[2012] UKUT 276 (TCC)
Case Number: TCC-JR/08/201

Adjustment for errors in VAT returns under regulation 35 of the VAT Regulations 1995 – exercise of discretion by HMRC – time limits for correcting errors in VAT returns – time limits for reclaiming overpaid VAT

UPPER TRIBUNAL (TAX AND CHANCERY CHAMBER)
TRANSFERRED FROM THE HIGH COURT OF JUSTICE
(ADMINISTRATIVE COURT)

BETWEEN

THE QUEEN
on the application of

CAPITAL ACCOMMODATION (LONDON) LIMITED (IN LIQUIDATION)

Claimant

- and -

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS

Defendants

TRIBUNAL: The Honourable Mr Justice Sales

Sitting in public at The Royal Courts of Justice on 6 July 2012

David Southern for the Claimant

Peter Mantle, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Defendants

DECISION

Introduction

1. This is the judgment on a claim for judicial review transferred to the Upper Tribunal by order of the Court of Appeal, which granted permission for the application for judicial review to be made (permission having been refused at first instance). I refer compendiously to the Defendants and H.M. Commissioners of Customs and Excise, whom they have replaced, as "HMRC". The Claimant was put into compulsory liquidation in May 2007 and the claim is brought on its behalf by the liquidator.

2. The claim is in relation to a decision of HMRC in 2009 by which they declined to issue a direction under regulation 35 of the Value Added Tax Regulations 1995 ("the Regulations") to the Claimant, acting by its liquidator, to allow it to correct certain VAT returns the Claimant had completed. The returns in question are those for the quarters ending 28 February 2005 ("the 02/05 return") and 31 May 2005 ("the 05/05 return"). The liquidator maintains that on proper analysis a sum of VAT included in the 02/05 return as output tax for which the Claimant had to account to HMRC, amounting to £718,552, should have been included instead in the 05/05 return. The liquidator says that the amount of output tax shown in the 02/05 return should be reduced by £718,552 and the amount of output tax shown in the 05/05 return should be increased by the same amount.

3. The significance of such a change would be to allow the liquidator to maintain a claim on behalf of the Claimant under section 80 of the Value Added Tax Act 1994 ("VATA") for repayment of a substantial sum in respect of VAT which the Claimant paid to HMRC at about the time it sent in the 02/05 return ("the sum paid", representing the £718,552 output tax less a deduction for input tax in respect of the relevant transactions to which that output tax related). This is because the liquidator maintains that the £718,552 ought not to have been included as VAT due, so that the sum paid ought not to have been remitted by the Claimant to HMRC; the relevant time limit under section 80 to claim repayment of sums remitted in respect of VAT not in fact due is three years from the end of the relevant quarterly accounting period; and the liquidator first claimed repayment of the sum paid by letter dated 23 April 2008 – more than three years after the period for the 02/05 return but less than three years after the period for the 05/05 return. If HMRC issue a direction under regulation 35 of the Regulations to allow the Claimant to change the 02/05 return and the 05/05 return by shifting the amount of £718,552 of output tax from the former to the latter, the liquidator maintains that he will be able to recover the sum paid from HMRC, for the benefit of the Claimant's creditors.

4. The amount of the sum paid has not been agreed between the parties and the Tribunal does not have evidence before it which would enable it finally to determine what it is. The liquidator maintains that it is a sum of the order of about £645,000.

5. Despite requests to the liquidator, HMRC have not been afforded access to the Claimant's books and records to check the figures put forward by the liquidator and to assess whether the disputed sum of £718,552 of output tax included in the 02/05 return was indeed included there in error, as the liquidator maintains. Even if it was, HMRC submit that they are not required to issue a direction under regulation 35 for the Claimant to change either the 02/05 return or the 05/05 return. In particular, in relation to the 05/05 return, HMRC say that on the liquidator's own case that return contained no error, since it did not contain a figure for output VAT which reflected the £718,552 now in dispute and it is the liquidator's contention that that sum ought never to have been included as output tax in any return.

The legal framework

6. For the purposes of this judgment, the relevant legal framework can be set out as follows. By virtue of regulations 31 and 32 of the Regulations, traders who are registered for VAT are required to maintain a VAT account in their own books. The VAT account has to show "the VAT payable portion for each prescribed accounting period" (typically, as with the Claimant, a quarterly period), representing the total of the output tax due from the trader for that period, and "the VAT allowable portion for each prescribed period", representing the total of the input tax allowable to that trader for that period. The trader is required to make a quarterly return to HMRC showing the amount of VAT payable by or to him: regulation 25. The returns are to be compiled by reference to the sums shown in the VAT payable portion and the VAT allowable portion in the trader's VAT account: regulation 39.

7. Errors may occur when VAT returns are made, with a trader showing either too much VAT as payable by him or too little VAT allowable to him as input tax. Regulations 34 and 35 make provision for corrections to returns and the VAT account.

8. Regulation 34 applies where a trader has made a return or returns which overstated or understated his liability to VAT or his entitlement to be repaid sums as a VAT credit, and allows him to correct his VAT account for the period in which he discovers errors made in an earlier period or periods (regulation 34(4), (5) and (6)(a)). Where he does this, his return for the current period will be adjusted to reflect the errors in relation to earlier periods which have been discovered (regulation 39(2) and (3)), and the amount which he pays HMRC for the current period will be increased or decreased as appropriate to reflect and cancel out the earlier errors.

9. This facility of correction under regulation 34 is subject to important limitations. First, an overstatement or understatement in a return is to be disregarded for the purposes of regulation 34 where a certain period has elapsed since the end of the prescribed accounting period for which the return was made: regulation 34(1A). In 2005 the period was three years. With effect from 1 April 2009 it has been extended to four years, subject to transitional arrangements which provide that any time limit which had already expired before 1 April 2009 would not be revived and extended as a result of the change. These time limit provisions reflect and match the time limit

provisions for the making of a claim under section 80 of VATA to recover overpaid VAT. Secondly, the power of correction under regulation 34 is subject to limits by reference to the amounts involved. It is restricted to smaller errors. It is only available where the aggregate value of previous errors discovered by a trader in a prescribed period are less than a maximum figure (currently £50,000): regulation 34(3). Where errors are discovered above the maximum allowed, the VAT account may not be corrected by virtue of this regulation: regulation 34(7). The errors the liquidator says he has discovered in the 02/05 and 05/05 returns are well above the amounts which would allow for correction under regulation 34.

10. Regulation 35 is the provision directly in issue in the present case. It provides:

> "Where a taxable person has made an error –
> (a) in accounting for VAT, or
> (b) in any return made by him,
> then, unless he corrects that error in accordance with regulation 34, he shall correct it in such manner and within such time as the Commissioners may require."

11. HMRC have issued guidance entitled, "How to correct VAT errors and make adjustments or claims", in Notice 700/45. The 1993 version of this Notice was replaced by the Notice in a revised form in July 2009 ("the HMRC Guidance"). Section 4 of the HMRC Guidance deals with correction of VAT errors in returns which have been submitted to HMRC. Errors which are careless or deliberate may be subject to a penalty. Where errors have resulted in an underpayment of VAT, interest may be charged. The Guidance identifies two methods for correcting errors (para. 4.2). Method 1 is the method under regulation 34, which is confined to use for smaller errors. The Guidance states that Method 2 must be used for larger errors (i.e. those above the maximum amount allowed to be corrected under regulation 34): paras. 4.4 and 4.5. Para. 5.1 of the Guidance (entitled, "What if I've accounted for output tax that wasn't due?") refers the reader to the guidance in Section 4. Where Method 2 is used, the Guidance states "you must not make adjustment for the same errors on a later VAT return"; instead, a special form (form VAT 652) should be used to notify HMRC of the error correction, or a letter should be written setting out specified details to explain the error and how it arose (para. 4.4). In this way, HMRC require a trader to provide them with full details to allow them to decide how to proceed, e.g. (if there has been an underpayment of tax) by making an assessment under section 73 of VATA leading to an order to pay the underpaid VAT plus interest and any penalty or (if there has been an overpayment of tax) acknowledging the right of the trader to claim a refund pursuant to section 80 and repaying the overpaid VAT accordingly.

12. Section 4.6 of the HMRC Guidance is headed, "What's the time limit for correcting errors?". The basic rule is that, subject to an exception which is not material for present purposes, a trader cannot adjust his VAT return to make an error correction notification for any errors that arose in accounting periods that are outside the limits set out in paras. 4.6.1 and 4.7. Para. 4.6.1 refers to and adopts the new time limits regime brought into effect for the VAT regime generally, in section 80 of VATA and regulations 29 and 34 of the Regulations (see para. [9] above and para.

[14] below). So does para. 4.7 with respect to the time limit to correct errors in relation to claiming input tax.

13. Section 80(1) of VATA provides that where a person has accounted to HMRC for VAT for a prescribed accounting period and "in doing so, has brought into account as output tax an amount that was not output tax due", then HMRC "shall be liable to credit the person with that amount" and may be liable to repay the overpaid tax. Section 80(3) provides for any claim to repayment to be subject to an unjust enrichment defence. Section 80(4) provides that HMRC shall not be liable to credit a person or repay such tax if the claim is made more than a specified period after "the relevant date". For a claim to repayment of overpaid VAT such as the liquidator wishes to be able to bring in the present case, "the relevant date" is "the end of the prescribed accounting period" mentioned in section 80(1): section 80(4ZA)(4). For an overpayment of VAT pursuant to the 02/05 return, therefore, the "relevant date" is 28 February 2005. For an overpayment of VAT pursuant to the 05/05 return, the "relevant date" is 31 May 2005.

14. Up to 31 March 2009 the limitation period under section 80(4) was three years, but from 1 April 2009 it became four years. However, as with the time limit in regulation 34 referred to above and a similar time limit in regulation 29 for reclaiming input tax, transitional provisions have the effect that where a three year time limit had already expired the right to claim overpaid tax did not revive with the introduction of the new four year limitation period. In the context of the present case, therefore, it is the old three year time limit that prevents the liquidator from simply reclaiming under section 80(1) what he maintains is the overpaid VAT in relation to the 02/05 return, since he only intimated a claim for repayment by letter dated 23 April 2008, more than three years after the end of the prescribed accounting period to which the 02/05 return relates. The liquidator hopes that, if HMRC are required to give a direction to shift the relevant amount of £718,552 of output tax from the 02/05 return into the 05/05 return, so that the overpayment is treated as made in relation to the 05/05 return, the Claimant's claim for repayment of VAT will be within time for the purposes of section 80, since made within three years of the end of the prescribed accounting period to which the 05/05 return relates.

15. A claim for over-paid VAT can be made by a trader under section 80 without the need for the trader to correct his VAT account or any VAT returns under regulations 34 and 35. Where corrections are made to his VAT account under regulation 34, a claim under section 80 will usually not be necessary since (where he has overpaid VAT) such corrections will result in him paying less VAT in respect of the accounting period in which the errors were discovered (see para. [8] above). On the other hand, where a large error is in issue, the trader will need to notify HMRC of the background to the claim for repayment and presumably HMRC might at that stage give a direction under regulation 35 for a correction of some kind to be made to his VAT account and/or his VAT returns.

16. Regulation 35 does not specify the form of correction which is required. HMRC have a discretion as to the manner in which they may direct a correction to be

made. In my view they are not obliged in every case to direct that the figures shown in the "VAT payable" portion or the "VAT allowable" portion of a trader's VAT account should be changed, with corresponding changes in the relevant VAT returns to reflect those changes. It may be sufficient for HMRC simply to direct that a note be entered in relation to such figures to record that they reflected an error and to explain the error. The VAT account would then show to anyone inspecting it a true and fair view of the VAT position at the relevant time, with a correction for the error which had been identified (and in such a case there might be no need to direct a correction to any VAT return which had been issued; alternatively, any correction to a return could take the form of including a similar note, without changing the figures already entered on the return). Hence, even when HMRC decide to direct under regulation 35 that an error be corrected, they are not obliged to direct that that be done in such a way as to circumvent the limitation period to reclaim overpaid VAT set out in the primary legislation, in section 80.

17. There is no appeal in respect of a decision by HMRC about how to exercise their powers under regulation 35. Therefore, where a taxpayer wishes to contend that they have acted unlawfully the remedy is by way of judicial review.

The factual background

18. Under a contract dated 16 March 2000, the Claimant provided to the Home Office welfare support services for asylum-seekers. The principal component of the services provided was accommodation.

19. In the invoices which the Claimant sent to the Home Office in relation to the provision of these services it charged the Home Office VAT. It did this for a considerable period, even though by letters dated 30 April 2004 and 25 November 2004 HMRC informed the Claimant that it was making exempt supplies and should stop charging VAT in relation to the supplies of accommodation. For some reason the Claimant did not accept this advice until the beginning of June 2005, from which time it changed its practice and ceased charging VAT on such invoices.

20. Before the Claimant changed its practice, in the 02/05 return it showed the VAT due in the accounting period on sales and other outputs as £1,168,851.13, on a turnover (excluding sums charged for VAT) of £6,679,535. At about the same time as the 02/05 return was filed on 31 March 2005, the Claimant paid HMRC an amount of VAT calculated by reference to these figures in the 02/05 return.

21. The records and affairs of the Claimant when it went into liquidation in May 2007 were in a state of disorder. Upon investigation after his appointment in December 2007, the liquidator came to the conclusion that these figures in the 02/05 return included sums derived from eight invoices sent to the Home Office, of which only two bore dates within the quarterly accounting period ended 28 February 2005 (to which the 02/05 return related) and the remaining six bore dates ranging from 29 March 2005 to 23 May 2005 (i.e. within the accounting period ended 31 May 2005 to which the 05/05 return related). It is the VAT element on these six disputed invoices,

totalling £718,552, which the liquidator claims should be removed from the 02/05 return and brought into account in the 05/05 return instead.

22. By letter dated 23 April 2008, the liquidator wrote to HMRC to explain the position on the six disputed invoices and to apply for a credit for the Claimant of overpaid VAT under section 80(1) of VATA. He said that the application was made in respect of the 05/05 return, and maintained that it was brought within the time limit set out in section 80(4). The liquidator also reclaimed the VAT paid to HMRC in respect of other invoices reflected in the 05/05 return.

23. HMRC responded by letter dated 16 July 2008. They said that the Claimant was out of time, according to the three year limitation period then applicable under section 80, to claim repayment in relation to the six disputed invoices reflected in the 02/05 return, but accepted that its claim to recover VAT paid in respect of the 05/05 return was in time and so agreed to consider refunding that amount (£64,787.28) once relevant documentation had been made available.

24. By letter dated 2 April 2009 to HMRC from Kingston Smith LLP ("Kingston Smith"), a firm of accountants acting for the liquidator, Kingston Smith put forward an argument that the 05/05 return was incorrect, in that the six disputed invoices (and the £718,552 of output tax shown on them) should have been reflected in that return rather than in the 02/05 return. Kingston Smith at this stage claimed that HMRC's letters of 30 April 2004 and 25 November 2004 took effect as directions under regulation 35 of the Regulations (a contention not pursued in these legal proceedings). On that basis, Kingston Smith maintained that the Claimant's claim for recovery of overpaid output tax in relation to the 05/05 return should be increased by reference to the output tax shown on the six disputed invoices.

25. HMRC replied on 29 April 2009 to point out that the output tax shown on the six disputed invoices had been accounted for and paid by reference to the 02/05 return, and so on the face of it could not be made the subject of a claim for overpaid output tax in respect of the 05/05 return.

26. The Claimant's position was recast in a further letter from Kingston Smith dated 10 July 2009, as follows: the 05/05 return was erroneous, in that it (rather than the 02/05 return) should have reflected the output tax shown on the six disputed invoices; a claim for repayment of overpaid output tax had been made by the liquidator in relation to the 05/05 return on 23 April 2008, within the three year limitation period; in order for that claim to cover the overpaid output tax in relation to the six disputed invoices the 05/05 return would have to be corrected; the liquidator could not correct the 05/05 return under regulation 34 because he was out of time to do so and because the amount of the error was too great; therefore, it was said, HMRC were obliged to issue a direction under regulation 35 for a correction to be made to the 05/05 return, so as to allow the liquidator to seek repayment of the overpaid VAT in relation to the six disputed invoices. It was implicit in this letter that the liquidator recognised that the Claimant was out of time under section 80(4) to reclaim that

overpaid VAT by reference to the 02/05 return in respect of which it had in fact been remitted to HMRC.

27. HMRC responded to the liquidator's request that they exercise their discretion under regulation 35 in this way by letter dated 30 July 2009. HMRC expressed the view that the error occurred in the period for the 02/05 return (with the liquidator contending that a correction in that return should then be reflected by a correction in the 05/05 return), and that the liquidator's letter of 23 April 2008 would have been out of time to allow for a correction of the 02/05 return. As explained in the witness statement of Mr Osborne for HMRC, this was based on HMRC's policy in the then current version of the HMRC Guidance that applications to make corrections should be made within three years. HMRC therefore rejected the request for a direction under regulation 35 and rejected the claim under section 80 to recover the overpaid VAT in respect of the six disputed invoices. HMRC's letter referred to the possibility of seeking an internal review of the decision.

28. The liquidator did seek an internal review, the outcome of which was to uphold the previous decision. Since no direction was issued under regulation 35 to change the 05/05 return to include the £718,552 of output tax shown in the six disputed invoices, and that sum remained included in the 02/05 return, the liquidator's claim for recovery of overpaid VAT in respect of that sum was time-barred under section 80 of VATA.

29. The liquidator proceeded to launch this judicial review claim in relation to HMRC's decision not to issue directions to correct the 02/05 and 05/05 returns. Although permission was refused at first instance on the papers and again at a renewed oral application for permission, it was granted by the Court of Appeal.

Legal analysis

30. The parties were agreed (and this seems right to me) that the test under regulation 35 for whether a taxable person "has made an error" in accounting for VAT or in any return is an objective one, so that the issue is to be determined by the court on the evidence rather than on the basis of the opinion of the taxable person himself (or, in this case, the liquidator) or the opinion of HMRC.

31. This resulted in some difficulty at the hearing, because HMRC did not accept that any error had in fact been made by the Claimant in compiling the 02/05 return by including the six disputed invoices in that return (and hence excluding them from the 05/05 return) and the liquidator did not put forward full evidence from the Claimant's underlying books and records (other than copies of the six disputed invoices themselves) to show what had in fact occurred by way of supply of services and at what times. There was something distinctly odd about the underlying facts, in that the Claimant had accounted for the VAT in respect of the six disputed invoices in the 02/05 return received by HMRC on 31 March 2005 and had paid HMRC that VAT on about the same date, well before the dates of all but one of those invoices. Moreover, although the Claimant had changed its practice in relation to charging VAT with

effect from 1 June 2005 - and so presumably had the VAT question under active consideration at about that time - it had not gone back to change what had been done in relation to the treatment of the six disputed invoices in the 02/05 return. Although HMRC had made requests to the liquidator to have access to the underlying records of the Claimant to check the position, the liquidator has not as yet allowed this. After some debate at the hearing, the parties agreed that, if the outcome of the claim were found to depend upon resolution of the question whether the Claimant had made an error in attributing the six disputed invoices to the period of the 02/05 return rather than to the period of the 05/05 return, the appropriate course in light of this situation would be for the court to adjourn final disposal of the claim until after disclosure to be given by the liquidator of the relevant underlying books and records of the Claimant. In the event, however, I have concluded that I am able to determine the claim for judicial review in favour of HMRC without the need to take these further steps.

32. There was also agreement between the parties that the relevant time limits for claims for refunds of overpaid tax provided for in section 80 of VATA (and in regulations 29 and 34 of the Regulations) complied with the requirements of EU law and the requirements of relevant Convention rights as set out in the Human Rights Act 1998.

33. The position under regulation 35 should be considered in relation to each of the 02/05 return and the 05/05 return. On the assumption that the six disputed invoices do genuinely relate to supplies made and payments received in the period covered by the 05/05 return, and on the basis that the VAT charged in those invoices was not properly chargeable because the supplies were exempt (as the Claimant had come to accept), then the 02/05 return reflected two errors, in that the supplies and payments in relation to the six disputed invoices had been allocated to the period covered by that return and VAT output tax in relation to those invoices was included in the sum for output tax and the sum for VAT to be paid to HMRC for that period in the relevant boxes of the return (boxes 1, 3 and 5).

34. By contrast, the 05/05 return reflected no error in relation to the six disputed invoices (it did reflect other possible errors resulting in over-paid VAT, but that was to be investigated and, if appropriate, a refund would be made for that: para. [23] above). On the assumptions set out above, although the supplies and payments in relation to the six disputed invoices were attributable to the period covered by the return, no VAT was due in that period on those supplies, so the figures shown in boxes 1, 3 and 5 of the return were correct, as they did not reflect any VAT in respect of such supplies. Moreover, even if the errors in the 02/05 return were to be corrected, that would not result in any need for a correction in the 05/05 return. All that would be required to produce a situation in which the two returns properly reflected the true underlying VAT position would be for the figures in relation to the six disputed invoices to be stripped out of the 02/05 return. No consequential change to the 05/05 return would be necessary or appropriate. (It should also be observed that the HMRC Guidance made it clear that in such circumstances as had arisen in this case, the correction of the error in the first return should not be carried out by changing figures in the second return: see paras. [11]-[12] above).

35. I therefore accept the main submission made by Mr Mantle for HMRC, that the liquidator has not established that there was any relevant error in the 05/05 return which would require or justify the issuing of a direction under regulation 35 requiring any change to be made to that return. This is fatal to the principal aim of the liquidator in these proceedings, which was to compel HMRC to direct that changes be made to the 05/05 return to increase the sums for VAT in boxes 1, 3 and 5 of the return, so as to allow the liquidator to maintain that he has made a claim within the statutory time limit under section 80 of VATA in relation to the 05/05 return for repayment of the overpaid VAT in respect of the six disputed invoices. The claim of the liquidator to have the 05/05 return changed to allow him to proceed in that way is dismissed.

36. That leaves the claim for a direction under regulation 35 to have the errors in the 02/05 return corrected. Mr Southern for the liquidator accepted that he could think of no practical or useful purpose that would be served by the making of a direction just to correct the 02/05 return, if the 05/05 return is not to be changed at the same time (as I have held it is not). If the figures in the 02/05 return are changed, that will not enable the liquidator to bring a claim under section 80 to recover the overpaid VAT in relation to the six disputed invoices, since he was out of time under section 80(4) to do so even on 23 April 2008 and remains out of time. Nonetheless, Mr Southern still pressed the liquidator's claim to have a direction issued to correct the 02/05 return alone.

37. HMRC's submission in answer to this was to say that the HMRC Guidance sets out the relevant requirements stated by them as to the manner and time for correction of errors, as referred to in regulation 35; that the relevant time limit for seeking a direction to correct an error in a VAT account or a VAT return is three years (according to paras. 4.6.1 and 4.7 and the transitional arrangements referred to there); and that the liquidator's request on 10 July 2009 for a direction to change the 02/05 return (assuming it could be construed to include such a request specifically in relation to that return) was out of time.

38. Mr Southern submitted that HMRC had advanced a similar argument regarding the effect for the purposes of regulation 35 of the time limits stated in the HMRC Guidance in *R (Cardiff County Council) v Customs and Excise Commissioners* [2002] EWHC 2085 (Admin); [2002] STC 1318, and that Stanley Burnton J rejected it. He relied on para. [51] of the judgment, where the learned judge said:

> "Regulation 35 does not purport to impose a limitation period on the Commissioners' liability for tax that it should have paid to the taxable person whose VAT return mistakenly showed an insufficient tax credit due to him. Regulation 29(1A) does impose such a limitation period. Thus, if a taxable person has overpaid VAT to the Commissioners, his liability is capped by section 80(4); if he has failed to claim a sufficient tax credit, the Commissioners liability is capped by Regulation 29(1A). A claim may fall under both provisions, as where there is a failure to claim input tax of £200 in

> a return showing a (mistaken) liability to the Commissioners of £150. But it is difficult to see why Regulation 35 should be construed as imposing a limitation period when it does not in terms purport to do so, and good reason to require a limitation period on the liability of a tax authority to the taxpayer to be clearly spelt out. I would add that the wording of Regulation 35, requiring correction of a return "within such time as the Commissioners may require", is more appropriate to the requirement that errors be corrected than a prohibition of late corrections."

He therefore ruled against the HMRC on one of the preliminary issues in that case, on the question whether a claim to recover over-paid VAT was precluded by operation of regulation 35 of the Regulations: see [26] and [52].

39. However, Stanley Burnton J also ruled, on another preliminary issue, that the taxpayer's claim to recover the overpaid VAT in that case was time-barred by virtue of section 80 of VATA: [43]-[50]. As part of his reasoning on that point, having previously stated at [9] that the 1993 version of the HMRC Guidance imposed a three year time limit on corrections under regulation 35, he said at [47] that his conclusion regarding the time-barring effect of section 80

> "… has the advantage that no inconsistency is produced between the effect of section 80 and the effect of Regulations 35 and 32. If repayment was due, the Council would be unable lawfully to correct its return under Regulation 35 and its VAT account would remain uncorrected and could not be adjusted by reason of the qualifications to Regulations 32(3)(c) and 32(4)(c), restricting corrections or adjustments to those required or allowed by (for present purposes) Regulation 35, and the limitation period for the correction of errors introduced by the Commissioners' Notice 700/45/93. The Council's VAT account would cease to show the true state of its account with the Commissioners. It would be anomalous if a taxable person could receive a repayment of sums paid by way of VAT but not be permitted to correct his VAT account to show that repayment. However, I do not rely on the provisions of the Regulations in order to interpret the Act."

40. As I read the judgment, Stanley Burnton J, in making his comments at [9] and [47], appears to have assumed that the time limit in the then current version of the HMRC Guidance (Notice 700/45/93) *would* be effective to limit the circumstances in which HMRC could be called upon to direct corrections to be made to a VAT account or VAT returns under regulation 35. By contrast, his comments in para. [51] seem to be directed to the terms of regulation 35 itself. He there rules that it does not by *its own terms* impose any time limit. But that seems to leave open the question whether an effective time limit could be imposed by HMRC by way of requirements as to when applications should be made to allow corrections to be entered, such as were contained in Notice 700/45/93.

41. The case went on appeal: [2003] EWCA Civ 1456; [2004] STC 356. The main appeal was against the ruling that the taxpayer's claim to recover overpaid VAT was

now time-barred under section 80. That appeal was dismissed, so the end result was that the taxpayer was found to be unable to recover the overpayment. There was no appeal against Stanley Burnton J's holding on the other preliminary issue, that regulation 35 did not impose any period of limitation (see [25]). Therefore, the judgments in the Court of Appeal did not address that question or the effect of the time limits for corrections set out in Notice 700/45/93.

42. In my view, the question about the effect of the HMRC Guidance was left open by both Stanley Burnton J and the Court of Appeal in the *Cardiff County Council* case. In my judgment, the correct analysis for the purposes of deciding the present case is as follows:

(i) Regulation 35 confers a discretion on HMRC to impose requirements as to the time in which a taxable person shall correct an error;

(ii) HMRC may, in the exercise of that discretion, lay down requirements in advance as to the time within which a taxable person must bring forward a proposed correction. The discretion is not limited to issuing requirements once a taxable person has come forward to identify an error or after HMRC identifies an error. I think that the cross-reference to regulation 34 in regulation 35 itself ("unless he corrects that error in accordance with regulation 34") is a significant indicator in support of this interpretation. If HMRC were not able in their discretion to lay down time limits for corrections under regulation 35 corresponding with those in regulation 34, then every time a taxable person failed to make a small correction under regulation 34 because time-barred by that provision, he would be entitled to make a claim for a correction under regulation 35 and seek to require HMRC to consider it on its merits. This would tend to defeat the object of having a time limit in regulation 34 itself;

(iii) By issuing the HMRC Guidance (and previous versions of it, such as Notice 700/45/93), with its requirements as to the time within which applications to correct errors should be made, HMRC has exercised its discretion in line with its powers identified in (ii) above. The time limits imposed by the HMRC Guidance are in line with the time limits in other relevant and connected provisions in the regime set out in the governing legislation (in particular, the time limits in section 80(4) and in regulations 29 and 34) and have the effect that corrections to be made under regulation 35 will be made at a time and in a manner which produces a coherent overall time limit regime for the recovery of over-paid VAT, and does not undermine the effect of the time limits in the primary legislation and the Regulations. The imposition of those time limits in the Guidance is therefore lawful and a proper exercise of HMRC's discretion under regulation 35;

(iv) Unless good reason can be shown why, on the facts of a particular case, the general time limit rules in the HMRC Guidance for correction of errors should not be applied, HMRC is entitled to point to those rules as the

basis for a decision to decline to issue a direction under regulation 35 for errors in a VAT account or in VAT returns to be corrected. There is no good reason put forward in the present case why HMRC should be prepared to waive the operation of the time limits set out in the Guidance in relation to the liquidator's request to correct possible errors in the 02/05 return. Such a correction would achieve no useful purpose, and consideration on the merits of the application to make the correction would require disproportionate time and effort on the part of HMRC to investigate the underlying facts;

(v) Therefore, HMRC were lawfully entitled to refuse to give further consideration to possible correction of the 02/05 return by relying on their policy as to time limits for corrections set out in the HMRC Guidance. The net effect of this is to leave the Claimant's claim to recover what the liquidator maintains was an overpayment of VAT time-barred by virtue of section 80(4) of VATA. There is nothing improper or wrong about this result.

43. As regards point (iv) above, Mr Mantle for HMRC wished to reserve their position whether there might be an obligation on them in certain cases to waive reliance on the time limits set out in the HMRC Guidance, or whether they could insist that the time limits be observed in all cases. He submitted, correctly in my view, that there were clearly no good grounds in the present case which could on any view be said to require HMRC to disapply those time limits, so the question did not strictly arise. Nonetheless, I should mention that I think it possible that in some (probably exceptional) circumstances a situation could present itself to HMRC in which they might be required to consider whether, in a particular case, the general requirements as to timing set out in the HMRC Guidance should be waived so as to allow the case for a correction under regulation 35 to be considered on its merits, in line with the general approach in public law to application of policies adopted in relation to the exercise of a discretion: see *British Oxygen Co. Ltd v Minister of Technology* [1971] AC 610. That would also give practical force to the fact that setting time limits in relation to regulation 35 is a matter of discretion for HMRC, rather than having strict time limits set out in the legislation itself as in section 80 and regulations 29 and 34.

Conclusion

44. For the reasons set out above, I dismiss the liquidator's claim for judicial review of HMRC's decision under regulation 35 not to direct corrections to be made in relation to the 02/05 return and the 05/05 return.

The Honourable Mr Justice Sales
RELEASE DATE: 30 July 2012