Neutral Citation: [2024] UKFTT 00176 (TC)

Case Number: TC09090

FIRST-TIER TRIBUNAL
TAX CHAMBER

By remote video hearing

Appeal reference: TC/2022/04587

PROCEDURE – application for disclosure – Pre-registration VAT – Regulation 111 VAT Regulations 1995 – whether in that context the Tribunal's jurisdiction in relation to quantification of VAT is appellate or supervisory – appellate – whether disclosure sought was relevant – no – application refused – if supervisory would it have been granted – no

Heard on: 25 September 2023
Judgment date: 27 February 2024

Before

TRIBUNAL JUDGE ANNE SCOTT

Between

ASPIRE IN THE COMMUNITY SERVICES LIMITED

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Michael Ripley of counsel, instructed by VAT Solutions

For the Respondents: Charlotte Brown, of counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs

DECISION

INTRODUCTION

1. This hearing was a Case Management Hearing to address the appellant's application for disclosure from the respondents ("HMRC"). An overview of that application is that in the appellant's words it:

> "…is seeking to obtain the same sort of information which HMRC would typically provide in judicial review proceedings concerning the exercise of an administrative discretion. The Application sets out three categories of items. In short, these relate to the identity of HMRC's decision-makers and contemporaneous evidence of HMRC's reasons for the decision".

2. On 29 April 2022, the appellant's representatives presented a Letter Before Claim for Judicial Review relating to the issues in this appeal. However, the Judicial Review was not pursued following receipt of the Pre-action Protocol Reply ("the Reply") from HMRC dated 20 May 2022.

3. The appeal concerns HMRC's decision dated 29 March 2022 to refuse part of the VAT which had been claimed by the appellant as input tax on its VAT return for the 07/21 quarter. The disputed VAT was incurred both before and after the date of the appellant's VAT registration but the focus of this appeal is on the disputed VAT incurred prior to the registration.

4. The application for disclosure ("the Application") relates only to the pre-registration VAT aspect of the appeal.

5. This appeal is one of seven appeals brought by taxpayers who instructed VAT Solutions and all raise the same issues in relation to pre-registration VAT. The core issue is that of VAT recovery in circumstances whereby the intended first and actual use of assets is for wholly exempt purposes. The other six appeals are currently stayed behind this appeal.

6. With the consent of the parties, the hearing was conducted by video link using the Tribunal's video hearing system. Prior notice of the hearing had been published on the gov.uk website, with information about how representatives of the media or members of the public could apply to join the hearing remotely in order to observe the proceedings. As such, the hearing was held in public.

7. The documents to which I was referred comprised a Bundle consisting of 322 pages and a Supplementary Bundle extending to 215 pages. I had Skeleton Arguments for both parties.

The Issue and the background to it

8. It is common ground that the Value Added Tax Act 1994 ("VATA") does not provide a statutory entitlement to recover VAT on pre-registration costs. In this appeal those costs related to wholly exempt supplies prior to registration.

9. HMRC had exercised its discretion under Regulation 111 of the Value Added Tax Regulations 1995 ("Regulation 111") which permits pre-registration VAT that has been incurred to be treated as input tax. The enabling section for those 1995 Regulations is to be found in section 24(6)(b) VATA which reads:-

> "Regulations may provide—
> …
> (b) for a taxable person to count as his input tax, in such circumstances, *to such extent* and subject to such conditions as may be prescribed, VAT on the supply to him of goods or services … notwithstanding that he was not a taxable person at the time of the supply …" [emphasis added]

10. For completeness, I have annexed at Appendix 1 the full text of Regulation 111 since the version at paragraph 39 in HMRC's Statement of Case is inaccurate as it is the original version (albeit the version in the Bundle is accurate) but the key provision is Regulation 111(1)(a) which reads:

> "(1)…the Commissioners may authorise a taxable person to treat as if it were input tax –
>
> (a) VAT on the supply of goods or services to the taxable person before the date with effect with which he was, or was required to be, registered …for the purpose of a business which either was carried on…by him at the time of such supply or payment.".

11. There had been reference to Regulation 111(2) at paragraph 57 of the Statement of Case. In the Skeleton Argument for the appellant it was argued that that sub-section limits what can be allowed as pre-registration input tax but that none of the VAT in dispute falls foul of that provision. In her oral submissions Ms Brown said that it was common ground that subsections (2) and (4) of Regulation 111 were not relevant. Mr Ripley confirmed in his Reply that that was an error in his Skeleton Argument and he agreed that that sub-section was of no relevance.

12. Accordingly, the dispute between the parties is focussed on the scope and application of HMRC's discretion under Regulation 111(1)(a) because HMRC allowed some but not all of the pre-registration VAT which had been claimed by the appellant. The appellant argues that HMRC has misunderstood the scope of Regulation 111 and misapplied its own policy.

13. Mr Ripley, rightly, argues at paragraph 3 of the Application that the Tribunal has jurisdiction to consider the availability of pre-registration input tax pursuant to section 83(1)(c) VATA notwithstanding the facts that:

(a) such VAT is merely "treated as if it were input tax" and

(b) Regulation 111 is worded as being a discretionary power.

14. Section 83(c) relates to appeals "…with respect to …the amount of any input tax which may be credited to a person". He made no comment on section 83(e) which is an appeal "…with respect to ….the proportion of input tax allowable under section 26…". Whilst HMRC agree that the Tribunal has jurisdiction, at paragraph 29 of their Objection to the Application, HMRC argue that VAT recovery is an appealable matter pursuant to sections 83(1)(c) and (e) VATA.

15. In summary, the appellant contends that HMRC's discretion extends to not only deciding whether to treat pre-registration VAT as input tax but also to the quantification thereof. By contrast, HMRC contend that the discretion in terms of Regulation 111 is limited to deciding whether or not to allow pre-registration VAT to be treated as input tax <u>but</u> the quantification of that is a matter of applying the relevant provisions in VATA, namely sections 24 to 26.

16. The relevance of the dispute is that if the quantification is discretionary then the Tribunal's jurisdiction is supervisory whereas, if it is not, then it is a full appellate jurisdiction. That matters when considering whether, and to what extent, if any, the Application should be granted since the appellant concedes that if jurisdiction is not supervisory, then the Application would fail on the grounds of relevance. The appellant argues that the Tribunal has a supervisory jurisdiction and HMRC disagree.

17. It is not disputed that the Tribunal has no general supervisory jurisdiction.

The Facts

18. The appellant is the representative member of a VAT Group that provides residential care and transitional services for individuals with autism, learning difficulties and behavioural problems.

19. On 11 February 2021, VAT Solutions had written to HMRC explaining that it was intended that there would be a restructuring of the appellant's businesses and an application would be made to register a VAT Group. Using the VAT Group the appellant would seek to make standard rated supplies of care on a non-regulated basis with an entitlement to recover input tax.

20. The appellant was registered for the purposes of VAT from 1 May 2021 which was the effective date of registration. The disputed VAT was incurred both before and after the date of registration. This hearing is concerned only with the pre-registration VAT.

21. Following the restructure of the business the appellant's supplies became both exempt and taxable having previously been wholly exempt pursuant to the welfare exemption set out in Item 9 Group 7 Schedule 9 of VATA. The appellant continues to make some exempt supplies.

22. The appellant started making taxable supplies in the period commencing 1 November 2021 being VAT period 01/22. The appellant submitted an electronic repayment VAT return for the 07/21 period seeking to recover VAT made on purchases made prior to and following the effective date of registration ("EDR"). The return submitted by the appellant had included an apportionment.

23. The total amount claimed as input tax on the return was £31,727.29 and there was no output tax. That was calculated using a use-based methodology with a recovery rate of 76% in relation to capital costs. In a letter dated 21 March 2022, HMRC agreed a figure of 77%.

24. On 22 September 2021, HMRC confirmed that the 07/21 return had been selected for review and requested further information which was provided on 29 September 2021.

The Correspondence

25. Correspondence ensued and, since both parties rely on specific wording in some of that correspondence, I have included a number of quotations.

HMRC's email dated 30 September 2021

26. Officer Riccomini wrote to VAT Solutions stating *inter alia* that:

> "HMRC Internal Manual VIT32000 states that '*the amount of [pre-registration] tax that can be recovered is the amount that would have been deductible had the business been registered at the time the tax was incurred*'. At the time the tax was incurred, the care providers that now make up the VAT group made (sic) would I assume have made wholly exempt supplies and would therefore not be entitled to recover <u>any</u> VAT incurred on their costs. Furthermore, my understanding is that where the first use of pre-registration costs is for exempt purposes, there is no mechanism to treat the VAT as input tax under our discretion to (sic) Regulation 111 but I have not yet made a decision on this as yet. Instead, I am confirming HMRC's position with specialist colleagues and will revert back to you at the earliest opportunity".

The reply from VAT Solutions dated 13 October 2021

27. This reply argued that:

> (a) Neither Regulation 111 nor any other VAT legislation prevented the recovery of pre-registration VAT for a business that was largely exempt prior to registration and partially exempt thereafter.
>
> (b) HMRC's interpretation of their manual VIT32000 was wrong. Instead reliance was placed upon Revenue and Customs Brief 16/2016: Treatment of VAT incurred on assets

used prior to registration ("RCB 16/16") on the basis that it "makes it perfectly clear that HMRC themselves envisage recovery of pre EDR VAT subject to the taxpayers' partial exemption position".

HMRC's letter of 23 December 2021

28. Following a further exchange of correspondence, Officer Riccomini wrote to VAT Solutions explicitly stating that his letter was not a decision letter and inviting further comments. The Officer stated that having discussed matters further with specialist colleagues "some credit is now exceptionally permitted" and under the heading "HMRC's discretion" there was a reference to Regulation 111(1)(a) (see paragraph 28 below).

29. The appellant relies on the following two paragraphs of the letter for the proposition that HMRC were expressly stating that they were using their discretion. Those paragraphs read:-

> "My approach
>
> I have considered whether HMRC may apply discretion to reflect the fact that although goods are used initially for exempt purposes they are also used for both taxable and exempt purposes from the date of registration. I have decided that it is fair and reasonable to allow for some credit on goods purchased close to registration that are used post registration for a mix of taxable and exempt supplies. It also reflects the partial exemption rules applicable to a VAT registered business where, within a partial exemption year, a change of use of goods purchased/VAT incurred arises. It is therefore an equitable approach particular to the circumstances of the type of business carried on and also reflects the business changes that occurred resulting in its requirement to register for VAT.
>
> Therefore, notwithstanding the provisions of Regulation 99(5), **for the purposes of the operation of Regulation 111 only,** the Commissioners are prepared to treat the period 1 May 2020 to 30 April 2021 as a longer period for [the appellant]. Regulation 99(5) is limited by reference to tax incurred after the date of registration but here we are seeking to deal with VAT incurred on goods/services purchased prior to that point."

30. By contrast Ms Brown relied on the paragraph headed "HMRC's discretion" which reads:-

> "HMRC's discretion
>
> Regulation 111(1)(a) gives HMRC the discretion to allow pre-registration VAT to be treated as though it were input tax subject to the normal rules on deduction. To that extent, pre-registration VAT is therefore no different to VAT incurred after the date of registration and can only be recovered where it relates to a taxable supply or what would have been a taxable supply had the entity been registered at the time the costs were incurred. The right to deduct must be determined at the time the liability to pay the VAT is incurred and, where a business incurred VAT in acquiring an asset which is used for making exempt supplies, there is no entitlement to VAT recovery to the extent that those costs are used in the making of exempt supplies."

31. The letter also relied upon RCB 16/16 and referred to the letter dated 13 October 2021. The Officer explained that RCB 16/16 set out HMRC's policy in relation to pre-registration VAT which was stated therein to be "subject to the normal rules of VAT deduction and is therefore only recoverable where it related to a taxable supply". He rejected the argument that it could or should be inferred from the RCB that:

> "…any VAT can be initially treated as eligible for recovery under Regulation 111, and then apportioned, where assets are used first used (sic) in the making of exempt supplies

> or for non-business purposes. The bullet points have been caveated with "*subject to normal rules on VAT deduction".*

I have annexed the relevant text from RCB 16/16 at Appendix 2.

32. The Officer argued that that view was supported by *Wilf Gilbert (Staffs) Ltd v Revenue and Customs* [2007] UKVAT V20170 ("Wilf Gilbert") and the Officer quoted from paragraph 2 which described the changes in the VAT legislation and commented thereon. He then quoted paragraph 10 in full and that reads:

> "It does not seem to me that the enabling provision and the regulation, taken together, can bear the meaning the Appellant claims. It must be assumed that, in granting a discretion to the Commissioners, Parliament intended that they should exercise it in a manner consistent with the objectives of the Sixth Directive and the 1994 Act. Those objectives include the fundamental principle I have mentioned, that input tax may be recovered to the extent that it is attributable to the making of taxable supplies, and no further. (I leave out of account the anomalous 'out-of-scope with recovery' supplies envisaged by section 26(2)(*c*).) Moreover, it seems to me that paragraph (2)(*a*)(ii) can properly be read to mean that where goods have been partially consumed—that is, used for the purpose of making supplies—before registration, even if they are still available for that purpose after registration, the input tax incurred in their acquisition may not be deducted 'save as the Commissioners may otherwise allow'—'otherwise' being apt to permit recovery of a proportion of the tax."

33. The Officer went on to say that "…under Regulation 111, HMRC can use its discretion to allow a fair and reasonable repayment of VAT in respect of assets purchased prior to registration that were originally used for making wholly exempt supplies but that will later be used to make both taxable and exempt supplies…".

The letters of 14 January and 7 March 2022

34. On 14 January 2022, VAT Solutions, on behalf of one of the appellants in one of the appeals stayed behind this appeal, wrote to HMRC's Officer Pugh replying to a letter which apparently raised the same points as the letter dated 23 December 2021 in this appeal.

35. It was argued that HMRC's approach wrongly proceeded on the basis that HMRC had a "…wide-ranging discretion under Reg. 111 to limit the recovery of pre-registration input tax even where the relevant purchases are to be used (in part) for making taxable supplies". They stated that HMRC had argued that that was because HMRC thought that *Wilf Gilbert* "suggests that Reg. 111 gives HMRC a discretion which must be exercised in accordance with the EU VAT Directives.".

36. VAT Solutions then cited *Nidera Handelscompagnie BV v Valstybinė mokesčių inspekcija prie Lietuvos Respublikos finansų ministerijos* Case C-385/09 ("Nidera") and a number of other CJEU decisions which post-dated *Wilf Gilbert* concluding that:

> "Accordingly, there is no longer any doubt that HMRC do not a (sic) have far-reaching discretion to limit the input tax which would have been deductible had it been occurred (sic) after the effective date of registration ("**EDR**") by arbitrarily limiting it to goods which have been acquired within a short period prior to the EDR. [The appellant in question] has an entitlement under EU law to a deduction for input tax and your approach is not permissible under the PVD."

37. The letter went on to argue that HMRC's proposed approach was directly contrary to the published policy in RCB 16/16 and the phrase "subject to the normal rules on VAT deduction" therein did not justify the limitations which HMRC had placed on the right to input tax. Rather,

that wording was "apposite to prevent a deduction of input tax where no input tax would ordinarily be available…". RCB 16/16 was said to be the product of detailed discussions with taxpayers and their representatives.

38. A number of arguments based upon RCB 16/16 were then advanced about recovery of VAT.

39. On 7 March 2022, VAT Solutions wrote to HMRC in regard to this appellant, referenced that correspondence and stated that there seemed to be an impasse and an appeal would be made to the Tribunal.

HMRC's letter dated 21 March 2022

40. On 21 March 2022, HMRC replied to the letter of 7 March 2022. That letter again stated that it was not a decision. Officer Riccomini stated:

> "I have now considered the comments you have made, liaised with colleagues including Nathan Pugh and my conclusions are that under SI 1995/2518 Regulation 111 there is no specific provision for the recovery of residual input tax. Pre-registration VAT is only recoverable if at the time it was incurred it related to taxable supplies (or what would have been). However, the Regulation does allow HMRC discretion to allow some apportionment where it is fair and reasonable to do so."

41. He distinguished the appellant's circumstances from those of the other taxpayers who were represented by VAT Solutions on the basis that, unlike the appellant, none of them had been making exempt supplies prior to registration. He argued that therefore *Nidera* and the other cited cases fell to be distinguished on the facts.

42. He again relied upon *Wilf Gilbert* and also cited two other cases that have not been produced in the Bundles.

43. He disagreed with VAT Solutions' analysis of RCB 16/16 stating that:

> "…HMRC does not agree that it can be inferred from the RCB that businesses are entitled to import all the VAT incurred on costs prior to registration as input tax where those costs were used to make wholly exempt supplies."

44. He expanded on that stating that input tax is not ordinarily available where, when the tax was incurred there was no intention to make taxable supplies and the supplies were, in fact, wholly exempt. He said that it was important to note the terms of HMRC's guidance, VAT Input Tax 32000: How to treat input tax: pre-registration, pre incorporation and post deregistration claims to input tax under regulation 111 ("VIT32000") and highlighted, as he had in his email of 30 September 2021, the following:

> "The amount of tax that can be recovered is the amount that would have been deductible had the business been registered at the time the tax was incurred."

(In their Statement of Case, at paragraph 41, HMRC included not only that sentence but also the following two sentences:

> "You should consider partial exemption and non-business restrictions when you calculate the amount of tax to claim. Please note that the partial exemption *de minimis* limit does not apply to VAT incurred pre-registration.")

45. He pointed out that had the appellant been VAT registered in the years of the claim it would have had no deductions as it was making wholly exempt supplies and had no intention of making taxable supplies. He reiterated that HMRC would use their discretion to allow some recovery.

46. He then set out a revised methodology which he considered to be a more fair and reasonable mechanism to calculate the recoverable element of VAT on the costs relating to wholly exempt supplies.

HMRC's decision letter dated 29 March 2022

47. As requested by VAT Solutions, Officer Riccomini issued a decision letter effectively denying a large part of the repayment claim of £31,727.29 in the 07/21 return. The adjustments made to the return reduced the VAT reclaimed on inputs in Box 4 to £7,138. He enclosed a further copy of the letter of 21 March 2022.

48. Mr Ridley relied on the fact that the Officer stated that:-

> "In my letter to you of 21 March 2022, although I explained that there is no statutory requirement to do so where pre-registration costs are first used to make wholly exempt supplies, I then set out that it is appropriate in these specific circumstances, by nature of the assets concerned, to use the discretion afforded to HMRC under SI 1995/2518 Regulation 111, to treat some of the tax incurred as recoverable input tax."

Mr Ridley emphasises the word "some" in the last sentence.

49. Under the heading "My Decision" the officer went on to explain that:

> "There is no statutory entitlement to allow recovery of VAT on pre-registration costs where those costs were first used to make wholly exempt supplies. However, Regulation 111 allows HMRC to exercise its discretion where it is reasonable to do so and to permit pre-registration VAT to be treated as input tax. I have set out, in my letter of 21 March 2022, the basis of the apportionment I have deemed appropriate…"

Mr Ridley emphasises the words "deemed appropriate" in the last sentence.

The Grounds of Appeal

50. The appellant appealed to the Tribunal on 22 April 2022.

51. There are three Grounds of Appeal, the third Ground of which applies to post-registration input tax and thus is not relevant in these proceedings.

52. In relation to pre-registration, the appellant appealed HMRC's decision on the following grounds, namely:-

> (1) HMRC have no general discretion to refuse to allow the recovery of pre-registration input tax.
>
> (2) HMRC have misapplied Regulation 111 and misapplied their public policy in relation thereto.

53. In relation to the first Ground of Appeal, the appellant relied firstly on paragraphs 41 and 44 of *Nidera* arguing that there was a *prima facie* entitlement to recovery of input tax on goods or services used for the purposes of making taxable supplies where there was a VAT invoice, and then secondly on paragraph 51 which reads:

> "51. It follows from the foregoing that a taxable person for VAT purposes cannot be prevented from exercising his right of deduction on the ground that he had not been identified as a taxable person for those purposes before using the goods purchased in the context of his taxed activity."

I observe in passing that there is no mention of invoices in those paragraphs but that is not material.

54. Secondly, at paragraph 11 of the Grounds of Appeal the appellant argued that:-

> "In reliance on the UK rules and, in particular, Regulation 111 of the Value Added Tax Regulations 1995, HMRC's decision wrongly proceeds on the basis that there is a wide-ranging discretion to allow (or disallow) however much input tax appears to them to be 'fair'. To the extent that there is any such discretion, it cannot operate to deny a taxpayer input tax to which it would be entitled under EU law."

55. In summary, in the first Ground of Appeal the appellant challenges the scope of HMRC's discretion in terms of Regulation 111 on the basis of EU law principles pursuant to the Principal VAT Directive (the "PVD").

56. In relation to the Second Ground of Appeal, in the Skeleton Argument for this hearing, Mr Ripley referenced some paragraphs in the Grounds of Appeal and argued that the appellant:

> "….challenges the manner in which HMRC have purported to exercise their discretion, including that they have applied it in a way that frustrates the purpose of the provision (paragraph 18), they have fettered their powers by reference to a mistaken understanding of the scope and purpose of any discretion (paragraph 19) and that HMRC's reasoning appears to contain faulty assumptions and various other errors (paragraph 20). Thus, the Grounds of Appeal expressly challenge not just the outcome of HMRC's decision, but the factors which HMRC took into account".

HMRC had argued that it was not their decision making process that was under appeal but rather the conclusion or outcome.

57. Those paragraphs in the Grounds of Appeal did not define the purpose of Regulation 111. Paragraphs 13 and 14, which are not referred to in the Skeleton Argument, and nor were they referred to in oral submissions, relied on RCB 16/16 for the premise [at 13] that Regulation 111 was "specifically designed to avoid a detailed consideration of the extent to which goods or services were used prior to the EDR for making supplies which are not subject to VAT". At [14] it was argued that the Regulation "intends that full recovery [of VAT] will be possible". Paragraph 16 advanced a similar argument in relation to VIT32000.

58. In summary it is argued that: "Properly, understood, (sic) Regulation 111, RCB 16/16 and VIT32000 mandate full recovery of VAT on purchases made prior to registration subject only to an appropriate partial exemption method" [20d].

The parties' arguments relating to the Statement of Case

59. Both parties made reference to the Statement of Case.

The appellant

60. Mr Ridley argued that it confirmed the basis of the decision made by HMRC. In particular, he relied on paragraphs 4, 27 and 33 which read:-

> "4. The Respondents took the view that in relation to pre-registration recovery:
>
> i. There is no statutory entitlement to allow recovery of VAT on pre-registration costs where those costs were first used to make wholly exempt supplies. However, Regulation 111 of the Value Added Tax Regulations 1995 SI 1995/2518 allows HMRC to exercise its discretion where it is reasonable to do so and to permit pre-registration VAT to be treated as input tax.
>
> ii. The Respondents considered it appropriate to exercise their discretion on the particular facts of this case and allowed some recovery with regards to pre-registration costs on an apportioned basis where they were to reflect the cost components of both taxable and exempt supplies from the effective date of

registration for VAT. No recovery was permitted with regards to pre-registration services as they were not of an enduring nature.

27. Within the Respondents' letter dated 21 March 2022, it was confirmed that the Respondents would use the discretion provided by … Regulation 111 *'in these particular circumstances to allow some recovery on assets that whilst used for exempt purposes prior to registration, have enduring use as cost components of exempt and taxable supplies from the date of registration.*'

33**.** The Tribunal is asked to decide:

1) Whether the Respondents have correctly applied Regulation 111 in exercising their discretion and permitting partial recovery of pre-registration VAT incurred in relation to wholly exempt supplies;

2) In exercising this discretion, whether the Respondents have reasonably apportioned and quantified the recoverable VAT …".

61. Mr Ridley argued that in all three of those paragraphs, discretion is at the centre of HMRC's argument and therefore the Tribunal will have to review the exercise of that discretion.

62. He conceded that at paragraph 38 of the Statement of Case, HMRC had quoted the statutory provisions in regard to partial exemption, being sections 26(1) and (2) VATA.

63. Lastly, he argued that in HMRC's contentions from paragraph 45 onwards of the Statement of Case, *ex facie* HMRC defend the exercise of discretion based on policy and guidance. Paragraph 45 set the tone for that and reads:

"On the facts of this case, HMRC considered that it was fair and reasonable to exercise its discretion and allow recovery of some of the VAT costs incurred in relation to wholly exempt supplies pre-registration when they became a mixture of taxable and exempt supplies post-registration. This is consistent with the treatment of VAT registered businesses that are partially exempt."

HMRC

64. Ms Brown stated that the last sentence of paragraph 4(i) was precisely what HMRC were arguing and that paragraph 4(ii) had been included to address the argument that only some of the costs had been allowed.

65. Paragraph 33 simply referenced the appellant's Grounds of Appeal.

The Application

66. On 10 February 2023, 11 days after Officer Riccomini's witness statement was served, the appellant informally asked HMRC for disclosure in the following terms:-

"Please provide us with the following:

a. A list of all HMRC officers with direct involvement in taking the decision in relation to pre-registration input tax or who were consulted in connection with that decision, including any specialist input provided to Officer Riccomini.

This will enable us to understand who were all the decision maker(s) (sic). We are aware that Officer Riccomini took advice from specialist colleagues and yet his witness statement does not explain the extent of their involvement.

b. Copies of all documents that relate to or which record the process by which HMRC reached the decision to limit pre-registration input tax in this way. These should include, but not be limited to, any notes made by officers and/or internal communications between officers which relate to the decision or record the process by which the decision was reached.

c. Copies of all documents (whether published or unpublished) that record the factors that HMRC took into account in reaching the decision apart from those stated in Officer Riccomini's statement at paragraphs 18-19. This should include in particular any other guidance and/or policy documents, whether published or unpublished."

67. For completeness, I have annexed at Appendix 3 the text of the two paragraphs from the Officer's witness statement but in summary the documents referred to were:

(i) Section 25 VATA,

(ii) Regulation 111,

(iii) HMRC's internal guidance VIT32000 and PE31300,

(iv) the case law cited in the pre-decision letter dated 21 March 2022, and

(v) RCB 16/16.

The guidance PE31300 is HMRC's published internal manual entitled VAT Partial Exemption Guidance.

68. The Application itself is in identical terms save only that the second paragraph in the informal request, which is an explanation, was not included in the information or documents sought but is referred to in the explanation of the relevance of the Application.

69. HMRC responded referring to Rule 27 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (as amended) ("the Rules"), stating that it is the default position, and questioned why the appellant sought disclosure outside of the usual disclosure regime.

70. The appellant then replied relying upon Judge Greenbank in *Janet Addo v HMRC* [2018] UKFTT 530 (TCC) ("Addo"). At paragraph 63 he had stated that:

> "63. It is also clear that, subject to the matters to which I refer below, it should ordinarily be regarded as fair and just for a party to be entitled to review documents held by the other party or to which the other party has access which are relevant to the issues in the case, even if those documents are not documents on which the other party itself intends to rely (and so the documents are not within FTR rule 27) and even if they are detrimental to the other party's case."

The appellant asked HMRC to explain why no disclosure was offered and the HMRC litigator undertook to take instructions.

71. On 2 March 2023, HMRC replied arguing that the information and documents sought were not relevant because:-

> "Whilst HMRC exercised its discretion (in the Appellant's favour) in applying regulation 111, it is the outcome, rather than the process which is under appeal. As this would fall within the FTT's appellate (not supervisory) jurisdiction, the requested disclosure is not relevant to the legal question before the FTT."

72. The formal Application was served on 16 March 2023. In summary, the appellant seeks information about the identity of HMRC's decision makers and contemporaneous evidence of HMRC's reasons for the decision.

73. The information sought is broadly that which would be sought in judicial review proceedings concerning the exercise of an administrative discretion. It is common ground that bringing an appeal is the appropriate route to challenge the decision in this case, rather than judicial review.

74. It is argued for the appellant that if the dispute had been addressed by way of judicial review, HMRC's duty of candour would have meant that the materials sought would have been produced, and, based on paragraph 32 of *Karoulla t/a Brockley's Rock v HMRC* [2018] UKUT 255 (TCC) the same principle applies in the Tribunal. That paragraph reads:

> "In any event, in the normal course HMRC should have disclosed these source documents, not only to Karoulla but also to the FTT, in accordance with its duty of candour. It is trite that the duty of candour is a concept derived from and developed in the area of judicial review. However, as HMRC will be well aware, it is long established practice that HMRC usually accept that the duty applies to them in normal tax appeals. If any evidence of that is needed, the normal practice is referred to clearly in the recent decision in *Gardner-Shaw UK Ltd & others v HMRC* [2018] UKFTT 313 (TC) at paragraph [27]:
>
> > '27. HMRC had accepted in the hearing before the Upper Tribunal, as they normally did in all cases, that they had a duty of candour in the Tribunal and in particular that, even if the Tribunal only ordered disclosure of documents on which each party relied, HMRC would disclose all relevant material held by them.'"

(In the Application, the appellant relied on the FTT decision in *Karoulla* but in the Skeleton Argument referred to the Upper Tribunal decision).

Legal Framework for disclosure

75. I was not referred to the case but I agree with Judge Staker at paragraphs 45, 56(1) and (5) and 57 in *Royal Bank of Scotland Group plc v HMRC* [2020] UKFTT 321 (TC) where he said:

> "45. On general principles, where a party makes an application for directions imposing disclosure obligations on another party, the burden is on the party making the application to persuade the Tribunal that there are sufficient reasons for granting it. It is not for the other party to persuade the Tribunal that the application should not be granted.
>
> …
>
> 56… an applicant for directions for specific disclosure will need to satisfy the Tribunal:
>
> > (1) that the material in respect of which specific disclosure is sought is necessary to deal with the case justly: this will be the case if the party applying for specific disclosure will suffer an unfair disadvantage (or the other party an unfair advantage) in the litigation as a result of lack of access to the material; that is, it is not enough that the material is merely *relevant* to the case or that the material would fall to be disclosed under a regime of standard disclosure
> >
> > …
> >
> > (5) …. that the proposed order for specific disclosure would be proportionate to the importance of the case, the complexity of the issues, the importance of the material sought to a just determination of the issues in the case, and the anticipated time and costs required to comply with the proposed order.

> 57. The Tribunal considers that an example of material that satisfies criterion (1) in the previous paragraph would be material which if put in evidence could potentially affect the outcome of the case in some material respect."

The Rules

76. The starting point is the Rules. As Judge Walters made clear in *Ebuyer v HMRC* [2014] UKFTT 921 (TC):- "Litigation in this tribunal is intended to conform to a different model from litigation in the High Court and the Rules establish the framework within which litigation in this tribunal is to be carried on."

77. Rule 27 is the provision in the FTT Rules for disclosure in standard and complex cases. That is the disclosure regime that applies in this case, unless and until, and except to the extent that, the Tribunal directs otherwise.

78. The Tribunal has the power pursuant to Rule 5(3)(d) to direct otherwise, and to impose broader disclosure obligations. The Tribunal does also have powers pursuant to other provisions of the Rules (for instance, under the more general provisions in Rule 5(1) and (2) and Rule 16) to expand or restrict the disclosure obligations of a party.

79. For the Tribunal to exercise its power to direct disclosure going beyond the requirements of Rule 27, which is what the appellant is seeking here, the Tribunal must be persuaded that it is appropriate to depart from the default rule in Rule 27. I describe it as the default rule, not least because Sales J, as he then was, at paragraph 24 of *HMRC v Ingenious Games* [2014] UKUT 62 (TCC) stated that Rule 27 was "the usual default rule which applies in tax tribunals". It is.

80. However, in *HMRC v Smart Price Midlands Limited* [2017] UKUT 465 (TCC), the Upper Tribunal dismissed an appeal against a decision of Judge Sinfield in the First-tier Tribunal ("FTT") and, at paragraph 73, quoted from that FTT decision as follows:-

> "[22] While the disclosure provided for by rule 27(2) may be appropriate in many appeals, there is no presumption that it must apply in all Standard and Complex cases. Whether the rule is varied in any particular appeal, as the opening words of rule 27(2) make clear it can be, is a matter for the discretion of the FTT in that case. Any such direction is made under rule 5 of FTT Rules which provides that the FTT may, among other things, make directions in relation to the conduct of proceedings and the provision of information and documents. The use of the word "may" in Rule 5 means that it is also a matter of judicial discretion whether to make such directions. The power of the FTT to make directions under rule 5 of the FTT Rules is a case management power which must be exercised in accordance with the overriding objective in rule 2 of the FTT Rules which is to enable the tribunal to deal with cases fairly and justly."

81. Rule 2 reads:-

> **2.—Overriding objective and parties' obligations to co-operate with the Tribunal**
>
> (1) The overriding objective of these Rules is to enable the Tribunal to deal with cases fairly and justly.
>
> (2) Dealing with a case fairly and justly includes—
>
> (a) dealing with the case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties;
>
> (b) avoiding unnecessary formality and seeking flexibility in the proceedings;

(c) ensuring, so far as practicable, that the parties are able to participate fully in the proceedings;
(d) using any special expertise of the Tribunal effectively; and
(e) avoiding delay, so far as compatible with proper consideration of the issues.

(3) The Tribunal must seek to give effect to the overriding objective when it—

(a) exercises any power under these Rules; or
(b) interprets any rule or practice direction.

(4) Parties must—

(a) help the Tribunal to further the overriding objective; and
(b) co-operate with the Tribunal generally.

82. Rule 5 of the Rules relevantly provides:-

"(1) Subject to the provisions of the 2007 Act and any other enactment, the Tribunal may regulate its own procedure.

(2) The Tribunal may give a direction in relation to the conduct or disposal of proceedings at any time, including a direction amending, suspending or setting aside an earlier direction.

(3) In particular, and without restricting the general powers in paragraphs (1) and (2), the Tribunal may by direction—

…

(d) permit or require a party or another person to provide documents, information or submissions to the Tribunal or a party; …".

83. Rule 27 of the Rules relevantly provides:-

"(1) This rule applies to Standard and Complex cases.

(2) Subject to any direction to the contrary, within 42 days after the date the respondent sent the statement of case (or, where there is more than one respondent, the date of the final statement of case) each party must send or deliver to the Tribunal and to each other party a list of documents—

(a) of which the party providing the list has possession, the right to possession, or the right to take copies; and

(b) which the party providing the list intends to rely upon or produce in the proceedings.

(3) A party which has provided a list of documents under paragraph (2) must allow each other party to inspect or take copies of the documents on the list (except any documents which are privileged)."

84. Rule 16 of the Rules permits the Tribunal to make an order for disclosure that goes beyond Rule 27 but Rule 16 must be read in the context of Rule 2(3) so any decision on disclosure must be proportionate.

Case Law on disclosure

85. Mr Ridley correctly stated that the issue of disclosure was considered by the Upper Tribunal in *McCabe v HMRC* [2020] UKUT 266 (TCC) and he placed particular reliance on

paragraphs 25, 28 and 33. Those paragraphs should be read in context and I have therefore included paragraphs 23 and 24. Those paragraphs read:-

> "23. Second, the FTT must exercise its discretion to order additional disclosure under Rule 16 so as to give effect to the overriding objective: Rule 2(3)(a). That objective of dealing with a case fairly and justly includes dealing with it in a way which is proportionate.
>
> 24. Third, the approach of the FTT to disclosure is not determined by the Civil Procedure Rules ('CPR'). Rule 27 of the FTT Rules states that a party must (amongst other things) produce a list of documents, which the other party may inspect, which that party intends to rely upon or produce in the proceedings. Importantly, that rule applies to both standard and complex cases: Rule 27(1). We have already observed that Rule 16 gives the FTT power to order the production of any document in a person's possession or control which relates to an issue in the proceedings. In *E Buyer UK Ltd v HMRC* [2017] EWCA Civ 1416, one of the issues was whether it was an error of law by the FTT not to have displaced Rule 27 with what the Court of Appeal called the broader 'CPR-style disclosure'. In determining that the FTT had not so erred, Sir Geoffrey Vos C stated, at [94]:
>
>> 'It is true that this is an important case, but the 2009 Rules were made for important as well as simple cases. The plain fact is that the procedure is different in the F-tT.'
>
> 25. Fourth, relevance is to be assessed by reference to the issues in the case and the positions of the parties. As the Court of Appeal succinctly observed in *HMRC v Smart Price Midlands Ltd and another* [2019] 1 WLR 5070, at [40]:
>
>> '40. Disclosure of documents is not an end in itself but a means to an end, namely to ensure that the tribunal has before it all the information which the parties reasonably require the tribunal to consider in determining the appeal. It is only one step in the overall management of the case which should, as the appeal progresses towards a substantive hearing, identify and if possible narrow the issues between the parties. The scope of the issues in contention at the trial depends in part on the legal test to be applied by the tribunal and in part on the parties' respective positions as to which elements of that test are in contention.'
>>
>> …
>
> 28.… a degree of caution must be exercised in drawing from the decision [the Upper Tribunal in *Ingenious Games*] principles of general application regarding disclosure. The guidance we have referred to in the subsequent Court of Appeal decisions in *E Buyer* and *Smart Price Midlands* is of broader general application. Having said that, we note that HMRC accepted as correct the Tribunal's statement that, in a case such as this appeal [which dealt with residence in the context of a double taxation treaty], it is appropriate for a party to see documents held by its opponent which are relevant to the opponent's <u>pleaded</u> case, in order to see whether they undermine that case." (Emphasis added by Mr Ridley)
>
> 33. … in considering an application for disclosure the test of whether a document is potentially probative of one of the issues is a sensible approach. As the Court of Appeal observed in *Smart Price Midlands*, the test must be applied by reference to the issues in the case. This does not mean the issues in some abstract or generalised sense, but the issues and asserted facts as identified from each party's <u>pleaded</u> case. Those will be the issues which must be determined by the FTT. (Emphasis added by Mr Ridley)"

86. In response to HMRC's suggestion that some of the documents sought could not be produced because of their sensitivity, Mr Ridley relied upon Judge Greenbank in *Addo* at paragraph 82 where he said:

> "I have not had sight of the relevant documents or information and so I am in no position to determine the extent to which they may or may not be regarded as 'sensitive'. While I do, of course, take into account the nature of the documents in determining their likely relevance to the issues in this case and the proportionality of ordering or directing their disclosure, my concern with the general proposition is that 'sensitivity' might easily become a cloak to disguise an unwillingness to disclose documents that are unhelpful to a party's case. That is not a good reason for non-disclosure. For that reason, I do not accept the general proposition that the alleged sensitivity of the documents – falling short of circumstances in which a claim for public interest immunity could be made or in which disclosure may of (sic) result in a breach of confidence - is itself a particular factor that I should take into account.".

87. In relation to disclosure generally, Mr Ridley pointed out that at paragraph 61 in *Mitchell and another v HMRC* [2023] EWCA Civ 261, Lady Justice Whipple said that Rule 27(2) is "only the starting point for disclosure, but the rule is flexible and can be varied in appropriate circumstances to meet the fairness and justice of the case". She went on to say that that point had also been made in *HMRC v Smart Price Midlands Limited and another* [2019] EWCA Civ 841 ("Smart Price CA").

88. I observe that she also said that:

> "In many cases before the FTT that starting point is adequate as an end point too, because HMRC and the taxpayer already have all the documents which relate to the dispute. But this case was different…".

89. Mr Ridley also relied upon Lady Justice Rose, as she then was, in *Smart Price CA* at paragraph 53 where she said in relation to the Alcohol Wholesaler Registration Scheme ("AWRS") that:

> "I agree with the conclusion of the FTT and Upper Tribunal in these appeals that where HMRC have access to many documents of which the applicant may be unaware, it is vital that the appellant trader have access to any exonerating material in the hands of HMRC. These cases are different from the more common appeals against a tax assessment where most if not all the material considered is provided to HMRC by the tax payer."

90. Ms Brown also relied on *Smart Price CA* but at paragraph 40 which, of course, was quoted at paragraph 25 in *McCabe.*

91. She too relied on *McCabe* but at paragraph 37 where the Upper Tribunal said:

> "On an application for disclosure, the tribunal will need to consider the degree of potential relevance of the document and whether there is a need for disclosure in order to enable a fair determination of the issues to take place".

92. Ms Brown noted the appellant's reliance upon *Addo* in support of its Application but responded pointing to paragraph 29 of *McCabe* which reads:

> "29. Mr Hickey also relied on various statements as to the principles applicable to disclosure in *Tower Bridge GP Ltd v HMRC* [2016] UKFTT 54 (TC) and *Janet Addo v HMRC* [2018] UKFTT 530 (TC). These were both FTT decisions which turned on their facts, and we do not consider that they are authority for any generally applicable principle in a case such as this."

Discussion

93. I have set out at such length the quotations upon which, in particular, Mr Ripley relies firstly because in Opening Submissions he stressed how important those quotations were to his case and secondly in his Reply Submissions he urged me to take no notice of Ms Brown's legal arguments which he stated were advanced for the first time in the course of the hearing.

94. His argument was that if Ms Brown's legal arguments were correct then that would undermine the Officer's decisions and the factors that he said that he had taken into account.

95. Mr Ridley argued that the pre-litigation correspondence and the pleaded case, being the Grounds of Appeal and the Statement of Case, demonstrated that, until this hearing, both parties had proceeded on the basis that HMRC had made a single decision based entirely on the exercise of HMRC's discretion. Therefore the Application was appropriate as the "reasonableness" of the decision was a live issue and thus the Tribunal's jurisdiction was supervisory.

96. I do not accept that Ms Brown's arguments were entirely unheralded. She was not responsible for the Reply dated 20 May 2022 which HMRC sent to VAT Solutions. That letter explicitly points out that the equivalent of section 40(6) VATA 1983, which deals with prior decisions, is to be found at section 84(10) VATA. The only other reference to the law applicable to this appeal in that letter is confirmation that section 40(1)(c) VATA 1983 is now section 83(1)(c) VATA.

97. Although the primary focus of the Reply is jurisdiction, it relies on *Barar and Another trading as Turret House Rest Home v The Commissioners of Customs & Excise* which has a Lexis citation of 1994 ("Barar") and *Barar* was in the Bundle.

98. One of Ms Brown's legal arguments was predicated on *Barar* and the existence of a prior decision in this case.

99. The Reply refers to the "decisions in dispute" referenced in VAT Solutions' Letter Before Claim but that letter has not been furnished to me. It may be that it is simply an error to refer to decisions in the plural but of course Ms Brown is arguing that there are either two stages in the decision made by HMRC or two decisions.

100. Certainly the detail of the legal argument based on *Barar* was not advanced previously but Ms Brown's Skeleton Argument makes it explicit at paragraph 19 that HMRC's position was that, in terms of the legislation with which I am concerned, there were two stages in the decision, namely

(a) there was a decision to allow tax to be treated as input tax in terms of Regulation 111, and

(b) a decision as to the amount of tax in terms of section 26 VATA which deals with "Input tax allowable under section 25".

101. As can be seen from paragraphs 28 and 29 above Officer Riccomini made it plain that his decision was that HMRC had a discretion to allow VAT to be treated as input tax but that was "subject to the normal rules on deduction". I find that that is capable of being construed as being a two stage decision (or two decisions) and is consistent with Ms Brown's approach.

102. Before turning to the detail of *Barar,* I propose to comment on *Wilf Gilbert* and *RCB 16/16* upon which Officer Riccomini has relied in correspondence and from which he had quoted.

103. Ms Brown argued that paragraph 6 of *Wilf Gilbert*, which described the appellant's stance in that case, articulated the same argument as the appellant in this instance, namely that:

> "… regulation 111 confers on the Commissioners only a limited discretion: they may allow or refuse recovery, but, having agreed to accept a claim, must allow it in full—they are not permitted to allow only partial recovery. The regulation, Mr Gilbert contended, refers only to "VAT on the supply of goods or services"; it does not, expressly or by implication, provide for partial recovery, for the reason suggested in the Commissioners' letter of 1 June 2006 or otherwise. The only condition imposed by the regulation of relevance to this case is that the VAT must have been incurred for the purpose of the taxpayer's business, and that condition was clearly satisfied in this case. Satisfaction of the condition carries with it the consequence that all the VAT so incurred is recoverable; the regulation does not lend itself to any other interpretation.".

104. Mr Ripley pointed out that the amount claimed by the appellant had included an apportionment so in fact the issue was whether the apportionment calculation by HMRC was a discretionary apportionment and, if so, whether HMRC had done the apportionment correctly. Ms Brown accepted that the appellant had lodged an apportionment so it was not on all fours with *Wilf Gilbert*. However, she argued that the general tenor of paragraph 6 had to be understood in the context of the following paragraphs.

105. In paragraphs 7 and 8 of *Wilf Gilbert*, Judge Bishopp pointed out that that argument relied upon a decision in *Jerzynek v Customs and Excise Commissioners* (2004, Decision 18767) where the taxpayer in question had at all times made taxable supplies, albeit not registered for VAT, whereas in *Wilf Gilbert* all of the supplies were exempt. The two cases fell to be distinguished. In this appeal, prior to registration, the appellant's supplies were wholly exempt. Incidentally, in *Nidera,* the business in question made supplies that would have been wholly taxable had it been VAT registered.

106. Judge Bishopp recognised that Regulation 111 contains no provision of its own for apportionment but he pointed to the words "to such extent" in the enabling section which is section 24(6)(b) VATA. That underpinned the conclusion that he reached which is to be found in the quotation from paragraph 10 cited by Officer Riccomini (see paragraph 32 above) and which has been at the heart of HMRC's case from the outset. I find that, in broad terms, Ms Brown is correct to say that the appellant's approach is that provided that the VAT was incurred for the purpose of the business, then if a decision to treat the VAT as input tax was made, then that tax is recoverable.

107. Officer Riccomini cited *Wilf Gilbert* in correspondence to support the point made under the heading "HMRC's discretion" that the discretion in Regulation 111(1)(a) was "subject to the normal rules of deduction" (see paragraph 30 above) and in references to RCB 16/16 where the same phrase was used (see paragraph 31 above). The Officer makes the same point at paragraph 19 of his witness statement.

108. In the Statement of Case, RCB 16/16 is reproduced at paragraph 40 (*Wilf Gilbert* is referenced at paragraph 49) and at paragraph 53 the phrase "subject to the normal rules of deduction" is again relied upon.

109. Ms Brown's oral argument was that the nub of the issue was that the appellant was arguing that it was the exercise of discretion under Regulation 111 which limited the recovery of VAT but that was wrong. HMRC had always maintained that it was the "normal rules of deduction" ie the statutory rules in the VATA, as described by Judge Bishopp at paragraph 10 of *Wilf Gilbert,* which limited recovery.

110. Albeit not in detail, Ms Brown's legal arguments had been trailed in correspondence, the Statement of Case and her Skeleton Argument.

111. In the Application, Mr Ripley relied upon *Barar* for the proposition that the Tribunal has jurisdiction to consider the availability of pre-registration input tax notwithstanding the fact that VAT is merely “treated as if it were input tax”. He is correct and that is not in dispute; HMRC had relied on *Barar* in the Reply stating *qua* jurisdiction that it was on “all fours” with this appeal. Ms Brown also relied upon *Barar* for her substantive argument on “prior decisions”.

112. In *Barar*, HMRC had refused to exercise its discretion in relation to pre-registration input tax in terms of the precursor to Regulation 111 (Regulation 37(1) of the 1985 Regulations). Those appellants had argued that the refusal to allow credit for input tax depended on a prior decision not to allow pre-registration tax to be treated as input tax and that there were two decisions which jointly gave rise to a right of appeal.

113. That Tribunal looked at sections 40(1)(c) and (d) VAT Act 1983 which were the precursors to section 83(c) and (e) VATA.

114. The Tribunal found that:

> “The Tribunal must ask whether the specific terms of Regulation 37 mean that until the Commissioners exercise their discretion in favour of the Appellant there is no decision “with respect to” the amount of any input tax which may be credited to a person. This latter conclusion appears to the Tribunal to be unsustainable. A decision by the Commissioners whether discretionary or not, to refuse to authorise a taxable person to treat an amount as input tax must in the simple meaning of the terms be a decision of the Commissioners ‘with respect to’ ‘input tax’”.

115. In *Barar*, which obviously turned on different facts, the Tribunal concluded that:

> “The Commissioners argue that there was one decision in two stages but not one decision based on a prior decision. However it appears to the Tribunal that as at present advised there was a prior decision on whether or not to allow the Appellants to treat tax as if it were input tax, and a further decision based thereon adjusting the Appellants’ input tax and preparing an assessment. Against that prior discretionary decision s 40(6) of the Value Added Tax Act 1983 gives a right of appeal.”

116. As I have indicated, the equivalent of section 40(6), which deals with prior decisions, is to be found at section 84(10) VATA. Of course in this appeal there is a decision in favour of the appellant so there is a right of appeal in terms of section 83 VATA.

117. Whilst I agree with Mr Ripley that *Barar* is not authority for the proposition that there will always be a prior decision, I agree with Ms Brown that the reasoning is relevant and indeed applicable in this appeal.

118. Mr Ripley pointed out that in paragraphs 60 and 61, 73 and 87 in *Abdul Noor v HMRC* [2013] UKUT 071(TCC) (“Noor”), the Upper Tribunal drew a distinction between different challenges where HMRC might, or might not, have jurisdiction in terms of section 83(1)(c) VATA. Given the argument about appellate and supervisory jurisdiction it is worth quoting paragraphs 87 and 88 which read:

> “**[87]** In our view, the FTT does not have jurisdiction to give effect to any legitimate expectation which Mr Noor may be able to establish in relation to any credit for input tax. We are of the view that Mr Mantle is correct in his submission that the right of appeal given by section 83(1)(c) is an appeal in respect of a person’s right to credit for input tax under the VAT legislation. Within the rubric ‘VAT legislation’ it may be right to include any provision which, directly or indirectly, has an impact on the amount of credit due but we do not need to decide the point. Thus, if HMRC have power (whether as part of their

> care and management powers or some other statutory power) to enter into an agreement with a taxpayer and that agreement, according to its terms, results in an entitlement to a different amount of credit for input tax than would have resulted in the absence of the agreement, the amount ascertained in accordance with the agreement may be one arising 'under the VAT legislation' as we are using that phrase. In contrast, a person may claim a right based on legitimate expectation which goes behind his entitlement ascertained in accordance with the VAT legislation (in that sense); in such a case, the legitimate expectation is a matter for remedy by judicial review in the Administrative Court; the F-tT has no jurisdiction to determine the disputed issue in the context of an appeal under section 83. As Mr Mantle puts it, the jurisdiction of the F-tT is appellate (*ie* on appeal from a refusal of HMRC to allow a claim). The F-tT has no general supervisory jurisdiction over the decisions of HMRC. That does not mean that under section 83(1)(c) the F-tT cannot examine the exercise of a discretion, given to HMRC under primary or subordinate VAT legislation relating to the entitlement to input tax credit, and adjudicate on whether the discretion had been exercised reasonably (see eg *Best Buys Supplies Ltd v* HMRC [2012] STC 885 UT at [48] – [53] – a discretion under Reg 29(2) of the VAT Regulations). Although that jurisdiction can be described as supervisory, it relates to the exercise of a discretion which the legislation clearly confers on HMRC. That is to be contrasted with the case of an *ultra vires* contract or a claim based on legitimate expectation where HMRC are acting altogether outside their powers.
>
> **[88]** In our view, the subject matter of section 83(1)(c) ('the amount of input tax which may be credited to a person') is the input tax which is ascertained applying the VAT legislation. Input tax is a creature of statute under the VATA 1994, reflecting the provisions of, now, the principal VAT Directive (2006/112/EC). Similarly, the crediting of an amount of input tax is a matter of statute. The appellate jurisdiction of the F-tT is formulated, in the case of section 83(1)(c), by reference to those concepts. The F-tT is not, expressly at least, given jurisdiction under this provision to decide the amount of something which is not input tax and which is not to be credited in accordance with the statutory provisions." (Emphasis added)

119. In his Skeleton Argument, having quoted the latter part of paragraph 87, Mr Ridley made it clear that, unlike in *Noor,* the appellant is not relying on legitimate expectation in relation to the amount of allowable input tax. The appellant takes the view that "The appeal is the very sort of case where the FTT can exercise a supervisory jurisdiction over the exercise of a discretion".

120. I have added emphasis to the quotation since Ms Brown, who relies on paragraph 88, argues that:

> (1) That which the appellant is seeking to recover is not input tax; it is tax that, HMRC having exercised their discretion, will be treated as input tax. That is not the same as it being input tax. Pertinently, the Regulation does not say that it will be recoverable as input tax. Not all input tax is recoverable.
>
> (2) The amount that is in dispute has been calculated by applying the VAT legislation, namely sections 24 to 26 VATA. Those provisions are not discretionary and carry full rights of appeal in terms of section 83 VATA.

121. Mr Ripley relied upon the fact that Officer Riccomini had said that "some of the tax incurred" would be treated as recoverable and the implication was that that was a discretionary decision as was the fact that the basis of the apportionment was what he had "deemed appropriate" (see paragraphs 48 and 49 above). Accordingly, it was simply one decision.

122. I am not persuaded by that argument. The officer is not a lawyer. He had consistently stated that the recovery of tax was subject to the usual rules for deduction. As Ms Brown pointed out, in the context of VAT, that is an exercise in "best judgment". The terminology used by the officer including where he said that he had considered what was "fair and reasonable" is apt in that context.

123. I agree with Ms Brown that pre-registration VAT is not input tax and it is only the exercise of HMRC's discretion in terms of Regulation 111 that permits such tax to be treated as input tax. The Regulation does not say that it may, or can, be recovered as input tax.

124. In oral argument, Mr Ridley correctly argued that the nub of the difference between the parties is that:

(a) The appellant argues that HMRC made one decision, relying upon their discretionary powers in terms of Regulation 111, to treat pre-registration tax as input tax and to restrict the recovery thereof, and

(b) HMRC argue that there were stages in the decision, namely a "prior" or "gateway" decision in terms of Regulation 111 to treat pre-registration tax as input tax and a subsequent decision based on Section 26(1) and (2) VATA to quantify the allowable input tax.

125. In fact, he referred to it as the appellant arguing that it was a one stage decision and HMRC taking the view that it was a two stage decision. I understand why he did that because HMRC's Skeleton Argument said at paragraph 19 that their decision in relation to pre-registration VAT should be considered in two stages. However, HMRC went on to argue both in writing and orally that in reality it is only the issue of quantum (and how that was arrived at) that has been appealed. The appellant is not appealing the right to treat any expenditure as if it were input tax. That is correct in the sense that there would be no recovery of anything if HMRC had not exercised their discretion. This issue is indeed the extent of that discretion.

126. Mr Ripley conceded that if HMRC were correct in their analysis then the appellant accepted that there was no need for disclosure as the Application would fail on the basis that the information sought was of very limited relevance.

127. I accept the argument that whether one describes it as a first stage in a decision or as a prior decision, there was a decision to allow expenditure to be treated as input tax. That decision was made in exercise of HMRC's discretion and in that regard the Tribunal has a supervisory jurisdiction.

128. I find that, having made that decision, as it were in principle, then, as Judge Bishopp pointed out in *Wilf Gilbert,* the provisions of VATA must be applied and the officer did so. That is the second stage or the second decision. Ms Brown is correct to say that those provisions are not discretionary. The Tribunal's jurisdiction in that regard is therefore not supervisory.

129. That being the case, the Application for Disclosure is not, as Mr Ridley rightly concedes relevant and therefore it is refused.

130. If I am in wrong in finding that the Tribunal's jurisdiction is not supervisory, would I have granted the Application?

131. The first point that I make is that the facts in this case are far removed from those in either *Smart Price CA*, which was a case where there was undoubtedly a supervisory jurisdiction in relation to the AWRS, or *McCabe* which dealt with residence in the context of a double taxation treaty where the jurisdiction was presumably appellate. Nevertheless I agree with the quotations from paragraphs 37 and 29 of *McCabe* which are at paragraphs 91 and 92 above respectively.

132. Any decision on specific disclosure, or disclosure generally, is an exercise of the Tribunal's discretion and that is always a balancing exercise. As I have indicated, *inter alia,* the disclosure sought must be proportionate, potentially probative of an issue and crucially should be necessary to deal with the case justly. It does not suffice that it is, in the words of Judge Staker, "merely relevant" to the case.

133. The Application states that the first item or category is required in order to enable the appellant to understand the extent to which Officer Riccomini was the "real decision maker". It is accurate to say that the witness statement makes no mention of the involvement of any other person in the Decision. What it does do, and repeatedly, is to refer to "my" decision and pre-decision letters, and say "I" did X, Y and Z. The officer's conclusion is that the comments in the witness statement are a "summary of my decision".

134. As can be seen from my findings in fact relating to the correspondence, and in particular from paragraphs 26, 28 and 40 above, the exhibits to his witness statement made it crystal clear that Officer Riccomini was very open with VAT Solutions and he had confirmed that he had consulted, and relatively widely, with colleagues including Officer Pugh. He had also consulted with specialists.

135. Either Officer Riccomini is lying when he says that he made the decision and why he did so or he is not and that is a matter that can be put to him in cross-examination. I fail to understand what the production of a list of consultees would achieve or how it would be relevant. I cannot see how it would be probative of any material issue given that the officer has offered the information that he consulted with others. Their identity is only of marginal, if any, relevance.

136. As Ms Brown rightly argues, the officer made a decision on behalf of HMRC. If for some reason he were unable to give evidence then, as is usual in these matters, another officer would then speak to the decision. In turn, the Tribunal would weigh the quality and credibility of Officer Riccomini's evidence, or that of any other officer, in the balance and come to a conclusion. The list would not assist.

137. What then of the other two categories of disclosure sought? In his Reply Submissions Mr Ripley conceded that there is an overlap between the two categories, which there is.

138. Firstly, these two categories are very widely drafted. Mr Ridley argues that HMRC has not said that the requests are disproportionate. Perhaps they have not used that word but it is the clear implication from their written and oral objections.

139. Secondly, in the third category, the appellant seeks copies of any guidance or policy documents, whether published or not. It is well established that HMRC's guidance, unless it is stated to have the force of law, is nothing other than HMRC's view on a given matter. By definition, published guidance is in the public domain and Ms Brown states that the appellant has been furnished with what exists.

140. Ms Brown stated unequivocally that all of HMRC's policy documents have been published and are in the hands of the appellant, and HMRC has shared with the appellant, as can be seen from the findings in fact, its interpretation thereof. Mr Ripley's response is that, in particular, the appellant requires to see relevant emails

141. As I have indicated at paragraph 12 above, the ultimate issue for the Tribunal is whether HMRC has misunderstood the scope of Regulation 111 and misapplied its own policy in a situation where the appellant's tax return included an apportionment with which HMRC disagreed. The Tribunal will have to embark upon an exercise in statutory construction.

142. Whether or not the published policy of HMRC is even relevant or the extent to which it could be relied upon would be a matter for argument at any hearing. Those are legal matters potentially involving argument based on, for example, *KSM Henryk Zeman SP zoo v HMRC* [2021] UKUT 182 (TCC) and other similar cases.

143. In my view it would be putting the cart before the horse to order disclosure of the type sought in the other two categories at this juncture.

144. In summary, for the reasons given, I would not have been minded to grant the Application.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

145. 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: 27th FEBRUARY 2024

Appendix 1

Exceptional claims for VAT relief

111. —

(1) Subject to paragraphs (2) and (4) below, on a claim made in accordance with paragraph (3) below, the Commissioners may authorise a taxable person to treat as if it were input tax—

(a) VAT on supply of goods or services to the taxable person before the date with effect from which he was, or was required to be, registered, or paid by him on the importation or acquisition of goods before that date, for the purpose of a business which either was carried on or was to be carried on by him at the time of such supply or payment, and

(b) in the case of a body corporate, VAT on goods obtained for it before its incorporation, or on the supply of services before that time for its benefit or in connection with its incorporation, provided that the person to whom the supply was made or who paid VAT on the importation or acquisition—

(i) became a member, officer or employee of the body and was reimbursed, or has received an undertaking to be reimbursed, by the body for the whole amount of the price paid for the goods or services,

(ii) was not at the time of the importation, acquisition or supply a taxable person, and

(iii) imported, acquired or was supplied with the goods, or received the services, for the purpose of a business to be carried on by the body and has not used them for any purpose other than such a business.

(2) No VAT may be treated as if it were input tax under paragraph (1) above—

(a) in respect of—

(i) goods or services which had been supplied, or

(ii) save as the Commissioners may otherwise allow, goods which had been consumed,

by the relevant person before the date with effect from which the taxable person was, or was required to be, registered;

(b) subject to paragraph (2A), (2C) and (2D) below, in respect of goods which had been supplied to, or imported or acquired by, the relevant person more than 4 years before the date with effect from which the taxable person was, or was required to be, registered;

(c) in respect of services performed upon goods to which sub-paragraph (a) or (b) above applies;

(d) in respect of services which had been supplied to the relevant person more than 6 months before the date with effect from which the taxable person was, or was required to be, registered;

(e) in respect of capital items of a description falling within regulation 113.

(2A) Paragraph (2)(b) above does not apply where—

(f) the taxable person was registered before 1st May 1997; and

(g) he did not make any returns before that date.

(2B) In paragraph (2) above references to the relevant person are references to—

(h) the taxable person; or

(i) in the case of paragraph (1)(b) above, the person to whom the supply had been made, or who had imported or acquired the goods, as the case may be.

(2C) Where the relevant person was, or was required to be, registered on or before 1st April 2009, no VAT may be treated as if it were input tax under paragraph (1) above in respect of goods which were supplied to, or imported or acquired by the relevant person more than 3 years before the date with effect from which that person was, or was required to be, registered.

(2D) Where the relevant person was or was required to be registered on or before 31st March 2010 and paragraph (2C) above does not apply, no VAT may be treated as if it were input tax under paragraph (1) above in respect of goods which were supplied to, or imported or acquired by, the relevant person on or before 31st March 2006.

(3) Subject to paragraphs (3A) and (3B) below, a claim under paragraph (1) above shall, save as the Commissioners may otherwise allow, be made on the first return the taxable person is required to make and, as the Commissioners may require, be supported by invoices and other evidence.

(3A) Where the taxable person was registered before 1st May 1997 and has not made any returns before that date paragraph (3) above shall have effect as if for the words “the first return the taxable person is required to make” there were substituted the words “the first return the taxable person makes”.

(3B) Subject to paragraph (3C) the Commissioners shall not allow a person to make any claim under paragraph (3) above in terms such that the VAT concerned would fall to be claimed as if it were input tax more than 4 years after the date by which the first return he is required to make is required to be made.

(3C) The Commissioners shall now allow a person to make any claim under paragraph (3) above in the circumstances where the first return the taxable person was required to make was required to be made on or before 31st March 2006.

(4) A taxable person making a claim under paragraph (1) above shall compile and preserve for such period as the Commissioners may require—

(a) in respect of goods, a stock account showing separately quantities purchased, quantities used in the making of other goods, date of purchase and date and manner of subsequent disposals of both such quantities, and

(b) in respect of services, a list showing their description, date of purchase and date of disposal, if any.

(5) Subject to paragraph (6) below, if a person who has been, but is no longer, a taxable person makes a claim in such manner and supported by such evidence as the Commissioners may require, they may pay to him the amount of any VAT on the supply of services to him after the date with effect from which he ceased to be, or to be required to be, registered and which was attributable to any taxable supply made by him in the course or furtherance of any business carried on by him when he was, or was required to be, registered.

(6) Subject to paragraph (7) and (8) below, no claim under paragraph (5) above may be made more than 4 years after the date on which the supply of services was made.

(7) Paragraph (6) above does not apply where—

(a) the person ceased to be, or ceased to be required to be, registered before 1st May 1997, and

(b) the supply was made before that date.

(8) No claim may be made under paragraph (5) above in relation to a supply of services which was made on or before 31st March 2006.

Appendix 2

Revenue and Customs Brief 16/2016: Treatment of VAT incurred on assets used prior to registration

…

Background

UK law allows a business registering for VAT to recover tax they have incurred on goods and services before their effective date of registration (EDR). This allows the recovery of VAT against goods and services as long as they're used by the taxable person to make taxable supplies once registered.

Services must have been received less than 6 months before the EDR for VAT to be deductible. This time limit simplifies the rules and means you don't need detailed calculations of the use before and after your EDR. This excludes services that have been supplied onwards. VAT on services received within the relevant time limit can be recovered in full.

We also have a simplified rule for goods. Goods have a 4 year time limit for deduction that is consistent with the general 'capping' provisions. This excludes goods that have been supplied onwards or consumed before EDR. However, VAT on fixed assets purchased within 4 years can be recovered in full.

The word 'consumed' has been interpreted inconsistently over time, particularly in relation to business assets. This brief clarifies the policy position.

HMRC policy

HMRC policy hasn't changed and is as set out below. This brief has been issued because VAT on assets held prior to EDR hasn't always been treated consistently.

Subject to the normal rules on VAT deduction:

- VAT on services received within 6 months of EDR and used in the business at EDR is recoverable in full.
- VAT on stock is deductible to the extent that the goods are still on hand at EDR (for example apportionment may be required).
- VAT on fixed assets purchased within 4 years of EDR is recoverable in full, providing the assets are still in use by the business at EDR.

Full recovery only applies if your business is fully-taxable. If you're partly-exempt, have non-business activities, or need to restrict VAT deduction for any other reason, you'll need to take that into account when calculating your deductible VAT.

There are different rules for capital items under the Capital Goods Scheme. Please see VAT Notice 706/2 for details.

Appendix 3

Officer Riccomini's statement

For completeness the two paragraphs from the Officer's witness statement read:-

> "18. Section 25 of VAT Act 1994 did not enable me to allow a recovery of VAT on pre-registration costs which were intended to be, and were first used, to make wholly exempt supplies. However, while there was no statutory basis for me to allow a recovery of VAT on pre-registration costs which were intended to be, and were first used, to make wholly exempt supplies, I exercised my discretion to do so on the facts of this case in accordance with SI 1995/2518 Regulation 111 ("Regulation 111"). My approach in this regard was informed by HMRC's internal guidance at VIT 32000 and PE 31300. The case law is set out at point 2 of my pre-decision letter of 21 March 2022.
>
> 19. Point 3 of my letter of 23 December 2021 responded to a point raised in VS's letter of 13 October 2021, which placed reliance on HMRC's Revenue and Customs Brief 16/16 ("RCB 16/16"). I explained that RCB 16/16 set out HMRC's policy in relation to pre-registration VAT and explained that pre-registration VAT was subject to the normal rules of VAT deduction. Whilst not quoted within the letter I note that RCB 16/16 says: *'Full recovery only applies if your business is fully taxable. If you're partly exempt, have non-business activities, or need to restrict VAT deduction for any other reason, you'll need to take that into account when calculating your deductible VAT'*. Therefore, it was only recoverable where it related to a taxable supply, and I did not infer from the Brief that VAT could be treated as eligible for recovery where it was first used to make exempt or non-business supplies".