. DCM made both taxable and exempt supplies and the VAT that was directly attributable to the making of taxable supplies was recoverable in full, whilst the VAT that was directly attributed to the making of exempt supplies was not recoverable at all. However, for DCM, like other similar businesses, there is a substantial amount of VAT that cannot be directly attributed to either type of supply and that VAT is commonly known as "residual input VAT".

60. Regulation 101 of the Value Added Tax Regulations 1995 ("the Regulations") provides for the apportionment of residual input tax between taxable and exempt supplies in proportion to their respective values. This is described as the "standard method". In terms of Regulation 102 of the Regulations, HMRC may approve an alternative method of apportioning residual input tax.

61. As most readers of this decision will be aware, the apportionment of residual input tax is relevant because in terms of Section 25 VATA, taxpayers are entitled to credit for so much of the input tax as is allowable and then to deduct that amount from any output tax that is due.

62. The current DCM VAT group was first registered in late 1997 and from that point it operated a Partial Exemption Special Method ("PESM") for allocating residual input tax. It was approved for use from October 1997. In September 1998, HMRC advised that it was no longer approved for use with effect from 30 September 1998 and DCM were directed to use the standard method for apportioning residual input tax. As Mr Murdoch put it, the withdrawal of approval was "the catalyst" for a long series of VAT appeals as DCM endeavoured to find a method of accounting for VAT which, in their opinion, did not financially disadvantage the business compared to their competitors but which also met with HMRC's approval.

63. It is relevant to refer in passing to the history of the relationship between DCM and HMRC in regard to residual input tax because, by late 2000, DCM had developed a floor space based PESM for which they sought approval on the basis that other optical retailers had approval for similar methodology. HMRC refused and DCM appealed that decision in 2002. That litigation continued for the next 12 years and was finally resolved in August 2014 when HMRC approved an alternative methodology which DCM agreed to apply from February 2002 onwards.

64. Appeal 1 had been sisted pending the outcome of that input tax litigation but the parties have been unable to agree the level of estimated input tax over-declared for the periods 10/02 to 04/05. The assessment of 20 October 2005 states that at £3,615,241.10 whereas the methodology agreed in August 2014, if applied to that period, would give rise to a figure of £3,173,511. We are not concerned with that aspect since these appeals relate only to output tax issues but it provides some background.

65. In addition, Mr Cordara referred us to *DCM (Optical Holdings) Ltd v HMRC*[4]. That case related to an appeal in relation to the proportion of input tax which should be allowable. Essentially DCM proposed that the residual input tax should be apportioned on the basis of usage of the floor area of their premises as between taxable, exempt and "non-attributable" business activities. The appeal was dismissed. However, Mr Cordara founded on the findings of the Tribunal, which of course are not binding upon us, under the heading Costs. That read as follows:-

> "It seems questionable whether the standard method can ever produce a 'fair and reasonable' result in the circumstances of the present case. The allocation of the outputs as between 'taxable' and 'exempt' bears no relationship to the costs of taxable and exempt inputs. In particular the substantial costs of salaries paid to professional optical staff distorts this. … in our view the respondents failed to respond adequately to the information provided by the appellant and its eagerness to continue negotiations."

We note that view. DCM have consistently argued that the standard method was not fair but what they did not do is tell HMRC that they were not using it.

The 2003 Settlement

66. Between 1998 and 2003 DCM and HMRC had been in negotiation in relation to agreeing a method for "apportionment" of the taxable percentage of the consideration for spectacles. In April 2001, HMRC raised a "best judgment assessment" which was appealed to the Tribunal by DCM. Ultimately a hearing was set down for 2 and 3 June 2003.

67. On 3 June 2003, following negotiation with PwC, HMRC wrote to Mr Murdoch at DCM, having written to PwC on 30 May 2003, and those letters confirmed that

> (a) three Notices of Assessment covering the VAT periods April 1998 to January 2001 were to be recalculated on the basis that 36% of the

[4] [2006] Lexus Citation 636

consideration received in respect of dispensed spectacles related to a taxable supply and therefore 64% to an exempt supply, and

(b) that for the tax periods between April 2001 and April 2003 DCM had agreed to voluntarily disclose any output tax under-declared on the same basis.

68. HMRC made it explicit that:

(a) they did not accept any reduction in the taxable costs in relation to special sales offers, such as discounts,

(b) the 64% figure related only to the periods from April 1998 to April 2003, and

(c) for the future "a fairer and more reasonable method to calculate the dispensing costs for the optometrist" was expected.

69. DCM withdrew their appeal.

70. Contrary to the undertaking in the 2003 Settlement, no voluntary disclosures were ever made in relation to output tax. Mr Murdoch conceded in cross examination that it would have been "difficult" for HMRC to have known that there would be, and were, no such disclosures. No explanation for that omission has ever been offered.

71. The Bundle included four voluntary disclosures in regard to input tax. On 7 January 2004, the disclosure referred to the quarter ended January 2002 and also referred to a previous disclosure which has not been produced. Bizarrely, on 12 October 2004, the disclosure referred to the quarter ended October 2001. On 6 April 2005 the disclosure referred to the quarter ended April 2002, and on 7 July 2005 to the quarter ended July 2002.

72. The disclosures were made by PwC and we reproduce below the text which was in identical terms for each disclosure other than the period and the sum of money involved. Clearly the document had simply been cut and pasted as errors such as the appellant's name, and even the spelling of that, are repeated.

Letter from PriceWaterhouseCoopers to HMRC dated 7 July 2005

"Dear Sirs

David Moulesdale Holdings Limited (DMHL")
VAT Registration Number ….
Voluntary Disclosure for under declared Input Tax

We refer to our submission of last year for a special partial exemption method for our above named client and a subsequent letter of 11 November 2002 from Mr W I Hunter.

We wish to submit a further voluntary disclosure on our client's behalf in respect of input tax that has not previously been claimed during the quarter ended July 2002. **As you are aware our client has used the standard partial exemption method on a without prejudice basis**

since the period end January 1999. The under declared input tax is the potential maximum difference in the standard partial exemption method and our proposed special partial exemption method.

The underdeclared amount is £232,374.11. As with the previous voluntary disclosure we are also submitting this as a "without prejudice" protective claim. We understand this amount may be subject to subsequent adjustment. This claim is intended to protect our client's position under the three year capping provisions. We do not anticipate these amounts will be refunded until the method is settled. Further, we also understand that these amounts may require adjustment at our client's partial exemption year end in April 2006.

We should be grateful if you would confirm receipt of this voluntary disclosure in writing as soon as possible.

Please do not hesitate to contact the undersigned should you wish to discuss this matter.

Yours faithfully".

73. We have highlighted in bold the statement that DCM was applying the standard method. They did not and they did not tell HMRC that they did not.

74. The final line in the 2003 Settlement letter to Mr Murdoch dated 3 June 2003 stated "If you intend to use the Point of Sale method you should enclose a copy of the receipts issued to your customers." The letter also indicated that the workings for a new apportionment method from period 07/05 should be submitted and then HMRC would visit DCM to verify that.

75. They did indeed visit on 27 October 2003 and were told that DCM was operating Point of Sale method (hereinafter referred to as SDC). HMRC intimated that they had seen a receipt recently and that receipt did not identify what supplies were subject to VAT and which were exempt so clearly SDC was not in operation.

Background to assessment issued on 20 October 2005

76. On 25 November 2003, PwC wrote to HMRC and referred to the meeting stating: "During the course of that meeting, we briefly discussed the separate charges that are to be disclosed at the point of sale by our client going forward." They sought approval of enclosures that were described as DCM's sales receipt and order confirmation. The impression given at that juncture was that copies of actual documents were enclosed. They were dated 11 August and 19 November 2003 respectively. The former bears no resemblance to the actual receipt lodged in evidence by DCM dated August and September 2003. In the course of evidence it became clear that they were in fact only proposed samples. From the evidence of the actual receipts that style seems to have been adopted in October 2003.

77. Officers O'Pray and Boyle met with, amongst others, Mr Murdoch on 29 January 2004 to discuss SDC. That meeting ended in "deadlock" because HMRC stated that DCM required to have FCA in place from 1 May 2003 (ie 07/03) until SDC could be agreed. DCM's stance was that there was a SDC method in place and HMRC were only proposing minor changes.

78. Correspondence then ensued and further changes were made to the documentation. Mr Murdoch conceded that the revised copy receipts furnished to HMRC in February 2004 were simply "proposed layouts". In more than one letter PwC indicated that SDC had been in place since May 2003 and it had been amended to incorporate HMRC's observations with effect from 1 February 2004. We can see from the actual receipts produced that the alteration to disclose the dispensing charge occurred between 5 and 12 February 2004.

79. On 19 August 2004 PwC requested formal confirmation that retrospective approval to the procedures would be granted from 1 February 2004 and also asked why HMRC did not consider that SDC was "not properly in place" prior to 1 February 2004. That latter point was not answered.

Visits on 31 August and 1 September 2005

80. Officer Boyle had written to DCM on 22 April 2005 agreeing to the proposed system of SDC if it had been properly applied in all shops and stating that an implementation date would be agreed at a forthcoming visit. Officer Boyle clarified that in evidence, stating clearly that if it was established that SDC had been implemented on a basis that was acceptable to HMRC from an earlier date than 1 May 2004, then that date would be used.

81. On 31 August 2005 Officers O'Pray and Boyle met with DCM. The agenda for the meeting was wide ranging since the business had expanded considerably and the officers obtained details of how the business was structured and what systems were in place. In preparation for that meeting they had looked at the VAT Returns and at the visit they looked at DCM's records. Crucially, those records disclosed that the standard method was not being used for partial exemption but rather a 75% recovery rate was being used for the residual input tax.

82. As far as SDC was concerned, as promised, the officers discussed an implementation date and enquired how the split between the taxable and exempt elements of the sale had been worked out. The officers were given copies of the VAT account which contained details of the calculation of output and input tax and it became evident from that, that the amount of the sale of dispensed spectacles which was treated as taxable in the periods 07/02 to 01/04 was 31% in 07/02, 38% in 10/02, 30% in the following five periods and 28% for all the periods thereafter.

83. DCM were immediately told that since approval for SDC had not been in place, periods 07/03 to 01/04 would have to be recalculated.

84. The following day the officers pointed to the 2003 Settlement, which had not been honoured, and decided that using best judgment they would apply the 36:64 apportionment to periods 10/02 to 01/04. (They also recalculated the input tax).

85. DCM were told that an assessment would be raised, it was, and the output element of that is the subject matter of Appeal 1. On 7 September 2005 Officer Boyle wrote to DCM to confirm the matters discussed at the visit on 31 August and 1 September 2005 and enclosed the Schedule of Assessment in a total of

£4,360,120.64 of which £744,879.54 was output tax. The figures on the assessment are not precisely the same as the figures which were calculated at DCM's premises and intimated on 1 September 2005 because the officers found some errors in the Returns and some missing sales.

Overview of DCM's *modus operandi*

86. We found Mr Murdoch to be a straightforward and credible witness in relation to how DCM operated. He very fairly conceded that it would have been very difficult for HMRC to have found out that DCM were not going to, and did not, comply with the 2003 Settlement.

87. He could offer no explanation as to why PwC appeared to have operated on the basis that the standard method was in use or why at various times it had been argued by various people that SDC was in place from 10/02. We did not agree with all of his opinions as to what HMRC knew or did and why and when but, since they were opinions and he was not an expert, they were discounted.

88. We also had evidence from Mr King in relation to DCM's operations.

89. DCM's business is seasonal and the final quarter in the year is the weakest with the strongest being the first.

90. DCM have always had ongoing promotions on its optical products, for example, two for one spectacles and money off vouchers. However, not all sales would have been discounted. Mr King estimated that perhaps 50% of customers obtained a discount and there were perhaps 200 transactions in each of the 151 stores each week. The computer systems had not been set up to identify discount information.

91. We are told that from approximately November 2002, DCM applied discounts to the taxable element so although, as we could see from some of the receipts, the customer would see a discount amounting to the cost of the eye test, the discount was actually applied to the frames. The result was that the taxable supply was reduced and therefore the liability to output tax.

92. Obviously the treatment of discounts overlaps with SDC. It has frequently been argued for DCM that they were compliant with 08/99 since 1 November 2002. HMRC accept that they were compliant from 1 February 2004. As we indicate at paragraph 80 above, Officer Boyle made it clear that if she had had information to enable her to arrive at an earlier date she would have done so.

93. However, it is difficult to see how that could have happened since until this hearing no actual receipts had ever been produced to HMRC.

94. It became absolutely clear in the course of the hearing that what had appeared to be "receipts" in the bundle (and described as such by PwC) and which had been produced to HMRC in the period 2003-2005 were simply specimen types of receipts which might be used. The physical receipts ultimately admitted in evidence were what was being used in the stores from which they emanated.

95. The earliest example of a receipt is one dated 2 August 2003 and it does identify eye test, services and goods. However, it also shows that the package price was £362.44 but that the promotion price for that package was £345.72. There is no indication whatsoever of the allocation of the discount and therefore the consequential impact on VAT.

96. It is undoubtedly the case that certainly since at least August 2003, there was a clear distinction on the receipts between supplies which carried VAT and those that did not. Whilst we can do the arithmetic to see how those figures are derived, firstly, it is not blindingly obvious on the face of the receipt, and, secondly, there is no reference whatsoever to "dispensing". The customer would simply know that goods were standard rated and services were not.

97. There was a general notice in the stores which stated that customers would be told that: "The total price you pay for spectacles will be made up of separately identified charges for: lenses and frames, dispensing services and eye test (where applicable), you will be given a full breakdown of these charges before you place your order. Your statutory rights are not affected".

98. As can be seen from the receipts annexed, the customer signs a declaration to say that they have been told the breakdown of charges.

99. The format of the actual receipts as opposed to the specimens sent to HMRC by PwC certainly seems to have evolved. The receipts that we have annexed at Appendix 1 are dated January 2004 and therefore show the position immediately before HMRC's implementation date. In neither case is it possible to identify the dispensing since the figure for "services" does not directly relate to the items in the Order.

100. Both also fortify us in the view that a customer who had a private sight test would have thought that that had been discounted because the order confirmation timed at 12:39 on 6 January 2004 has only one discount and that discount is shown next to the sight test, albeit in the VAT analysis it is described as a standard rated discount on goods. The other has a number of discounts and all are applied to goods but again the sight test appears to have been discounted. Incidentally, we do not accept the ingenious argument advanced for DCM that there was no discount on sight tests, just a refund! That flies in the face of the wording on the receipts.

101. It was conceded that the receipts "...may not make particular sense to a customer" but then argued that HMRC could audit and would see that there were separate charges and the discount had been applied to the standard rated elements.

102. The position certainly had changed by February 2004 and for the first time the dispensing charges could clearly be identified. That was one of the prerequisites for 08/99 compliant SDC.

HMRC and discounts

103. HMRC suggested that discounts are an issue in only Appeals 2, 3 and 5 but it is not entirely clear whether they also arise in the other appeals. It seems probable that

they do arise in Appeal 6. They do not arise in Appeal 4 since the decision in that regard was not appealed (see Footnote to the Decision). Since our decision is in principle only, we assume that it might be an issue in the remaining five appeals.

104. Discounts have been the source of a recurrent dispute and were an issue as long ago as the 2003 Settlement and then in the correspondence leading up to the visit in 2005. On 3 November 2005, HMRC again formally asked DCM for information about how discounts were treated. There was no response and exactly the same question was posed again on 30 August 2006 and not answered.

105. At a meeting between the parties on 21 March 2007, DCM agreed in principle that discounts should be applied in the same proportion as SDC. However, there was an ongoing dispute between the parties as to whether or not SDC should be applied on a flat percentage rate. That was resolved in June 2008 but the treatment of discounts was still a contentious issue. Mr Murdoch conceded that during the summer of 2008 HMRC were yet again seeking detailed calculations or figures from DCM in respect of discounts. DCM took the view that it was "very laborious" to extract the information and no doubt it was, since we were told that the computer systems were not designed to identify them easily.

106. At a meeting on 22 September 2008, and subsequently, there was discussion about the varied methods in which discounts could be apportioned. HMRC's position as described by Officer Boyle was that "…if the discount given to the customer was against the frame then that would be quite appropriate to put that to taxable, but if it was discount given on the whole thing then in our view it would have to be apportioned between the exempt and taxable element of the sale." That remains HMRC's stance. The problem for DCM is isolating the information as to when and if discounts were attributable only to frames etc.

107. HMRC repeatedly asked for data following that meeting and on 11 December 2008 eventually received four bundles of raw data for period 10/05. That data was what Mr Cordara described as "not particularly analysed". Despite repeated requests no data was ever submitted by DCM for periods 01/06, 04/06 and 07/06.

108. On 15 January 2009, Officer Boyle wrote to DCM requesting information on discounts for the periods 04/04 to 07/05 and 01/06 to the then present day. She indicated that, on the basis of the information received on discounts, there was a potential under-declaration of output tax of approximately 50% and that therefore she intended to protectively assess from period 01/06 using the figures provided for period 10/05. She then issued letters stating that the Returns were amended and that those were "assessment letters" based on her "best judgment".

109. Those letters included the decisions in Appeals 2 and 3.

Overview of HMRC's *modus operandi*

110. At the outset of the hearing it was clear from the skeleton arguments that, at best, there was some confusion about whether assessments had been issued, whether there were what was described as *quasi* assessments and, indeed, what precisely had happened over the period. This was explored in some considerable detail.

111. Thankfully Officer Little gave very clear, competent and totally credible evidence. She was the decision-maker for the decisions in Appeal 6. On taking over the case she noted that the repayment for period 07/05 (Appeal 2) had been withheld pending verification of the figures. Officer Boyle had requested information and the calculations to support the declared figures on the 07/05 Return but it had proved very difficult to get information from DCM. Therefore a decision was taken that all subsequent repayment Returns were suspended pending resolution of those issues.

112. How did that work in practice? The value of the repayment sought is held on the tax payer's VAT ledger as "Not Posted". Officer Little explained that the "Not Posted" column on the ledger included items that were for information only such as when "...a VAT repayment claim is received but not credited".

113. The monies are not physically credited to the customer's VAT account until the Return is verified and/or formally amended. Whilst in the "Not Posted" column officers can, and do, as Officer Boyle did, make decisions which alter the taxpayer's recorded position in that column.

114. HMRC describe it as a position where an officer inhibits any repayments being released or any cash being sent to the trader. It puts an automatic stop on monies being released to the business. The VAT ledger would show sums thought to be due to (or by) the trader but not paid. Officer Boyle had set an inhibit on the DCM ledger in September 2005.

115. The net effect of that is that when the subsequent Returns were received by HMRC, and they were net repayment Returns, they were entered in the "Not Posted" column in the VAT ledger and they were not credited to DCM.

116. Essentially, until HMRC have fully verified a Return it is not credited, and no adjustments can be made by assessment because Section 25 VATA has not come into play as no tax is payable.

117. If verification proves impossible or there is a lack of co-operation then HMRC would take a best judgment decision. That then means that the credit would be altered or reduced to nothing, that is to say denied in its entirety. At that point, because the Return has been verified (or processed), the statutory time limits start to run and the only method open to HMRC to recover tax thereafter is by way of assessment.

118. In 2008, Officer Boyle had not appreciated that because she had set the inhibit on the ledger, which stopped the Returns being processed, then the time limits imposed by Section 73 VATA would not start to run. For that reason she described her subsequent action in purporting to raise an assessment as being protective because the three years were about to elapse. She did however write to DCM in July 2008 stating: "…however as the original return has not been fully processed the assessment was not actioned".

119. The problem which arises with unprocessed Returns is that HMRC's customer facing systems do not make that clear and indeed are somewhat in conflict with that. An example is the letter from Officer Boyle to DCM dated 16 January 2009 which reads as follows:-

> "**VAT return for period 1 November 2005 to 21 January 2005**
>
> I refer to the above return, submitted by you on or about 22 February 2006.
>
> As you have been notified, the Commissioners consider that the amounts shown should properly be amended as follows:
>
> Box 1 Vat due on sales increased to £654,601.50
>
> Box 4 Vat reclaimed on purchases increased to £820,946.41
>
> Box 5 Net Vat to be reclaimed by you reduced to £166,345.11
>
> This arises for the following reason:
>
> As per my letter of 15 January 2009 a protective assessment is necessary until a resolution is reached regarding discounts.
>
> The net amount considered on present evidence to be properly repayable in respect of this period (subject to outstanding debits or credits in respect of other period(s) is thus £166,345.11 and your account at the VAT Central Unit at Southend will be adjusted accordingly."

120. Officer Boyle said that the reason that the letter was in those terms was because it was a standard or *pro forma* letter but because the Returns were still being verified she was actually unable to take action to adjust the VAT account (or ledger).

121. Officer Little freely conceded that no one outwith HMRC reading that letter could know that the VAT ledger would not be adjusted in that way and that the account would not in fact be adjusted until such time as the Return was verified and a decision to lift the inhibit made.

122. The obvious issue that arises is what could DCM, or any other taxpayer do in these circumstances since presumably they would assume that assessments had been raised. (As noted above, on at least one occasion in 2008, Officer Boyle had in fact explained that the "assessment" would not in fact be "actioned").

123. Officer Little explained that the decision-maker could have been asked to explain the position, the decisions could have been appealed under Section 83(1)(b) and (c) VATA and a repayment supplement could be sought.

124. Of course, in regard to these decisions DCM appealed to the Tribunal.

125. Officer Little was very clear that the circumstances in these appeals were very unusual, that HMRC would seek co-operation wherever possible and where that failed best judgment would be applied and appropriate action taken to then "move" the taxpayer out of "Not Posted".

126. In our view, that is in fact what happened in these appeals. DCM were in dispute with HMRC in respect of numerous input and output related issues. In some, such as Careplan, they produced the information sought to HMRC and matters were resolved, in others such as discounts, after the elapse of a considerable amount of time, HMRC used best judgment.

Discussion and Decisions on SDC and the implementation date and discounts

127. Both parties were agreed that there was a measure of overlap between SDC and discounts and we agree not least because the parties considered dealing with discounts in the same way as SDC but did not do so.

SDC

128. HMRC's consistent stance is that they accept that SDC was in place from 1 February 2004 in a format that was "broadly acceptable subject to further refinements". There were further refinements.

129. DCM rely on Mr Murdoch's unchallenged evidence that SDC was in all stores from period 01/03 and that without any substantive change. We disagree. It flies in the face of the evidence of the meeting in October 2003 and the subsequent letter from PwC (see paragraphs 75 and 76 above).

130. There is no doubt that, as pointed out above, there was a significant change in the level of information furnished on the receipts in August and September 2003 and that provided in later periods.

131. Mr Cordara argues that it is wrong to say that there is a "relaxation" in 08/99 and that it is simply a public notice. It is certainly that but in our view it is fair to describe it as a relaxation of the strict statutory position. It explicitly states that dispensing must be separately identified. As can be seen from the receipts, dispensing was not identified before the retrospective implementation date of 1 February 2004. Although the earlier receipts do make clear the different charges for an exempt supply and a taxable supply, Annex B of 08/99 makes it clear that **all** patients must be able to identify the dispensing charge. In our view all that a customer would have known was that they did not have to pay VAT on every part of the bill.

132. Although we can see that on 5 February 2004, the receipts were not 08/99 compliant, nevertheless HMRC accept that there was compliance from 1 February 2004 and we find that that was the implementation date.

Discounts

133. DCM argue that Mr Murdoch gave unchallenged evidence that there was no basis to extrapolate from the 10/05 material to other periods. We accept his evidence that there were seasonal and other variations with differing promotions but beyond that his evidence is simply his opinion. What DCM did not do is respond to requests

for information other than for period 10/05. Neither we nor HMRC know whether period 10/05 had more or less discounts than in other periods.

134. As long ago as 2005 HMRC were repeatedly asking for information about the treatment of 2 for 1 offers. They got no response.

135. DCM argue that it was not possible to produce more data because of the effort involved. They also argue that since prior to the 2003 Settlement HMRC had known that there was an issue with discounts and should have acted on that. They say that the only "fact" is that there are discounts but nothing beyond that and quantification was not possible. The attribution of all discounts to the goods on the receipts should suffice.

136. We find that it is DCM's choice to offer discounts. The fact that their computing systems made it difficult to access data to support arguments on discounts is not HMRC's problem. Furthermore in her letter of 15 January 2009, again requesting information, Officer Boyle indicated that unlike the data for 10/05, HMRC did not require the full details of each transaction. All that was required was "The final summary page providing details of the total underdeclared amounts for each period will suffice." They have had a very long time to provide that. The fact is that they have chosen not to do so.

137. She also offered to amend her figures if data was provided but of course none was provided.

138. The 2003 Settlement reflected discounts because there were discounts at all times. We have the unchallenged evidence of Officer Boyle that in a telephone call on 22 September 2008, DCM intimated to HMRC that they were looking at ways to rectify the Returns submitted and make changes to the system to ensure that discounts were applied in the same percentages as used for SDC and the 10/05 data was supplied in order to back that up.

139. The reality is that every customer pays one consideration for two supplies when buying spectacles or lenses. Therefore Section 19(4) VATA applies and that reads:

> "(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**."

We have highlighted in bold the crucial wording, notwithstanding DCM's suggestion that we are not being asked to construe this section.

140. It is argued for DCM that if they agree a particular allocation with a customer, in this case, attribution of all of the discount(s) to the goods and none to the services, then that dictates the VAT treatment. We have difficulty with that argument. We are put in mind of the advertisements which are seen regularly for kitchens and sofas where the retailer offers to sell the goods "free of VAT". Of course the goods are not free of VAT. It is simply that the retailer absorbs the VAT cost.

141. Both parties relied on *Tron* which, although not involving exempt supplies, analyses the predecessor provision to Section 19(4). Mr Cordara argued that it is authority for the proposition that the transaction is as it is presented to the taxpayer and, of course, he is correct on the facts of that case. Mr Richardson argued that the finding at page 182 that the attribution to a supply "…is done so that the remainder of the consideration …may be attributed to the other supply" and "The subsection does not, however enable a 'payment of money' to be divided up…" was precisely in point with these appeals.

142. We note that it was held that "In determining the value of a supply…one should not be concerned with the motives of either the supplier …or the recipient." Therefore, whilst we do understand Mr Murdoch's unchallenged assertion that discounted healthcare is not an attractive marketing message we do not accept that that is a basis for deciding that all discounts should be applied to goods. Furthermore, DCM offered discounted sight tests!

143. In regard to the contractual terms, we were referred to Parker LJ at paragraph 159 of *Tesco* which we reproduce in full at Appendix 5. In summary, we agree specifically with pointer 3 which states that "The terms contractually agreed may not be determinative as to the true nature and effect …". We take the view that in certain cases the contractual terms will be definitive but should that be the case here?

144. HMRC relied on paragraphs 102 to 109 in *Courts* for the proposition that the Tribunal can look beyond the contractual terms. It can, but we take Mr Cordara's point that *Courts* was concerned with a very different set of facts.

145. HMRC relied heavily on *C R Smith,* which is relied upon in *Courts,* and in particular paragraphs 17 and 18 which read:

> "[17] VAT is ordinarily charged not upon the market value of the goods or services supplied but upon the consideration agreed by the parties. It is open to the parties to agree on whatever consideration they like and provided that truly reflects what is actually paid, it is not open to challenge by the commissioners. But when a supply of taxable goods is combined with a supply of exempt services in a single package, particularly to a consumer, there is a temptation for both parties to agree on an inflated price for the exempt services and a correspondingly lower price for the taxable goods. This is called value shifting. It suits the supplier because he gains a competitive advantage from being able to reduce his total price. It naturally suits the consumer to pay less. The only losers are the commissioners.
>
> [18] If, therefore, the construction put forward by the commissioners was better calculated to prevent value shifting, that would be a powerful argument in its favour."

That is precisely the situation in these appeals, although, of course Mr Cordara relied on the first two sentences of paragraph 17 and Mr Richardson on the remainder! The primary thrust of Mr Cordara's argument was that HMRC have no role as the taxation authority to rewrite the transaction and that would be disproportionate.

146. DCM certainly have a problem with the discounts before the implementation of SDC 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.

147. 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.

148. 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.

149. In our view, the words "properly attributable" in Section 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.* The reality is that a free sight test is just that, as is a 2 for 1 offer.

150. 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.

151. Lastly, in regard to discounts, although it relates to assessments and decisions, we are underwhelmed by the argument that it was common knowledge in HMRC and the general public that opticians offer discounts so HMRC should have acted sooner. These are self-assessment Returns.

Appeal 1 and time bar

152. At the heart of Mr Cordara's argument is that the starting point is the VAT Return in each period and the simple fact is that those Returns were not read by HMRC until the visit in August 2005. He argues that "the clock starts to run" when the Return is submitted and that nothing material or of sufficient weight was discovered thereafter in any of the appeals.

153. DCM argue that when the Return for 10/02 was received by HMRC on 2 December 2002, it should have been evident to HMRC from the face of that Return that a heavily partially exempt business was reclaiming all of its input tax against a 31% declared tax total. Accordingly had an officer of HMRC read the Return an assessment could have been raised at that time.

154. A similar argument was advanced in respect of period 01/03 where, if the Return had been read, it would have been obvious that the taxable, as opposed to total ratio, was generating a recovery of the order of 63% which would be totally inappropriate for a business where there is a very high percentage of residual input tax.

155. The same argument applied in regard to the Return for 07/03.

156. It was conceded, of course, that these are self assessed Returns.

157. Quite apart from any other consideration, we do not accept that, even if the Returns had been read, that they, in isolation, would have given rise to the assessment. What they almost certainly would have done is to have triggered a VAT investigation. We are not entranced by a taxpayer attempting to rely on its own *mal fides.*

158. The relevant sections of Section 73 VATA read as follows:-

> "**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 Commission 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.
>
> (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.
>
> (9) Where an amount has been assessed and notified to any person under subsection (1), (2), (3) [F121, (7), (7A) or (7B)] above it shall, subject to the provisions of this Act as to appeals, be deemed to be an amount of VAT due from him and may be recovered accordingly, unless, or except to the extent that, the assessment has subsequently been withdrawn or reduced."

159. Both parties referred to and relied on *Pegasus*, as indeed do we, and in particular at paragraph 15 where Aldous LJ stated in the context of the construction of Section 73(6)(b) VATA:-

> "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".

160. At paragraph 18 he goes on to quote from *Cumbrae Properties (1963) Limited v C & E Commissioners*[5] where he endorsed the opinion of the judge at 104 stating:

> "The question for the Tribunal on an appeal, therefore, is whether the Commissioners' failure to make an earlier assessment was perverse or wholly unreasonable".

161. Mr Cordara took us to paragraph 11 in *Pegasus* which states that:

> "Section 73 has to be construed as a whole… Subsection (6) is to protect the taxpayer from tardy assessment, not to penalise the commissioners for failing to spot some fact…".

162. We also agree with the Tribunal in *NP* at paragraph 154 where it stated that:

> "Pegasus Birds at [13] is authority for the principle that not every fact is relevant but only facts of sufficient weight to justify the making of the assessment and that the Tribunal can only interfere with the decision of the assessing officer if there was sufficient material to show that his failure to make an earlier assessment was perverse."

163. Of course, the argument is that the assessment was out of time because HMRC knew or should have known from the VAT Returns that there was something seriously awry. In particular, the fact that the standard method was not being operated properly was obvious from the date of receipt of each of the four Returns because that could be seen from the percentage taxable total. We simply do not accept that.

164. We accepted Officer Boyle's clear explanation that before the visit it would have been impossible for HMRC to work out from the VAT Returns that DCM were not using the standard method because of the variety of supplies that were being made. HMRC did not know whether there were other sources of income. They also did not know if the figures entered on the Returns were correct and indeed in a number of cases they were not.

165. We find as fact that HMRC had been repeatedly misled when they were told that the standard method was being applied. They had the appellant's undertaking in the 2003 Settlement. It was only at that visit on 31 August 2005 that the officers discovered that that had not been honoured and the extent of the problem. Both parties referred us to paragraph 82 *et seq* in *St Martin.* We find that it was on 31 August and 1 September 2005 that the officers found evidence of the facts which underpinned the assessment.

166. HMRC should not have to check Returns to ensure that taxpayers honour their obligations and tell the truth. More pertinently, we rely on *Post Office* where it was held that:

> "The principle of law to be applied to the facts was not when the error in the computation should have been discovered by the commissioners but when the evidence of the facts had come to their knowledge".

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[5] 1981 STC 799

167. Although this appeal deals only with output tax we have referred to the "discoveries" in regard to both input and output tax because, as Mr Richardson correctly argued, the assessment includes both and the issue for the Tribunal in the context of time bar is whether Officer Boyle was justified in making the assessment.

168. Officer Boyle was very clear that it was the information uncovered at the visit which enabled, and caused, her to calculate the figures underpinning the assessment. We accept that.

169. 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.

170. 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.

171. It was also suggested that HMRC should have realised from the receipts sent to them by PwC on 25 November 2003 and 27 February 2004 that different percentages would be arrived at. Firstly, it is obvious from the face of the latter receipts that those were not actual receipts. Secondly, the letter of 27 February 2004 did mention percentages of 30% and 70% but that stated that DCM "intends to make separate charges". It did not say what it was doing at the time.

172. HMRC acted immediately at the visit, telling DCM precisely what they had discovered and calculating the assessment. Officer Boyle's letter of 7 September 2005 to DCM sets out clearly the information which had been discovered in the previous week. That letter made it absolutely explicit that as far as input tax was concerned two material facts had been uncovered. Firstly, DCM were not using the standard method and secondly, they were using a 75% figure and the officers had been unable to uncover any calculations supporting that reclaimable percentage of 75%.

173. Officer Boyle had recalculated the entitlement to input tax for each quarter from period 10/02 to 05/05 using the standard method of calculation which is taxable income over total income and pointed out that the denominator must include income from the dentistry business.

174. As far as output tax was concerned, for periods 10/02 to 04/03, being the periods specifically covered by the 2003 Settlement and where DCM had completely failed to voluntarily disclose under-declarations, she recalculated the output tax as envisaged by the 2003 Settlement.

175. Lastly, as far as the periods 07/03 to 01/04 are concerned, SDC being approved thereafter, the officers had discovered that DCM had used an exempt percentage of 70%. That too was recalculated on the same basis as the 2003 Settlement.

176. 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.

Assessments, quasi assessments and time bar in Appeals 2-6

177. Mr Cordara very helpfully pointed to the following terms of Article 22 of the now repealed Sixth Directive which characterise why VAT is a self-assessed tax:

> "4. Every taxable person shall submit a return within an interval to be determined by each Member State...
>
> The return must set out all the information needed to calculate the tax that has become chargeable and the deductions to be made, including, where appropriate, and in so far as it seems necessary for the establishment of the tax basis, the total amount of the transactions relative to such tax deductions and the total amount of exempted supplies...
>
> 5. Every taxable person shall pay the net amount of that when submitting the return…".

Article 22(5) is replicated in Article 206 of the Principal VAT Directive and is implemented in UK law.

178. It is for DCM to ensure that the entries on the Return are correct thereby establishing a right to repayment[6].

179. Once the Return is submitted, if that gives rise to a repayment claim or VAT credit then HMRC had the right to refuse that, in whole or in part, or to set it off or execute a debt. If the Return is believed to be incomplete or incorrect then in terms of Section 73(1) VATA HMRC may assess the amount of VAT due from a taxpayer, but that is not the case here since these appeals relate to repayment claims (it is of course accepted that there is no distinction between payment and repayment traders (M&S2). The issue at all times was the extent to which, if any, DCM were entitled to VAT credits in any period.

180. Essentially whilst a repayment claim based on a Return is in "Non Posted" it is in the words of Moses J in *GSI* and endorsed in *Tradecorp* an "unadjudicated claim" as opposed to "an admitted or an established claim" and there is "a critical distinction" between the two. It was only when these claims with which we are concerned were moved out of "Non Posted" that they became an admitted or established claim and thus a credit which could give rise to an assessment.

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[6] *Rompelman*

181. Although we read and heard, sometimes tortuous, argument in regard to the decisions under appeal, in our view, ultimately the issue was more straightforward.

182. It is now agreed that the decisions are not assessments. We were referred to *Bupa* by both parties and Arden LJ makes it explicit at paragraphs 36 to 42 exactly what constitutes an assessment. There is no such thing as a *quasi* assessment. An assessment can include both input and output tax, which are legally significant, but if a taxpayer contends that it is entitled to a repayment then the appropriate route in the absence of an assessment is an appeal in terms of Section 83 VATA.

183. We agree with the finding of the Tribunal in *Benridge* at paragraph 39 that there is no need to raise an assessment where no tax is due.

184. We also agree with the finding at paragraph 21 that:

> "…HMRC do not have a general power to revise or adjust VAT returns. The most that they can do is require the taxpayer to do so under regulation 35 ". What they can do, and did here, was issue decisions indicating what amendments would be acceptable.

and at paragraph 22:

> "The issues that then arise are whether this is a course that the Respondents are entitled to adopt without raising an assessment…and whether in fact there is any relevant appeal right under section 85…".

185. The first issue is precisely Mr Cordara's point. The decisions have been appealed under Section 85 and there is no challenge to the validity of those appeals.

186. Mr Richardson argued 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 duty to investigate and consider repayment claims is implicit in Section 25 VATA. There is no explicit power to do so but, of course, HMRC have that power.

187. Lightman J *in Tradecorp* at paragraph 18 makes it clear that:

> "The commissioners are under a duty to conduct a reasonable and proportionate investigation into the validity of claims for a refund and repayment and…are entitled to take a reasonable time to investigate claims prior to authorising deductions and repayments and what is a reasonable time within which to complete an investigation must depend on the particular facts."

188. He goes on to say that the burden of proof lies with the taxpayer. In these appeals we have no hesitation in finding that the delays are in very large part attributable to DCM who were largely unresponsive to requests for information. We noted the argument for DCM that in a situation where Section 73 VATA imposes stringent time limits it would be wholly disproportionate to be able to have longer periods for investigation. The remedy lay within DCM's hands. They could have provided information, they could have sought Judicial Review, they could have complained.

189. We find that Officer's Boyle and Little acted proportionately against the background of DCM's level of co-operation or not.

190. We heard much debate about the impact of Officer Boyle's decision and the fact that the ledger was not adjusted until the claim had been verified. We placed much reliance on *Tradecorp* where Lightman J analysed the entitlement to deduct input tax and (where the deduction exceeds the amount of the tax due) the *prima facie* right to repayment of output tax. At paragraph 30 he stated that:

> "The Commissioners' investigations are the appropriate means to verify whether or not there exists a valid claim to deduction. Until the claim is accepted or established there is no right to payment".

191. *Tradecorp* is authority for the proposition that until the claim is admitted, in this case moved from "Not Posted" in the VAT ledger, there is no right to a credit so Section 73 cannot be engaged. We do not accept Mr Cordara's argument that it is authority only for the proposition that the commissioners are entitled to time to investigate before they have to pay interest.

192. HMRC's position was that when and if a credit had been granted, then and only then, would an assessment have been required if HMRC wished to reduce it. Section 73(2) VATA would then be engaged with the relevant time limits. Mr Richardson argued that Section 73 is **the** statutory authority for VAT assessments. It is but it did not arise in these five appeals.

193. DCM's position was that the decisions have no statutory basis not least because the decisions could not create a debt to the Crown. They could not but they were steps on the way to opening a door to the raising of an assessment which would do that. Officer Boyle's decisions, for all that they were erroneously described as assessments, were simply decisions before there was any credit in respect of each of the Returns in question. Officer Little acted quickly once there were VAT credits.

194. In summary, we do not accept the argument that the "clock starts to tick" when a Return is submitted to HMRC. This is not a situation involving "re-opening returns without limit of time" as argued for DCM. The periods in question were "open" from 07/05. Looking at both Section 73 VATA and the Authorities, the time limits enshrined in statute only come in to play when there is a repayment or a VAT credit or a VAT Return is found to be incomplete or incorrect giving rise to debt due by the taxpayer.

195. Accordingly, there are no assessments or time barred assessments and no time bar in these appeals.

Decision

196. For all these reasons the appeals in all six appeals are dismissed.

Footnote to Decision

Strike out applications

197. We have indicated elsewhere in this decision that there were numerous appeals lodged by DCM in respect of the multiplicity of decisions issued by HMRC. In relation to output tax, there were two issues in particular where the disputes with HMRC ran in tandem, namely, in regard to Careplan and the application of discounts. In some cases, such as in regard to period 07/06, DCM had appealed decisions in respect of both strands albeit taken on different days and assigned different references by the Tribunal. The appeal relating to Careplan was subsequently withdrawn by DCM.

198. By the time we came to the strike out applications on the fourth day of the hearing, the strike out applications in respect of Appeals 3 and 5 were no longer opposed since DCM were no longer pursuing an argument on Careplan.

199. In that regard, we observe that in regard to Appeal 5 it is not only DCM who made an erroneous reference (in their case to the period under appeal) but HMRC asked for references to the "decision of 16 July 2009" to be struck out but their reasoning related entirely to the decision dated 15 January 2009 which was the decision on Careplan in relation to period 07/06. On that basis, and for the record, and of consent we strike out the references to "15 January 2009" in the Further and Better Particulars of the Grounds of Appeal.

200. As far as Appeal 3 is concerned, again for the record, HMRC erroneously ask for strike out of references to the "decision of 18 March 2009" whereas what both parties knew was the relevant decision that DCM had sought to add to the process was the decision for period 01/06 relating to Careplan and dated 15 January 2009. Accordingly, for the record we confirm that we strike out the references to that date in the Further and Better Particulars of the Grounds of Appeal.

201. The third application related to Appeal 4. On 20 January 2009, DCM wrote to the Tribunal lodging a Notice of Appeal against what was described as "the 04/06 assessment" on the grounds that the figures are estimated. It is now a matter of agreement between the parties that the said assessment was not in fact an assessment, albeit described as such, but rather a decision. HMRC did not dispute that that decision was an appealable decision in terms of the relevant legislation.

202. On 15 September 2015 DCM lodged Further and Better Particulars of the Grounds of Appeal which stated:-

> "These Further and Better Particulars of the Grounds of Appeal replace those Grounds of Appeal set out in the original Notice of Appeal dated 20 January 2009 in respect of the Notice of Assessment dated 15 January 2009 ('the 15/01/09 Assessment') in respect of the VAT period 22 January 2006 to 22 April 2006 ('period 04/06'), and apply also to the subsequent Notice of Assessment dated 18 March 2009 ('the 18/03/09 Assessment') which was also issued in respect of period 04/06….."

203. It is a matter of agreement that the said communication of 18 March 2009 ("the March decision"), albeit described as an assessment, was in fact also simply an appealable decision. No appeal was ever lodged by DCM.

204. The decision that had been appealed related to a reduction in the VAT credit because of an under-declaration of output tax in respect of Careplan. By contrast, the March decision did not relate to that issue but was described as a "protective assessment" because of the impasse on the discount issue.

205. HMRC argued that any purported appeal in regard to the decision of 18 March 2009 be struck out in terms of Rule 8(2)(a) of the Rules since no Notice of Appeal had been lodged in terms of Rule 20 of the Rules.

206. We heard argument from both parties. Mr Legg for DCM ultimately made an oral application to the effect that a late appeal be admitted in respect of the decision dated 18 March 2009. He cited in support thereof *John O'Gaunt Golf Club v HMRC*[7] which cites with approval *Data Select Limited v HMRC*[8] ("*Data Select*"). He also produced that authority. One of the criteria identified in *Data* Select is that the Tribunal should ask itself "what is the purpose of the time limit?". We agree with the Upper Tribunal in *Graham v HMRC*[9] where it stated:

> "… Time bar provisions satisfy the need for a degree of legal certainty which should not be lightly overridden. A good reason to do so is usually required."

207. Since these appeals are Scottish appeals, we had regard to *Advocate General for Scotland v General Commissioners for Aberdeen City*[10] ("*Aberdeen*") which is also specifically endorsed in *Data Select*.

208. We also had due regard to Rules 2 and 5 of the Rules. We have annexed at Appendix 6 paragraphs 22 and 23 from *Aberdeen*.

209. Every application for admission of a late appeal depends on its own facts and circumstances and the Tribunal has a wide discretion. The general approach to such discretionary decisions is set out in *Aberdeen* and paragraph 23 is authority for the proposition that considerations or circumstances which would be relevant to the question as to whether proceedings should be allowed beyond the time limit include

(1) whether there was a reasonable excuse for not observing the time limit,

(2) whether matters had proceeded with reasonable diligence once the excuse had ceased to operate,

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[7] TC/2014/04510

[8] 2012 UKUT 187

[9] 2014 UKUT 75

[10] 2005 CSOH 135

(3) whether there is prejudice to one or other party if the appeal proceeds or is refused,

(4) other considerations affecting the public interest, and

(5) has the delay affected the quality of available evidence.

210. There is no reason to address here all of the arguments deployed by both parties and we set out only our findings in regard to our reasons for our decision.

211. At the heart of DCM's argument was the proposition that at all relevant times HMRC and DCM were aware that both discounts and Careplan were live issues in regard to output tax. For the period 01/06 decisions on those two issues were taken on consecutive dates but in Appeal 4 there was a gap of some months between the two decisions. DCM took the view that because the basis for the appeal of the first decision was that the "assessment" was "estimated" that could encompass both strands.

212. We find that there is no reasonable excuse for the failure to observe the statutory time limit in this instance. We do not accept the argument that because there was an appeal of one decision in regard to 04/06 then if further decisions were issued they did not require to be appealed. Of course they did. HMRC might have withdrawn the first decision and then there would have been no extant appeal. It does not suffice to state that HMRC were aware that there was a dispute extant about discounts which is the subject matter of this decision.

213. Taxpayers are expected to act with reasonable prudence and diligence in dealing with their affairs. It would have been prudent to have appealed that decision. Other decisions were appealed. It was not argued that the failure to appeal the decision was a mistake. It would appear that the taxpayers, who were professionally advised throughout, and employ a group tax manager either decided, erroneously, that it was not necessary to appeal the March decision or perhaps it was a simple oversight.

214. Even if there had been a reasonable excuse, we do not consider that matters proceeded with reasonable diligence once the excuse had ceased to operate. When the Further and Better Particulars were lodged in September 2015 it should have been blindingly obvious to DCM that no Notice of Appeal had been lodged. An application for admission of a late appeal could have been lodged with the Tribunal at that juncture. It was not.

215. When HMRC lodged their Statement of Case, which made it absolutely evident that they considered that the only live issue for the Tribunal in regard to Appeal 4 did not include the subject matter of the March decision, that should have been yet another prompt to make an application.

216. When HMRC lodged the strike out application, again DCM should have been on notice that they required to make an application for a late appeal.

217. Clearly there was potential prejudice to DCM if this application was refused. At the point that the decision on strike out was addressed no decision on the substantive issue had been taken and potentially a large sum of money was at stake.

218. They also argue that they are prejudiced because HMRC's strike out application was lodged at what was described as "the 11th hour". Their application is even later.

219. Since the argument on discounts is deployed in regard to the other appeals, and as we indicate above a broad brush approach was eventually adopted, we do not find that there would not be any particular prejudice to HMRC in terms of litigation itself. Since we had heard the evidence the delay had not affected the quality of the available evidence in any respect.

220. HMRC have been aware for a long time that DCM wished to litigate discounts for other periods but they had every reason to believe that since no appeal had been lodged the matter was closed for this period. They had absolutely no reason to believe that it was even potentially a live issue until September 2015. They believed that they had finality.

221. There are no considerations affecting the public interest.

222. We have carefully weighed all of the factors in the balance and looked at the other factors identified in *Data Select*.

223. On the balance of probabilities, we find that HMRC were entitled to believe that the question of discounts in period 04/06 was, and had been a closed book, and that for a very long time.

Decision

224. For all these reasons we refuse DCM's application to extend the time for lodging an appeal and we grant HMRC's partial strike out application in Appeal 4. The partial strike out applications in Appeals 3 and 5 are granted of consent.

225. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

ANNE SCOTT
TRIBUNAL JUDGE

RELEASE DATE: 23 MARCH 2017

APPENDIX 1

VAT Information Sheet 08/99

Opticians: Apportionment of charges for supplies of spectacles and dispensing

ANNEX B
(referred to in the current position paragraph)

Separately disclosed charges

Opticians will not be required to perform an apportionment of charges for spectacle sales if they make separate charges for the spectacles and the dispensing, thus establishing a separate consideration for each of the supplies. One of the normal criteria for establishing separate considerations is that customers should be able to obtain the supplies separately at the individual specified charges should they so wish. This is not usually possible with dispensing services which are normally "tied to" the supply of spectacles. Customs have therefore relaxed this requirement and will accept that separate considerations have been established for the spectacles and dispensing if the charges for each are stated and made known to **all** patients at the time of the supply.

Customs do **not** consider that separate considerations have been established where:

- the costs of each supply and the final charge to the patient are recorded in the optician's accounts but only a single charge is disclosed to the patient or

- separate charges are only disclosed to those patients who request the information.

If patients are informed of the charge for each supply, Customs does not require the optician to reveal how much of each charge is attributable to the cost of the supply and how much is profit or "mark-up". Nor does Customs require the charges to be disclosed by any particular method. However, whatever method of notifying the patient is adopted, the optician must be able to satisfy the local VAT Business Advice Centre that the information is actually being conveyed to all patients, whether they have requested it or not.

APPENDIX 2

optical express

132 Main Street, Cambuslang, Glasgow
0141 6412366

06/Jan/2004 16:24

ORDER CONFIRMATION

Rayban 8502	130.00
VARILUX PANAMIC AIRWEAR 1	269.00
Extras:MI+HI	0.00
No Frame	0.00
Frame Upgrade	0.00
HOYA GP 1.5	0.00
Lens Upgrade	0.00
Extras:	0.00
5% Frame discount	-6.50
£30 Discount	-30.00
Sight Test (Private)	10.00
Discount	-10.00
- -	
TOTAL DUE	362.50

(E) Sight Test	10.00
(E) Services	279.30
(SR) Goods	119.70
(SR) Discount (on goods)	-46.50
- -	
TOTAL DUE	362.50

VAT ANALYSIS
- - - - - - - - - - - - -

Standard Rate (SR)	
£73.2 VAT @ 17.5%	10.90
Exempt (E)	
£289.3 VAT @ 0.00%	0.00

VAT No. 680672418

The separate elements of the total have been explained to me and I accept that the total payable is made up of those separate charges. I agree to the amounts for each supply shown.

.....

132 Main Street, Cambuslang, Glasgow
0141 6412366

06/Jan/2004 12:39

ORDER CONFIRMATION

Killine Siena KO14	50.00
S28 1.49 MAR	109.00
Extras:MI+HI	0.00
Eyeclass Liberty 25	0.00
Frame Upgrade	0.00
	0.00
Lens Upgrade	0.00
Extras:	0.00
Sight Test (Private)	10.00
Discount	-10.00

- -

TOTAL DUE	159.00

(E) Sight Test	10.00
(E) Services	111.30
(SR) Goods	47.70
(SR) Discount (on goods)	10.00

- -

TOTAL DUE	159.00

VAT ANALYSIS
- - - - - - - - - - - - -

Standard Rate (SR)	
£37.7 VAT @ 17.5%	5.61
Exempt (E)	
£121.3 VAT @ 0.00%	0.00

VAT No. 680672418

The separate elements of the total have been explained to me and I accept that the total payable is made up of those separate charges. I agree to the amounts for each supply shown.

.....

APPENDIX 3

Joint List of Authorities

EU Directives

1. **6th VAT Directive (77/388/EEC) – Article 22.**
2. **Principal VAT Directive (2006/112/EC), Articles 206, 242, 250-261.**

UK Statute

3. **Value Added Tax Act 1994** ("VATA") Sections 19, 24-26, 28, 58-59, 63, 69. 72-77, 80, 81, 83-85, and Schedule 11, paragraph 5.

Statutory Instruments

4. **VAT Regs 1995/2518, Regulations 24-25, 28, 29, 31-32, 34-35, 37-40A.**

Other materials

5. **VAT Information Sheet 08/99 ("08/99").**
6. HM Internal Manual (Assessments and Error Correction).
7. VAT Notice 700/45 – HMRC Error Correction, Public Notice.
8. VAEC6080 Time Limit Implications in Making and Notifying Assessments.
9. De Voil Indirect Tax Service, V5.101, V3.152.

European Cases

10. ***Rompelman v Minister van Financiën*** [1985] 3 CMLR 202 ("Rompelman").
11. *EC v UK* [1988] STC 251.
12. *Garage Molenheide BVBA v Belgium* [1998] STC 126 ("Molenheide").
13. *Marks & Spencer plc v CEC* [2002] STC 1036.
14. ***Marks & Spencer plc v HMRC*** [2008] STC 1408 ("M & S 2").

Domestic cases

15. *International Language Centres v CEC* [1983] STC 394 (QBD).
16. *Joseph Samuel Developments* [1992] VATTR 1 (VAT Trib).
17. ***CEC v Tron Theatre Ltd*** [1994] STC 177 (Ct Sess) ("Tron").
18. ***CEC v Post Office*** [1995] STC 749 (QB) ("Post Office").
19. *R v CEC ex p Kay* [1996] STC 1500 (QBD).
20. *Sunningdale Golf Club v CEC* [1997] V&DR 79 (V&DT).
21. ***Pegasus Birds Limited v CEC*** [2000] STC 91 (CA) ("Pegasus").
22. *Cheesman v CEC* [2000] STC 1111 (Ch).
23. *Kingfisher plc v CEC [2000] STC 992 (Ch).*
24. ***C R Smith Limited v CEC*** *[2003] STC 419 (HL ("C R Smith").*
25. *University Court of University of Glasgow v CEC* [2003] STC 495 (Ct Sess).

26. *Hartwell plc v CEC* [2003] STC 396 (CA).
27. ***Tesco plc v CEC*** [2003] EWCA Civ 1367 ("Tesco").
28. *CEC v Pegasus Birds* [2004] STC 262 (Ch).
29. *CEC v DFS Furniture Co plc* [2004] STC 559 (CA).
30. *Lex Services plc v CEC* [2004] STC 73 (HL).
31. *Courts plc v CEC* [2004] EWCA Civ 1527.
32. ***R (on the application of UK Tradecorp) v CEC*** [2005] STC 138 (QB) ("Tradecorp").
33. ***National Provident Institution v CEC*** [2005] V & DR 297 (V&DT) ("NP").
34. ***BUPA Purchasing Limited & ors v CEC*** *(No 2)* [2007] EWCA Civ 542 ("BUPA").
35. *Chamberlin v HMRC* [2011] STC 1237.
36. *HMRC v Atlantic Electronics Ltd* [2012] STC 931 (UT).
37. ***Benridge v HMRC*** [2012] UKUT 132 (TCC) ("Benridge").
38. *HMRC v Royal College of Paediatrics and Child Health* [2015] STC 1243 (UT).
39. *Area Technology v HMRC* [2016] UKFTT 98 (TC).
40. ***St Martin's Healthcare Limited v HMRC*** [2008] Lexis Citation 757 ("St Martin").
41. *Customs & Excise Commissioners v First National Bank of Chicago* [1998] STC850.
42. ***Customs & Excise Commissioners v Leightons Limited*** 1995 STC 458. ("Leightons").
43. 18746: *Courts plc* [2004] Lexus Citation 847 ("Courts").
44. 19549 ***DCM (Optical Holdings) Ltd*** [2006] Lexis Citation 636 ("DCM").

APPENDIX 4

Appeal 1

IN THE FIRST-TIER TRIBUNAL

Tribunal Centre: EDINBURGH
Reference no: EDN/06/004

DCM (OPTICAL HOLDINGS) LTD

Appellant

-against-

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS

Respondents

STATEMENT OF AGREED FACTS

The Appellant and the Respondents have agreed the following facts.

1. The Appellant makes supplies of dispensed spectacles. That supply consists of a taxable supply of goods - the spectacles and lenses - and an exempt supply of services – the dispensing service.

2. On 30 May 2003, the Appellant gave notice to the VAT and Duties Tribunal that the Appellant and the Respondents had reached an agreement to treat the decision under appeal in appeal EDN/01/0070 as varied in the manner set out in the Respondents' letter of 30 May 2003. In the same notice, the Appellant withdrew appeal EDN/01/0070.

3. Officer William O'Pray of the Respondents' Tax Avoidance and Partial Exemption team and Officer Fiona Calder met with the Appellant's David Moulsdale, Graeme Murdoch and John Stewart and Price Waterhouse Cooper's ("PWC") Mike Bailey and Catherine Jones on 27 October 2003.

PWC were the Appellant's representatives at that time. The meeting was held at PWC's offices at 209 West George Street Glasgow.

4. By letter dated 25 November 2003, PWC sought the Respondents' approval of the Appellant's procedures for disclosing the separate charges it made for the supply of spectacles and the supply of dispensing services to its customers at the point of sale. PWC provided an example of a copy of an order confirmation, a copy of a sales receipt and a copy of a notice which was displayed in the Appellant's stores.

5. Officer O'Pray and Officer Moira Boyle, both of the Respondents' Tax Avoidance and Partial Exemption team, met PWC's Stuart Wallace and the Appellant's Mr Moulsdale and Mr Murdoch on 29 January 2004. The meeting was held at PWC's offices at 209 West George Street, Glasgow.

6. By letter dated 27 February 2004, PWC provided the Respondents with revised SDC documentation. By letter dated 11 March 2004, the Respondents informed PWC of their concerns.

7. By letter dated 4 May 2004, PWC provided a response to the Respondents' concerns regarding the Appellant's operation of SDC. By letter dated 2 June 2004, the Respondents requested answers to further points that they wished answered about the Appellant's operation of SDC.

8. PWC responded by letter dated 5 July 2004. The Respondents provided their further queries to PWC by letter dated 21 July 2004.

9. By letters dated 19 August 2004 and 5 October 2004, PWC provided further information on how the SDC system was being operated and requested confirmation that the Appellant's operation of SDC was approved from 1 February 2004 onwards.

10. By letter dated 12 October 2004, the Respondents advised PWC that there was "still a problem", but solely in relation to contact lens patients on the Appellant's Frequent Replacement Scheme

11. By letter dated 11 February 2005, PWC provided further proposals issue relating to the invoicing of contact lens patients on the Appellant's Frequent Replacement Scheme .

12. By letter dated 22 April 2005, the Respondents agreed to the Appellant's proposed system for the operation of SDC if it had been implemented in all shops. The Respondents stated that they were planning an inspection of the Appellant's records and that they would confirm an implementation date at that time.

13. Officers Boyle and O'Pray visited the Appellant's premises on 31 August and 1 September 2005.

14. Officers Boyle and O'Pray met with the Appellant's Mr Murdoch during the visit of 31 August and 1 September 2005.

15. During the visit, Mr Murdoch provided copies of the Appellant's VAT account to Officers Boyle and O'Pray.

16. By letter dated 7 September 2005, the Respondents provided the details of their calculation of a proposed assessment.

17. On 22 September 2005, Officers Boyle and O'Pray visited the Appellant's premises. Officers Boyle and O'Pray requested the Appellant's figures for dental sales for VAT periods 01/05 and 04/05. The Appellant provided those figures.

18. By letter dated 23 September 2005, the Respondents provided a schedule showing their amended calculation of the proposed assessment.

19. An assessment for £4,360,113 was raised on 30 September 2005. The assessment was issued to the Appellant on 20 October 2005.

20. By letter dated 17 November 2005 the Appellant requested a review of the decision to issue the assessment. By letter dated 25 January 2006, the Respondents upheld their decision to issue the assessment.

21. By Notice of Appeal dated 2 February 2006, the Appellant appealed the Respondents' decision to uphold the assessment.

Appeal 2

IN THE FIRST-TIER TRIBUNAL

Tribunal Centre: EDINBURGH
Reference no: EDN/07/0082

DCM (OPTICAL HOLDINGS) LTD

Appellant

-against-

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS

Respondents

STATEMENT OF AGREED FACTS

The Appellant and the Respondents have agreed the following facts.

1. The Appellant is a national optical retailer and online supplier of related goods. Its business also included the provision of dentistry and cosmetic facial procedures. Parties have been engaged, since at least 2000, in discussions, correspondence and litigation regarding the way in which the Appellant accounts for VAT.

2. The Appellant made supplies of dispensed eyewear (spectacles and contact lenses). The sale of dispensed eyewear includes a taxable supply, the goods, and an exempt supply, a dispensing service.

3. The Appellant's VAT return was received by the respondents on 09 September 2005. The return for 07/05 showed a net repayment due from the Respondents to the Appellant of £319,952.49.

4. For VAT period 07/05, the Appellant operated a method known as Separately Disclosed Charges ("SDC") to identify the consideration for each of the taxable supply of spectacles and the exempt supply of dispensing services.

5. The Respondents considered that the Appellant did not operate the SDC method correctly for period 07/05 as it used a fixed percentage to apportion the

consideration for the taxable and exempt supplies.

6. The Appellant also offered discounts on the supply of dispensed spectacles to its customers.

7. A meeting was held on 21 March 2007 at the Glasgow office of the Appellant's then representative, Price Waterhouse Cooper ("PWC"). The meeting was attended by Graeme Murdoch and Alexandra Buchan, the Appellant's newly appointed Group Tax Manager, Stuart Wallace and Sylvie Cooper of PWC Birmingham and the Respondents' Peter Rae, Willie O'Pray and Moira Boyle.

8. The application of discounts to the supply of dispensed spectacles was discussed between the parties during the meeting of 21 March 2007.

9. By letter dated 19 June 2008, the Respondents informed the Appellant that they accepted that the SDC method could be operated on a fixed percentage basis. However, the Respondents did not repay the amount claimed by Appellant in its return for period 07/05. The Respondents requested a meeting with the Appellant to discuss the treatment of discounts. The Respondents subsequently requested discount figures from the Appellant .. The Appellant has not provided the discount figures for period 07/05.

10. By letter dated 30 July 2008, the Respondents communicated a decision to the Appellant in respect of period 07/05.

11. The Appellant appealed the decision of 30 July 2008 on 1 August 2008 and requested that it be added to an existing appeal under tribunal reference number EDN/07/0082.

12. Appeal EDN/07/0082 had been sisted on 20 June 2007. The sist was recalled on 24 June 2015.

13. On 1 February 2013, the Respondents communicated a decision regarding period 07/05 to the Appellant. The Appellant appealed that decision under tribunal

reference number TC/2014/00132.

14. By letter dated 18 June 2015, the Respondents informed the Appellant of their decision to withdraw all the decisions that were under challenge in appeal EDN/07/0082 with the exception of the decision of 30 July 2008.

Appeals 3 and 5

IN THE FIRST-TIER TRIBUNAL

Tribunal Centre: EDINBURGH
Reference no: EDN/09/0017
&TC/2009/13140

DCM (OPTICAL HOLDINGS) LTD

Appellant

-against-

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS

Respondents

STATEMENT OF AGREED FACTS

The Appellant and the Respondents have agreed the following facts.

1. The Appellant's return for VAT period 01/06 showed a net repayment due from the Respondents to the Appellant of £373,410.71. The return showed output tax due of £442,571.16 and input tax of £ 815,981.87.

2. The Appellant's return for VAT period 07/06 showed a net repayment due from the Respondents to the Appellant of £404,519.89. The return showed output tax due of £562,089.07 and input tax of £966,608.96.

3. A meeting was held on 21 March 2007 at the Glasgow office of the Appellant's then representative, Price Waterhouse Cooper ("PWC"). The meeting was attended by Graeme Murdoch and Alexandra Buchan, the Appellant's newly appointed Group Tax Manager, Stuart Wallace and Sylvie Cooper of PWC Birmingham and the Respondents' Peter Rae, Willie O'Pray and Moira Boyle.

4. The application of percentages splits and discounts to the supply of dispensed spectacles was discussed between the parties during the meeting of 21 March 2007.

On 22 September 2008, Officer Boyle and Alexandra Buchan, the Appellant's Tax Manager, had a telephone conversation.

5. The Appellant send a letter dated 11 December 2008 accompanied with four ring-binders. The ring-binders contained the details of transactions for VAT period 10/05 for all of the Appellant's shops.

6. By letter dated 15 January 2009, Officer Boyle requested that the Appellant provide the figures for discounts for periods 04/04 to 07/05 and 01/06 to the then present.

7. By letter dated 16 January 2009, Officer Boyle informed the Appellant of a decision by the Respondents' in respect of period 01/06.

8. The Appellant appealed the decision of 16 January 2009 in respect of period 01/06 on 20 January 2009. The appeal was assigned to tribunal reference number EDN/09/0017.

9. Appeal EDN/09/0017 was sisted on 22 April 2009.

10. By letter dated 16 July 2009, Officer Boyle informed the Appellant of a decision by the Respondents in respect of period 07/06.

11. The Appellant appealed the decision of 16 July 2009 in respect of period 07/06 on 13 August 2009. The appeal was assigned to tribunal reference number TC/2009/13140.

12. Appeal TC/2009/13140 was sisted on 24 November 2009. By letter dated 1 February 2013, the Respondents issued a further decision in respect of period 01/06. The Appellant has appealed that decision under tribunal reference number TC/2014/00132.

13. By another letter, also dated 1 February 2013, the Respondents issued a further decision in respect of period 07/06. The Appellant has also appealed that decision under tribunal reference number TC/2014/00132.

14. The sists of appeals EDN/09/0017 and TC/2009/13140 were recalled on 24 June 2015.

Appeal 4

IN THE FIRST-TIER TRIBUNAL

Tribunal Centre: EDINBURGH
Reference no: EDN/09/0024

DCM (OPTICAL HOLDINGS) LTD

Appellant

-against-

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS

Respondents

STATEMENT OF AGREED FACTS

The Appellant and the Respondents have agreed the following facts.

The Appellant's return for VAT period 04/06 showed a net repayment due from the Respondents to the Appellant of £423,525.77. The return showed output tax due of £653,284.96 and input tax of £1,076,810.73

The Appellant made supplies of a form of product which it called Careplan. In exchange for consideration, the Appellant undertook to provide after-sale care of spectacles in the event that this was required by the customer.

Supplies of Careplan were fully taxable. However, the Appellant treated supplies of Careplan made during period 04/06 in the same way as supplies of dispensed spectacles – partially taxable and partially exempt.

A meeting was held on 24 January 2008 between the Respondents' Officer Boyle and the Appellant's Mr. Murdoch and Ms. Buchan. It was agreed at that meeting that Careplan was a taxable supply. Following the meeting, the Appellant agreed to provide figures to correct the amount of output tax which had been declared in respect of Careplan.

The figures were provided by the Appellant in a letter dated 12 September 2008. The increase in output tax identified by the Appellant for period 04/06 was £6,318.07. In the letter of 12 September 2012, Ms. Buchan stated that the supply of Careplan had been treated as fully taxable in the Appellant's accounting system since 28 February 2008.

By letter dated 15 January 2009, Officer Boyle informed the Appellant of the Respondents' decision in respect of period 04/06.

The Appellant appealed the decision of 15 January 2009 in respect of period 04/06 on 20 January 2009. The appeal was assigned to tribunal reference number EDN/09/0024.

Appeal EDN/09/0024 was sisted on 22 April 2009.

On 13 December 2000, the Appellant proposed the use of a partial exemption special method ("a Special Method") to calculate its deductible residual input tax. This floor-space Special Method was rejected by the Respondents on 11 November 2002. The Respondents' decision to reject the floor-space Special Method was the subject of an appeal that was concluded on 21 August 2014. The appeal was finally disposed of by the Upper Tribunal issuing a consent order to the effect that the floor-space Special Method proposed by the Appellant was refused effect. The Appellant and the Respondents were able to agree to a consent order as the Respondents had approved the use of a different, mutually acceptable Special Method by the Appellant on 14 August 2014 with effect from 1 February 2002. The deductible residual input tax for period 04/06 will be recalculated using the mutually acceptable Special Method. Therefore, the errors made by the Appellant in carrying out the partial exemption calculations for period 04/06 are no longer of significance.

The sist was recalled on 24 June 2015.

Appeal 6

IN THE FIRST-TIER TRIBUNAL

Tribunal Centre: Edinburgh
Reference no: TC/2014/00132

DCM (OPTICAL HOLDINGS) LTD

Appellant

-against-

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS

Respondents

STATEMENT OF AGREED FACTS

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1. The Appellant is a national optical retailer and online supplier of related goods. Its business also once included the provision of dentistry and cosmetic facial procedures. The Appellant has been registered for VAT since 25 September 1997. In the course of its business, the Appellant makes certain supplies which, for the purposes of the Value Added Tax Act 1994 ("VATA"), are taxable supplies and others which are exempt supplies.

2. The Appellant submitted VAT returns for VAT periods 07/05, 01/06, 04/06, 07/06, 10/06, 01/07, 04/07, 07/07, 09/07, 12/07, 03/08, 06/08 and 12/08. These returns contained claims for repayment of VAT credit. The amount of the Appellant's repayment claims is shown in the following table:

VAT Period		**Amount of Repayment Claim**
07/05		£319,952.49
01/06		£373,410.71
04/06		£423,525.77
07/06		£404,519.89

10/06		£304,146.81
01/07		£246,012.88
04/07		£423,141.45
07/07		£284,583.13
09/07		£279,940.60
12/07		£335,114.77
03/08		£241,805.99
06/08		£565,879.45
09/08		£154,796.73
12/08		£351,154.74

3. By email dated 15 February 2012, the Appellant's representative, Shaun King, provided the Respondents with the Appellant's calculations of output tax due for VAT periods 01/06 to 12/11.

4. The amounts of output tax set out by the Appellant's representative in the email of 15 February 2012 for periods 01/06 to 12/08 are set out in the following table:

Period	**Additional output tax**
01/06	£213,349.80
04/06	£282,401.60
07/06	£257,777.75
10/06	£224,471.04
01/07	£193,384.52
04/07	£279,446.71
07/07	£221,876.57
09/07	£152,417.20
12/07	£206,135.92
03/08	£265,096.98
06/08	£247,375.76
09/08	£225,991.51
12/08	£192,348.01

5. By letter dated 8 August 2012, the Appellant informed the Respondents that it had made dental supplies which should have been treated as taxable supplies.

6. By letter dated 25 September 2012, the Respondents assessed the Appellant for £171,170.84 of tax due for VAT period 09/08.

7. By letters dated 1 February 2013, the Respondents informed the Appellant of their decisions to reduce the Appellant's repayment of VAT credit for VAT periods 07/05, 01/06, 04/06, 07/06, 10/06, 01/07, 04/07, 07/07, 09/07, 12/07, 03/08, 06/08 and 12/08 as follows:

VAT period 07/05 – repayment reduced from £319,952.49 to £144,248.49;
VAT period 01/06 – repayment reduced from £373,410.71 to £131,727.46;
VAT period 04/06 – repayment reduced from £423,525.71 to £151,296.01;
VAT period 07/06 – repayment reduced from £404, 519.89 to £148,872.28;
VAT period 10/06 – repayment reduced from £304,146.81 to £67,927.07;
VAT period 01/07 – repayment reduced from £246,012.88 to £42,459.93;
VAT period 04/07 – repayment reduced from £423,141.45 to £132,114.85;
VAT period 07/07 – repayment reduced from £284,583.13 to £48,504.67
VAT period 09/07 – repayment reduced from £279,940.60 to £98,582.38;
VAT period 12/07 – repayment reduced from £335,114.77 to £136,458.44;
VAT period 03/08 – repayment reduced from £241,805.99 to nil;
VAT period 06/08 – repayment reduced from £565,879.45 to £122,311.00;
VAT period 12/08 – repayment reduced from £351,154.74 to £225,745.42.

8. By letter dated 14 April 2013, the Appellant's VAT representative requested a local reconsideration of the application of the statutory time limits to the decisions of 1 February 2013 and 25 September 2012.

9. By letter dated 26 April 2013, the Respondents informed the Appellant's VAT representative that they were treating the letter as a request for a statutory review.

10. By letter dated 3 June 2013, the Respondents upheld the decisions of 1 February 2013 and the decision to issue the assessment of 25 September 2012.

11. On 30 January 2014, the Respondents made a repayment of £1,500,000 to the Appellant in respect of the periods under appeal. This payment was made on the basis that even if the Respondents are successful in these appeals, the Appellant would still be due a repayment for the periods under appeal.

[159] So what is the correct approach in the instant case? There are number of pointers in the authorities referred to in Part 3 of this judgment, under heading (a) '*Authorities as to the approach to be adopted in analysing the relevant transaction'*. The more significant of such pointers in the context of the instant case seem to me to be these: 1. The resolution of the issue as to the application of para 5 in the instant case depends upon the legal effect of the Clubcard scheme, considered in relation to the words of the paragraph (see *British Railways Board* especially [1977] STC 221 at 223, [1977] 1 WLR 588 at 591 per Lord Denning MR: see [34] above). 2. In considering its legal effect, the entire scheme must be examined (what is the 'entire scheme' for this purpose being objectively determined by reference to the terms agreed) see *Pippa Dee* especially [1981] STC 495 at 501 per Ralph Gibson J: see [33] above). 3. The terms contractually agreed may not be determinative as to the true nature and effect of the scheme (*Reed, see [36] to [38]* above): it is necessary to go behind the strictly contractual position and to consider what is the economic purpose of the scheme, that is to say 'the precise way in which performance satisfies the interests of the parties' (see the Advocate General's opinion in *Mirror Group*, para 27: see [41] above). 4. Economic *purpose* is not the same as economic *effect*. The fact that two transactions have the same economic *effect* does not necessarily mean that they are to be treated in the same way for VAT purposes (see *Littlewoods* especially at para 84 per Chadwick LJ: see [42] above). 5. Equally, the economic *purpose* of a contract (what the Advocate General in *Mirror Group* called the 'cause' of a contract: see para 27 of his opinion: at [41] above) is not to be confused with the subjective reasons which may have led the parties to enter into it (in so far as those subjective reason are not obviously evident from its terms) (see *Mirror Group* para 28: at [41] above). The Advocate General went on to observe (an observation which seems to me to be particularly apt in the context of the tribunal's decision in the instant case):

> "… failure to distinguish between the cause of a contract and the motivation of the parties has been the source of misunderstandings, … and has complicated the task of categorising the contracts at issue.'

APPENDIX 6

Advocate General for Scotland v General Commissioners for Aberdeen City

[22] Section 49 [of the Taxes Management Act] is a provision that is designed to permit appeals out of time. As such, it should in my opinion be viewed in the same context as other provisions designed to allow legal proceedings to be brought even though a time limit has expired. The central feature of such provisions is that they are exceptional in nature; the normal case is covered by the time limit, and particular reasons must be shown for disregarding that limit. The limit must be regarded as the judgment of the legislature as to the appropriate time within which proceedings must be brought in the normal case, and particular reasons must be shown if a claimant or appellant is to raise proceedings, or institute an appeal, beyond the period chosen by Parliament.

[23] Certain considerations are typically relevant to the question of whether proceedings should be allowed beyond a time limit. In relation to a late appeal of the sort contemplated by s49, these include the following; it need hardly be added that the list is not intended to be comprehensive. First, is there a reasonable excuse for not observing the time limit, for example because the appellant was not aware and could not with reasonable diligence have become aware that there were grounds for an appeal? If the delay is in part caused by the actings of the Revenue, that could be a very significant factor in deciding that there is a reasonable excuse. Secondly, once the excuse has ceased to operate, for example because the appellant became aware of the possibility of an appeal, have matters proceeded with reasonable expedition? Thirdly, is there prejudice to one or other party if a late appeal is allowed to proceed, or if it is refused? Fourthly, are there considerations affecting the public interest if the appeal is allowed to proceed, or if permission is refused? The public interest may give rise to a number of issues. One is the policy of finality in litigation and other legal proceedings; matters have to be brought to a conclusion within a reasonable time, without the possibility of being reopened. That may be a reason for refusing leave to appeal where there has been a very long delay. A second issue is the effect that the instant proceedings might have on other legal proceedings that have been concluded in the past; if an appeal is allowed to proceed in one case, it may have implications for other cases that have long since been concluded. This is essentially the policy that underlies the proviso to s33(2) of the Taxes Management Act. A third issue is the policy that is to be discerned in other provisions of the Taxes Acts; that policy has been enacted by Parliament, and it should be respected in any decision as to whether an appeal should be allowed to proceed late. Fifthly, has the delay affected the quality of the evidence that is available? In this connection, documents may have been lost, or witnesses may have forgotten the details of what happened many years before. If there is a serious deterioration in the availability of evidence, that has a significant impact on the quality of justice that is possible, and may of itself provide a reason for refusing leave to appeal late.