[2019] UKFTT 714 (TC)

TC07486

VAT – bespoke retail scheme – whether claim for bad debts can reduce DGT at any time – no - DGT to be adjusted when debt becomes bad or, if not, claim to be made under s 80 VATA or VAT REG 34 – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2018/4810

BETWEEN

DIXONS RETAIL PLC **Appellant**

-and-

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

TRIBUNAL: JUDGE BARBARA MOSEDALE
MARK BUFFERY

Sitting in public at Taylor House, Roseberry Avenue, London on 9 & 10 September 2019

Mr D Garcia and Mr R Harvey, Solicitors, of Mishcon de Reya LLP, for the Appellant

Mr A McNab, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs

DECISION

INTRODUCTION

1. The appellant ('Dixons') is a well-known high street retailer. At all material times, it was the VAT group representative member and it had a bespoke retail scheme agreement ('BRSA') for the purpose of accounting for VAT to HMRC. It was accepted that it paid over VAT to HMRC on sales for which it had received a cheque that was later dishonoured and that in the period 5/12/96 to 6/2/2003 it did not reclaim this VAT.

2. In its VAT return for the period 01/2018 it made an adjustment to reclaim this VAT in the amount of £1,876,141.00. HMRC refused to accept the adjustment. The appellant appeals against that decision.

THE BACKGROUND TO VAT LAW IN ISSUE

Retail schemes

3. Both parties accepted that the EU law (now contained in the Principle VAT Directive ('PVD') but at the relevant time contained in the Sixth VAT Directive ('6VD'), and in particular in what is now Art 395 PVD, permitted the UK to allow retailers to have simplified schemes in order to account for VAT. Art 395 was very general; it authorised Member States to

> 'introduce special measures for derogation [from the PVD] in order to simplify the procedure for collecting VAT…'

4. The VAT Act 1994 ('VATA') Sch 11 §2(6) authorised secondary legislation for retail schemes. That secondary legislation was contained in the VAT Regulations 1995 ('the VAT Regs').

Liability to VAT in a case of non-payment by the customer

5. Both parties were also agreed that the PVD and 6VD gave the appellant a directly effective right to adjust its VAT liability for bad debts: this was the effect of Art 90 when read with Art 73:

> **Article 73**
>
> In respect of the supply of goods or services, other than as referred to in Articles 74-77, the taxable amount shall include everything which constitutes consideration obtained or to be obtained by the supplier, in return for the supply, from the customer or a third party, including subsidies directly linked to the price of the supply.
>
> **Article 90**
>
> In the case of cancellation, refusal or total or partial non-payment, or where the price is reduced after the supply takes place, the taxable amount shall be reduced accordingly under conditions which shall be determined by the Member State.

6. In other words, where a cheque was dishonoured, it was a case of total non-payment and the appellant had a directly effective right to reduce the taxable amount accordingly. While Art 90(2) permitted a Member State to derogate from art 90 in cases of total or partial non-payment, it was common ground that the UK had not done so.

7. The parties were also agreed that while this was a directly effective right, it was not a right without limitations: a Member State could set a reasonable time limit under which a taxpayer could exercise its directly effective right. The question in the appeal was whether the UK government had put a time limit on the appellant's directly effective right to reclaim the output tax which it had accounted for in respect of sales for which the cheques tendered in payment were later dishonoured.

THE DISPUTE

8. Both parties were agreed that the appellant's bespoke retail scheme, in common with any standard retail scheme, required it to account for VAT by reference to its 'Daily Gross Takings' ('DGT'). Standard retail schemes, and Dixon's bespoke retail scheme ('BRSA'), provided that the calculation of DGT was to exclude the value of cheques which had been tendered in payment for supplies which were then dishonoured.

9. HMRC's case was that Dixon's BRSA set out how it was to account for VAT, including offsetting VAT on dishonoured cheques. As Dixons had failed to do this in the period in question, Dixons had over-declared its liability for output tax in the relevant periods. HMRC's position was that Dixons had therefore been entitled to make a claim to recover such over-declared VAT under s 80 VATA; instead it had merely made an adjustment in its 01/2018 VAT return which, said HMRC, it was not allowed to do; and in any event, even if that adjustment was to be treated as a claim under s 80, it had made the claim too late.

10. Dixon's case, in brief outline, was that it accounted for VAT under a retail scheme. The retail scheme was a complete code for VAT accounting. Its retail scheme permitted it to deduct from its DGT the amount of dishonoured cheques and to do so without any express or implied time-limit. That is what it had done in its VAT return for 01/18. It did not matter that the cheques had been dishonoured, and were in respect of supplies which had taken place, many years earlier, as there was no time limit on making the adjustment.

11. Originally, Dixons relied on Reg 38 of the VAT Regs but it has now accepted that Reg 38 was not applicable. Reg 38 applied only where the amount of the consideration was adjusted after the time of the supply. Dixons accepted that the appeal concerned bad debts: the price of the contracts never changed; all that had happened was that the contract price was unpaid as the cheques tendered in payment had been later dishonoured.

12. The parties were also agreed that Reg 34 of the VAT Regs was not relevant. That permitted adjustments to a VAT return within four years where a VAT return had under- or over- stated the taxable person's tax liability. Whether or not Reg 34 could have applied to dishonoured cheques, both parties agreed that the financial limit on claims was exceeded in this case and so it was not applicable.

The history of the dispute

13. Dixons had identified its failure to make adjustments to its DGT in respect of dishonoured cheques no later than 2011; on 23 September 2011, it submitted to HMRC a voluntary disclosure for various amounts of over-declared output tax and underclaimed input tax. The claim included an amount of £1,876,141 in respect of VAT on sales in the periods 01/97 to 01/03 for which cheques had been tendered and which were later dishonoured.

14. The entire claim was rejected as out of time. Dixons lodged an appeal against this rejection (TC/11/8595) which was then stayed behind the *Leeds City Council* case which tested the legality of the three year cap. That litigation was unsuccessful, see[2015] EWCA Civ 1293, and Dixons withdrew its appeal.

15. As stated above, Dixons then reclaimed the £1,876,141 in its VAT return for 01/18 and informed HMRC that it had done so. HMRC rejected the claim by letter dated 25 June 2018. HMRC also issued an assessment for the amount of £1,876,141.

JURISDICTION

16. At the outset of the hearing, the panel raised the issue of the Tribunal's jurisdiction. The appellant had already appealed HMRC's refusal to repay the sum of money in dispute in this appeal and had (in effect) by its withdrawal had its appeal determined against it.

17. This point had not been considered by the parties in advance; HMRC did not suggest the Tribunal lacked jurisdiction. But as the parties cannot confer jurisdiction by agreement, it was agreed the appellant would consider the matter overnight and make representations to the Tribunal the following morning as this was listed as a two day case.

18. Mr Harvey prepared a note on jurisdiction overnight and Mr McNab for HMRC informed us that he (largely) agreed with it. In very brief summary, they were agreed that the Tribunal had jurisdiction. They recognised three doctrines that might result in the Tribunal having no jurisdiction and they were:

(a) Issue estoppel

(b) Cause of action estoppel

(c) Abuse of process

19. They were agreed that issue estoppel does not apply in the Tribunal (see *Littlewoods* [2014] EWHC 868 (Ch) at [190] and its application in this Tribunal in *Spring Capital* [2016] UKFTT 232 (TC)). So the same issue can be raised a second time – as long as there is no cause of action estoppel or abuse of process.

20. We note, in passing, that in any event it is not clear whether there would be issue estoppel. That would depend on the definition of the 'issue': it is probably wrong to see the original proceedings as raising the question whether the appellant was by any means entitled to recover from HMRC the VAT it paid on transactions for which it received dishonoured cheques; rather, the issue in the previous proceedings was whether the appellant was entitled to make a s 80 claim for the VAT on the dishonoured cheques, which was not the issue in these proceedings.

21. Moving on to cause of action estoppel, that estoppel is defined as:

> Cause of action estoppel arises where the cause of action in the later proceedings is identical to that in the earlier proceedings , the latter having been between the same parties,,, and having involved the same subject matter, In such a case that bar is absolute in relation to all points decided unless fraud or collusion is alleged, such as to justify setting aside the earlier judgment. The discovery of new factual matter which could not have been found out by reasonable diligence for use in the earlier proceedings does not,,, permit the latter to be re-opened.
>
> Per Lord Keith in *Arnold v NatWest Bank PLC* [1991] 2 AC 93

22. The appellant's view was that cause of action estoppel did not apply because (a) nothing had been decided in the earlier proceedings and (b) the cause of action was not the same: the earlier cause of action was s80; this cause of action was an adjustment under a BRSA.

23. We did not agree that nothing had been decided in the earlier proceedings. While the appeal was withdrawn by the appellant, it does not follow that the appellant could choose to reinstate those proceedings. On the contrary, the appellant would need leave of the Tribunal to do so. It follows that those proceeding were, therefore, concluded against the appellant. Logically that must be so. Those proceedings remain concluded against the appellant unless and until the appellant successfully applies for them to be reinstated. Presumably the appellant has no intention of making such an application as it accepts that the s 80 claim was out of time and any appeal is bound to be decided against it. That is why it withdrew it.

24. However, we were agreed that these proceedings concerned a different cause of action to those earlier proceedings; the appellant has been assessed for making what HMRC considered to be an unauthorised adjustment to its VAT return in 2018. It was entitled to appeal that assessment to the Tribunal, and to have the Tribunal rule on it. This was so despite the fact that at the root of the adjustment was its much earlier failure to adjust for dishonoured cheques

at the time they were dishonoured, which was the same root cause as (part of) its s 80 claim back in 2011 which was refused by HMRC and gave rise to the appeal which was withdrawn. It was not the same cause of action.

25. However, we thought it might be an abuse of process for the appellant to trigger a second cause of action (by adjusting a current VAT return) over the same issue that had already been decided against it (when it withdrew its earlier appeal). However, we thought in the particular circumstances of this case it was not an abuse because, as already stated, it is not really the same issue. While the root cause of both sets of proceedings was its earlier failure to adjust for dishonoured cheques, the first set of proceedings concerned a s 80 claim. But if the appellant was right and it was able to make retail scheme adjustments without time limit, then its inability to make a s 80 claim without time limit should not prevent it making such an adjustment. In any event, HMRC did not allege that the second proceedings were abusive.

26. We concluded that we had jurisdiction. We move on to consider the appeal.

THE FACTS

Dixon's bespoke retail scheme agreements (BRSAs)

27. It was agreed before the hearing by the parties that Dixons had been a party to a BRSA from 1 September 1999 to 27 April 2002 ('the 1999 BRSA') and had then been a party to another BRSA from 28 April 2002 to 18 August 2012 ('the 2002 BRSA'). Neither party could find any evidence for a BRSA prior to 1 September 1999 but by the time of the hearing HMRC accepted the appellant's contention that it would have been a party to retail scheme throughout the period at issue in this appeal and the applicable retail scheme would have allowed it to exclude the value of dishonoured cheques . The exact provisions in the pre- September 99 retail scheme were unknown but their effect was therefore agreed.

28. Nevertheless, HMRC still complained that, as the appellant's witness (Mr Detain) was unable to give first hand evidence of any period prior to when he joined the appellant in 2014, HMRC did not accept his view that Dixons had had a *bespoke* retail scheme in place before 1 September 1999. It seems to us that the status of Mr Detain's evidence is immaterial as we have no factual dispute to resolve. Moreover, HMRC indicated that they had no questions for Mr Detain and therefore his evidence, in so far it was factual rather than opinion or speculation, was accepted by us. We did not need to resolve whether the pre-September 1999 retail scheme was standard or bespoke.

29. By the time of the hearing, HMRC had also agreed the quantum of the appellant's claim. There was therefore no relevant factual dispute between the parties.

The law on retail schemes

30. As I have said, the appellant's case was that the BRSAs (and standard retail schemes) were a complete code, at least for the calculation of VAT: VAT had to be accounted for on the terms of the BRSA and that excluded the application of other provisions of VATA, said the appellant, such as time limits on adjusting VAT returns. Another way of putting this was that the appellant's case was that the method of making the claim was provided for within the BRSA, so s 80 was simply inapplicable to reclaims under a BRSA. Any time limit for a s 80 claim was therefore inapplicable.

31. The appellant points out that the power to create delegated legislation for standard and bespoke retail schemes was very general and would have allowed HMRC to insert a time limit. The primary legislation was VATA 1994 and it provided:

> **Schedule 11 §2(6)**
>
> (6) Regulations under this paragraph may make special provision for such taxable supplies by retailers of any goods or of any description of goods or of

services or any description of services as may be determined by or under the regulations and, in particular –

(a) For permitting the value which is to be taken as the value of the supplies in any prescribed accounting period or part thereof to be determined, subject to any limitations or restrictions, by such method or one of such methods as may have been described in any notice published by the Commissioners in pursuance of the regulations and not withdrawn by further notice or as may be agreed with the Commissioners; and

(b) for determining the proportion of the value of the supplies which is to be attributed to any description of supplies, and

(c) for adjusting that value and proportion for periods comprising two or more prescribed accounting periods or parts thereof.

32. The legislation was very general; therefore, we accept, and think Mr McNab did too, that the regulations made under it could have included a time limit on making adjustments, after the event, to the amount of VAT accounted for to HMRC. However, the VAT Regs which were the regulations made under this legislation, said nothing about time limits:

67 Retail Schemes

(1) The Commissioners may permit the value which is to be taken as the value, in any prescribed accounting period or part thereof, of supplies by a retailer which are taxable at other than the zero rate to be determined by a method agreed with that retailer or by any method described in a notice published by the Commissioners for that purpose; and they may publish any notice accordingly.

(2) The Commissioners may vary the terms of any method by –

(a) publishing a fresh notice,

(b) publishing a notice which amends an existing notice, or

(c) adapting any method by agreement with any retailer.

33. Our understanding of what the appellant was saying was that, although primary legislation would have permitted the regulations to make provisions for time limits, in practice the VAT Regs only made provision for how the value of supplies was to be calculated. Mr Garcia's position seemed to be that the regulations did not permit retail schemes to include a time limit on the making of adjustments and that therefore there was no time limit. Permitted adjustments to the amount accounted for to HMRC, he said, could therefore be made at any time.

34. Mr McNab's view, if I understood it, was that Regulation 67 (and therefore the retail schemes, both standard and bespoke, made under it) was concerned only with the calculation of output tax; it was not concerned with time limits for making adjustments because adjustments had to be made under the terms of VATA, such as under s 80, which had its own time-limit.

35. Our view is that the Act was wide enough to permit Regulations which imposed a time-limit on adjustments but Reg 67 did not impose a time limit on adjustments but was concerned solely with the valuation of supplies in a prescribed accounting period ('PAP'). We agree with HMRC rather than the appellant on the implications of that: the implication is not that an adjustment to DGT could be made at any time but that it was permitted at one point in time. If the appellant failed to correctly calculate its DGT in any particular period, then it was outside the provisions of the retail scheme and dependant on other provisions of the VAT legislation to make an adjustment in a later period. This was because Reg 69 only permitted a retail

scheme to provide for the calculation of output tax. When utilising other provisions of the VAT legislation to make a late adjustment, it was subject to the applicable time-limits.

36. That conclusion might appear to be sufficient to dispose of the appeal, but we will address the arguments on the BRSA itself as that was the main thrust of submissions made to us.

The terms of the BRSAs

37. Dixon's 1999 BRSA had the following provision on dishonoured cheques:

> 3. ADJUSTMENTS TO DAILY GROSS TAKINGS
>
> Each VAT accounting period, output VAT is reduced by applying the calculated period VAT rate to the value of dishonoured cheques and credit card transactions processed during the period and reducing the VAT control account by this amount. VAT will be accounted for on the full value of any payment subsequently received.

38. Dixon's 2002 BRSA had the following provision on dishonoured cheques:

> 3. HEAD OFFICE ADJUSTMENTS
>
> 3.1 Dishonoured cheques and credit cards
>
> Adjustments will be made by journal through the bad debt system once all attempts to retrieve the debt have failed. This adjustment will only be made in so far as the original payment related to taxable supplies.

39. As we have said, it was agreed that the retail scheme operated by Dixons prior to the 1999 scheme would have had a similar provision.

The VAT notices

40. This was a sensible concession by HMRC. HMRC's published notices of the time required BRSAs to have such a provision. Notice 727/2 (August 1997) *Bespoke Retail Schemes* provided as follows:

> **Appendix A**
>
> **Daily Gross Takings (DGT): checklist**
>
> …..
>
> (e) adjustments:
>
> ……
>
> (vii) *dishonoured or unsigned cheques and debit cards*
>
> You may reduce your DGT for such items from cash customers only, in so far as the payment relates to taxable supplies…..

41. While the organisation and headings of the March 2002 version of this notice changed, the text did not (bar deletion of the aberrant comma) and we do not set it out again. It did not change in the June 2006 version. The text did change for the August 2011 version and it then said:

Dishonoured or unsigned cheques and debit cards	You may only reduce your DGT for such items where they are consideration for sales that have been included within the scheme (DGT)

42. We also note that the June 2006 and 2011 version of the notice (both being after the period in question) contained this statement:

> 2.3 A bespoke retail scheme is a method of determining output tax on retail sales made by large businesses….3.3…[a] bespoke retail agreement

> should…specify how output tax will be calculated in any period covered by the agreement….

43. We could find no express statement that the calculation of DGT was undertaken in order to arrive at an approximation to output tax but it seems clear that that that was the purpose of the calculation of the DGT in all retail schemes. There was also no reference to bad debt relief, but again it seems obvious that there was no requirement for BDR because bad debts were dealt with within any retail scheme by removing them from the DGT.

44. The parties were agreed that both standard retail schemes (contained in HMRC VAT Notices) and bespoke retail schemes permitted taxpayers to calculate their output tax by calculating their DGT. Retail schemes explained how the DGT was to be calculated and what adjustments could be made to the DGT. The parties were also agreed that retail schemes contained no express time limit on when adjustments should be made.

45. HMRC's case was that it was a necessary implication that adjustments should be made when the right to make them became known, so that the permitted adjustment for dishonoured cheques should be made when the cheques were (to the appellant's knowledge) dishonoured. The appellant's position was that there was no express nor implied time limit on its right to adjust for dishonoured cheques so an adjustment for dishonoured cheques could be made at any time.

Was there implied time limit?

46. The appellant said, and I do not think Mr McNab disagreed, that all the standard retail schemes and all BSRAs permit DGT to be reduced by the amount of dishonoured cheques. Both parties thought it implicit that this would require (at least in some cases) for the DGT to be adjusted in a PAP after the PAP in which the sale for which the cheque was tendered in payment took place.

47. We agree with this analysis: a cheque could be taken in the last hour on the last day of a PAP: in such an instance, notice of dishonour could not possibly be received until the next PAP at the earliest. In reality, it was probably normal for most notices of dishonour to be received in a later PAP than the one in which the sale took place. We consider that it is clear that retails schemes and in particular Dixons' bespoke retail schemes permitted an adjustment for a dishonoured cheque in a different PAP to the one in which the sale took place: the crucial question was whether the schemes permitted adjustment in *any* PAP.

48. Mr McNab said that the adjustment was permitted, and only permitted, in the first PAP in which the appellant discovered the cheque had been dishonoured. The appellant did not agree and considered it could make the adjustment in any PAP after it discovered the cheque had been dishonoured.

49. We have set out above the provisions in the appellant's BRSA and also the provisions in HMRC's notice on BRSAs. It seems clear to us that, although none of them contain provisions defining what is a dishonoured cheque, they provide that once the appellant knows a cheque is dishonoured it has the right to make an adjustment in its present PAP. This clearly follows because that is what all the BRSAs and the notice above quoted say: we do not think it was in dispute. It follows that, if the taxpayer did not make that adjustment in the first PAP in which it had the entitlement to make it, its DGT for that period <u>must</u> have been over-stated.

Failure to deduct falls within s 80?

50. The appellant's case is that where it has so over-stated its DGT, there must be some allowance for ex post facto adjustments as EU law requires this. The appellant does not consider s 80 VATA apt to cover claims for dishonoured cheques within a retail scheme; it is agreed that the bad debt provisions do not apply, and therefore it follows, says the appellant, that the right to make later adjustments to the DGT must be integral to the retail scheme. And

(says the appellant) as the retail scheme includes no time limit on adjustments, it must be possible to make them at any time.

51. Is the appellant right to say s 80 is not apt to cover ex post facto adjustments to the DGT? S 80 VATA provided:

> **Credit for, or repayment of, overstated or overpaid VAT**
>
> (1) Where a person -
>
> (a) has accounted to the Commissioners for VAT for a prescribed accounting period (whenever ended), and
>
> (b) in doing so, has brought into account as output tax an amount that was not output tax due, the Commissioners shall be liable to credit the person with that amount.
>
> (2) The Commissioners shall only be liable to credit or repay an amount under this section on a claim being made for the purpose.

52. Mr Garcia pointed out that when Dixons accounted for VAT on the sale for which a cheque was tendered and later dishonoured, it was bringing into account as output an amount that *was* due. Dixons only became entitled to make an adjustment to take the amount out of its output tax sometime later when it learnt that the cheque had been dishonoured.

53. We agree. But HMRC's point was that in the PAP in which Dixons received notice of dishonour, Dixons were entitled to reduce its DGT by the amount of the dishonoured cheque. If they did not do so (as is the case), then HMRC's case is that it is correct to say that Dixons 'brought into account as output tax an amount that was not output tax'. In other words, its DGT, which was its calculation of its output tax, was higher than it was required to be by law because it had failed to make adjustments it was entitled to make in the PAP when it learnt a cheque was dishonoured.

54. We agree with this analysis. It is clear that a retail scheme is a simplification method; it is clear that DGT is an approximation for output tax. When a retailer puts its DGT in its output tax box of its VAT return, it is bringing into account an amount as output tax. We agree with HMRC that when Dixons failed to deduct from its DGT its dishonoured cheques in the first PAP that it knew of the failed payment, then it was bringing into account as output tax an amount that was not output tax due; it was not due because Dixons was entitled to deduct the dishonoured cheques from the DGT.

55. So we conclude that Dixons, once it failed to deduct the dishonoured cheques in the first PAP in which it was entitled to do so, could have make a claim under s 80 for the dishonoured cheques. Dixons accept it cannot do so now: it is too late:

> S 80(4) The Commissioners shall not be liable on a claim under this section –
>
> (a) to credit an amount to a person under subsection (1) or (1A) above…
>
> if the claim is made more than 4 years after the relevant date.
>
> (4ZA) The relevant date is –
>
> (a) In the case of a claim by virtue of subsection (1) above, the end of the prescribed accounting period mentioned in that subsection…….

It is also too late, of course, for Dixons to challenge any rejection of its s 80 claim as its appeal was withdrawn and it can't litigate the same matter twice.

56. There was a second reason given by Mr Garcia for saying that s 80 could not apply to adjustments to DGT. That was based on the Court of Appeal decision in *British Telecommunications plc* [2014] EWCA Civ 433 ('*BT')* which, he said, showed that there was

no room for s 80 to apply where the provision in question (such as a retail scheme) was a complete code.

57. *BT* was a case concerning the bad debt relief ('BDR') provisions. It was not concerned with a retail scheme. The taxpayer claimed BDR going back many years.

58. At [86] the Court of Appeal said that for the period in time when UK law failed to make express provision for BDR, the appellant was able to rely on its directly effective right to bad debt relief: but its claim was time limited by the time limit applicable to claims for restitution.

59. At [87-88] the Court of Appeal said that for the period when UK law did have a BDR provision, but one which included an illegal insolvency restriction, the Appellant was entitled to treat UK law as having a BDR provision *without* the illegal insolvency restriction. That BDR provision did have a time limit on claims, but it was a time limit tied in with the (illegal) insolvency restriction. That time limit was therefore also found inapplicable and treated as if it was not part of the legislation. It seems this was either an application of the principle of conforming interpretation or of disapplication of non-conforming legislation.

60. But it left the BDR provision without any time limit. The Court of Appeal refused to imply a 'reasonable' time limit saying:

> [89]…the application or otherwise of limitation periods to the bringing of claims is a matter of the domestic law of the member state where the claim is brought. HMRC can, in my view, point to nothing in such domestic law that can justify its assertion that the direct enforcement by BT of its EU law rights under the provisions of ss 12 and 22 …would have been subject to the condition that such claims must brought within a reasonable time. In particular, if the domestic legislation had properly implemented [the PVD] but had expressly provided that refund claims could be brought without limit of time, that might have been unusual, but would not have been unlawful….I can see no reason why the implied unlimited time for the bringing of BT's directly effective claims under the s 22 machinery is not equally lawful….

61. HMRC did not suggest that this tribunal should imply a reasonable time limit and so this ruling is not directly an issue in this appeal. But the appellant said it was authority for the fact that a retail scheme, like a BDR scheme, was a 'complete' code that would contain a time limit if there was a time limit. If there was no time limit in the code, then there was no time limit on the exercise of the right. Moreover, the appellant said, as the retail scheme was a complete code , it necessarily meant that s 80 was inapplicable.

62. Certainly, the Court of Appeal in *BT* had said that a s 80 claim could not have been brought instead of a BDR claim:

> [126]…s 80 applies to cases where the taxpayer has brought into account as output tax an amount that was not output tax due. When [the appellant] made its supplies, it accounted for tax which was then due. The subsequent failure of the customer to pay for the supply gave rise to a bad debt, and a possible claim for bad debt relief, which would be for the repayment of all or part of the output tax originally paid by BT. The arising of such bad debt did not, however, mean that the output tax earlier paid was not output tax due within the meaning of s 80. It was and remained so, and the arising of the bad debt did not retrospectively change that.

63. However, it can be seen that the Court of Appeal said this for exactly the same reason why it was correct for Dixons to account for VAT within the DGT on the sale paid for with a cheque that was later dishonoured. There was no error in the PAP in which the sale took place: Dixons was correct to include the sale in its DGT; BT was correct to include the sale in its output tax calculation.

64. But in its ruling, the Court of Appeal said nothing about the PAP in which the debt went bad: in *BT* it was not relevant because BDR leads to an *input* tax adjustment, so in later accounting periods, when the debt went bad, BT had not accounted for an excess of output tax and s 80 on its face could not apply. But that is not true with a retail scheme because retail schemes adjust DGT (ie output tax) when a debt goes bad. A failure to adjust the DGT for a bad debt therefore means that the retailer does over-account for output tax.

65. In conclusion, the reason given by the Court of Appeal for why s 80 does not apply to BDR claims is not applicable to retail schemes. The reason given, contrary to the appellant's case, was *not* that the BDR provisions amounted to a complete code. Nevertheless, the appellant says that it was implicit in the Court of Appeal's decision in *BT* that they saw the BDR provisions as a complete code including a time limit. A retail scheme, says the appellant, should be viewed the same way. Therefore, the lack of time limit in the BRSA and any retail scheme simply meant there was no time restriction on making an adjustment to DGT for bad debts.

66. The appellant accepts that retail schemes and BDR are mutually exclusive; users of retail schemes (as the later versions of Notices state, see notice 700/18 at 2.2) can't use BDR relief because relief for bad debts is inherent in the calculation of DGT. Even if not expressly stated in the legislation, the two schemes are clearly mutually exclusive. Nevertheless, the appellant sees BDR as an analogy to retail schemes: the time limits on calculation of BDR or DGT is, says the appellant, integral in the schemes, so that if there is no express time limit that is because there is no time limit at all. The appellant can only make one claim for a dishonoured cheque, but it can do so at any time.

67. The appellant says HMRC wants to have its cake and eat it: when it suited HMRC in *BT* they argued that BDR was a complete code including a time limit; now they say a retail scheme is not a complete code and time limits are outside it.

68. However, we are unable to extract any such principle from *BT* or the BDR provisions. The BDR provisions were clearly intended to contain a time limit because they contained an express time limit. The only reason the BDR adjustments were permitted without limit of time was because the conforming interpretation/disapplication removed the time limit from the legislation. The same is not true of the retail scheme legislation nor the retail schemes themselves which contained no expressly stated time limit on claims for bad debts. The *BT* case is not authority that a retail scheme was a complete code for reclaiming VAT.

69. So, having considered what the appellant had to say about *BT,* we remain of the view that s 80 VATA was on its face applicable to a late adjustment for dishonoured cheques in a retail scheme. But that conclusion does not address the appellant's case that under the terms of the retail scheme, its adjustment was not late.

Interpretation of BRSA

70. At root the appellant's claim is that the BRSA allowed it to adjust for a dishonoured cheque in any PAP once it knew of it. We do not think that that is a correct interpretation of the legislation as stated above at §§35-36; we also do not think it is a correct interpretation of the BRSA:

> (1) While the notices use the word 'may' adjust DGT, they were using that word in sense that any particular BRSA 'may' include such an adjustment provision; it was not intended to suggest that if such adjustments were permitted by the DGT, they could be made at any time; on contrary once the taxpayer was entitled to make an adjustment, any amount treated as DGT which was in excess of the amount of DGT actually due was not DGT and not due.

(2) In any event, Dixons' BRSA did not say 'may' but actually required an adjustment to be made. An adjustment for dishonoured cheques was clearly required to be made immediately;

(3) It logically follows that if a taxpayer made the adjustment it was obliged to make at the time it was supposed to make it, there could be no implication into a retail scheme that there was permission to make the adjustment at a later stage;

(4) There was no reason to suppose that a retail scheme, standard or bespoke, was intended to be a complete code which included within it provisions for adjustment for when a taxpayer did not calculate DGT as instructed. We have already said that the retail scheme contained nothing but the calculation of DGT. Other provisions of VATA clearly applied to retailers (eg provisions on deduction of input tax, completion of VAT returns); there is no reason why other provisions on adjustments, such as s 80 VAT, VAT Regs 29, 34 and 38 were not also intended to apply. We think they were because there are no equivalent provisions in retail schemes.

(5) While we recognise that the BDR provisions could not be used by retailers operating a retail scheme, that is because retail schemes did cater for bad debts: retail schemes made the BDR provisions superfluous. They did not make other provisions of VATA and the VAT Regs superfluous.

71. We think that the BRSA in question, and in fact all BRSAs and standard retail schemes, provided a method of calculating output tax. Permitted deductions from the DGT were to be made in the PAP in which the entitlement to the deduction arose. BRSAs and retail schemes were not intended to provide for late deductions, which should therefore fall under the normal rules in VATA and the VAT Regs. Retail schemes and in particular Dixons' BRSA had no time limit on deductions because they only provided for timely deductions: out of time deductions had to be made under the normal rules for such late deductions in VATA and the VAT Regs (such as s 80, and Regs 29, 34 and 38).

72. Mr Garcia did say that when HMRC rejected the appellant's adjustment in its 01/18 return they did so on the basis it was too late; whereas if HMRC were right in what they said in this hearing, the adjustment should have been rejected on the basis that it was made under the wrong provision. He is perhaps right on this but it makes no difference: the question for the Tribunal is whether HMRC was right to reject the adjustment, it is not whether they rejected it for the right reason.

73. We consider that HMRC were right to reject the adjustment because the appellant had no right under its BRSA to make an adjustment to its DGT for dishonoured cheques other than in the period in which it was notified that the cheques were dishonoured; and while it did have limited rights to make late adjustments under provisions such as S 80 VATA and Reg 34 of the VAT Regs it had not met the criteria for such adjustments in the case of the bad debts the subject of this appeal.

Retail scheme did provide for errors

74. That is sufficient to dispose of the appeal. But we mention one final point which supports the conclusion which we have reached independently of it. And that point was that Dixons' 2002 retail scheme (see §38 above) did provide for errors. The 2002 BRSA also included this term near the end in one of the sweeping up general provisions:

> In the circumstances that Dixons Group PLC fails to calculate output VAT on retail sales according to the methods and adjustments agreed within this scheme, it shall recalculate the scheme correctly and accordingly claim or pay any VAT overpaid or underpaid as appropriate.

75. Where it refers to 'claim', says HMRC, that must be a reference to a claim under s 80 VATA. The appellant naturally did not agree. But we do agree with HMRC: we consider that this provision clearly indicates that ex post facto adjustments were not to be made by adjusting the DGT but by making a separate claim. The necessary implication was that such a claim must meet the requirements of VAT legislation, such as those of s 80 VATA, VAT Reg 29, 34 or 38. It clearly indicates that the retail scheme was not a complete code: we think that is clear in any event for reasons already given.

76. We acknowledge that the earlier BRSA did not have an equivalent term of general application. The appellant might say that that implies that the position in 2002 changed from the 1999 BRSA and that that therefore implies that it ought to recover all VAT on dishonoured cheques prior to the 2002 BRSA coming into force.

77. We would not agree. For all the reasons we have already given, we think none of the BRSAs permitted ex past facto adjustments to the DGT. We think, on the contrary, that this explicit provision in the 2002 BRSA reflected what was implicit in earlier BRSAs. Indeed, while we recognise that this provision was not referred to in the hearing and therefore we had no submissions on it, we note that the 1999 BRSA under the heading 'non-retail scheme items' dealing with exports and zero rated items, had under the heading 'liability errors' this provision:

> Where the liability of a product for resale was found to be in error, either by incorrect understanding of the liability or through a posting error, leading to a misdeclaration of output tax, the agreement shall not itself restrict the right of either party to obtain a settlement of any tax misdeclared, subject to the normal provisions of VAT law on repayments.

78. It seems likely that this was a forerunner of the general provision in the 2002 BRSA and reflects what we have already found which was that ex post facto adjustments were not catered for within any of the retail schemes. We do not base our decision in whole or in part on this factor, as we did not have submissions on it, but we do consider it consistent with our conclusion.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

79. 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.

BARBARA MOSEDALE
TRIBUNAL JUDGE

RELEASE DATE: 02 DECEMBER 2019