VALUE ADDED TAX — repayment claims — VATA s 80, VAT Regs reg 37 — whether intimation of claim without particulars satisfies statutory requirements — no — whether claim must be allocated to prescribed accounting periods — yes — no claim within statutory meaning made

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

Appeal refs: UT/2014/0085
UT/2014/0087

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS — **Appellants**

- and -

BRATT AUTO CONTRACTS LIMITED
BRATT AUTO SERVICES LIMITED — **Respondents**

BRATT AUTO CONTRACTS LIMITED
BRATT AUTO SERVICES LIMITED — **Appellants**

- and -

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

Tribunal: Mr Justice Warren
Judge Colin Bishopp

Sitting in public in London on 14 December 2015

Mr Raymond Hill, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the appellants in the first appeal and respondents in the second appeal

Mr Ian Bridge, counsel, instructed by Fieldfisher LLP for the respondents in the first appeal and appellants in the second appeal

DECISION

Introduction

1. This decision relates to appeals by both parties from a decision of Judge Berner, sitting in the First-tier Tribunal ("the F-tT"), by which he determined a preliminary issue in related appeals by Bratt Auto Services Limited ("BAS") and Bratt Auto Contracts Limited ("BAC") against the rejection by HMRC of their respective VAT repayment claims. BAS and BAC are associated companies, both of which owned fleets of vehicles which were rented or leased to their customers; BAS dealt in short-term rentals and BAC in long-term contract hire.

2. By a letter dated 30 March 2009, written by the solicitors then acting for both companies, BAS and BAC made, or purported to make, claims for the recovery of output tax for which they said they had incorrectly accounted in various periods ending on or before 30 April 2007. The claims were founded upon two well-known decisions of what is now the Court of Justice of the European Union ("CJEU"), namely *Elida Gibbs Ltd v Customs and Excise Commissioners* (Case C-317/94) [1996] STC 1387 ("*Elida Gibbs*") and *European Commission v Italian Republic* (Case C-45/95) [1997] STC 1062 ("*Italian Republic*"), decisions which have spawned a very large number of repayment claims. It was common ground before Judge Berner, and remains common ground, that the letter was sent on the penultimate day of the time limited for making such claims.

3. Judge Berner set out the terms of the letter (which he mistakenly referred to as the 30 April 2009 letter) at some length. We think that for the purposes of this appeal it will be more helpful to identify what, in the light of his decision, are its significant features.

4. The letter made the point that both companies had entered into administrative receivership in 1991. The receivership had come to an end, allowing the companies' director to resume control of them, but it had led to the loss of certain documents or, at least, to their being stored inaccessibly although efforts were being made to retrieve them or obtain copies from other sources. The letter made it clear that the claims were based on the decisions in *Elida Gibbs* (which related to the VAT treatment of car manufacturers' bonuses) and *Italian Republic* (which related to the VAT treatment of the profit margin on the sale of a car when input tax deduction had been blocked) and went on to provide some detail of the background which led to their being made. It then referred to the accounts of BAS for the year ended 31 December 1989, a copy of which was enclosed, and by reference to those accounts explained how the solicitors had arrived at a value of £1,293,750 for BAS's *Elida Gibbs* claim for that year. The method of calculation and its result are unimportant for present purposes.

5. What is important is that the value of the claim as so calculated was a global figure, not separated into individual amounts for each of the prescribed accounting periods within the year. The letter indicated that BAS intended to make a claim, calculated in a similar manner, for each relevant year but it offered no further figures. It went on to add that BAC wished to make an *Elida Gibbs* claim calculated by the same method but which could not then be quantified, even for one year, since no relevant documents had been obtained. No method of calculation or amount was put forward for either company's *Italian Republic*

claim, and no supporting documents were provided. The letter did, however, offer to provide such further information and documents as HMRC might require.

6. The letter went on to indicate that the claim would be extrapolated – presumably, although the letter did not say so, on the assumption that accurate information would not be found – over the period of trading, going as far back as 1973. In fact, as HMRC later pointed out, the two companies were incorporated only in December 1978, and their claims could not go back any further.

7. HMRC rejected all of the claims on the grounds that they did not satisfy the statutory requirements, to which we come shortly. That rejection was upheld on review.

8. Despite the rejection of the claims further information was volunteered in April 2010. The solicitors produced an amended *Elida Gibbs* claim for BAS, amounting to £3,829,215 and covering all of the years from 1976 (despite its pre-dating the company's incorporation) to 1989 inclusive. We observe in passing that the original claim for 1989 had reduced to £783,512. In each case, a single figure for the entire year was identified. The solicitors also quantified BAC's *Elida Gibbs* claim at £1,156,092, in this case for the years 1982 to 1989 inclusive. Again, a single figure was given for each year. No further information was supplied to support either company's *Italian Republic* claim. HMRC remained of the view that none of the claims satisfied the statutory requirements.

9. The provisions which govern the making of repayment claims are to be found in s 80 of the Value Added Tax Act 1994 ("VATA") which, so far as relevant to this appeal, and as it was in force on 30 March 2009, was as follows:

> "(1) Where a person—
>
> (a) has accounted to the Commissioners for VAT for a prescribed accounting period (whenever ended), and
>
> (b) in doing so, has brought into account as output tax an amount that was not output tax due,
>
> the Commissioners shall be liable to credit the person with that amount …
>
> (2) The Commissioners shall only be liable to credit or repay an amount under this section on a claim being made for the purpose …
>
> (4) The Commissioners shall not be liable on a claim under this section—
>
> (a) to credit an amount to a person under subsection (1) … above …
>
> if the claim is made more than 3 years after the relevant date …
>
> (4ZA) the relevant date is—
>
> (a) in the case of a claim by virtue of subsection (1) above, the end of the prescribed accounting period mentioned in that subsection …
>
> (6) A claim under this section shall be made in such form and manner and shall be supported by such documentary evidence as the Commissioners prescribe by regulations; and regulations under this subsection may make different provision for different cases.

> (7) Except as provided by this section, the Commissioners shall not be liable to credit or repay any amount accounted for or paid to them by way of VAT that was not VAT due to them."

10. BAS and BAC accept that s 80 contains an exhaustive code for the making of repayment claims, and that there is no other means by which the claims might be pursued.

11. The regulations to which sub-s 80(6) refers are the Value Added Tax Regulations 1995 (SI 1995/2518). The relevant provision is reg 37, which provides that:

> "A claim under section 80 of the Act shall be made in writing to the Commissioners and shall, by reference to such documentary evidence as is in the possession of the claimant, state the amount of the claim and the method by which that amount was calculated."

12. BAC and BAS submitted appeals to the FTT against HMRC's rejection of their claims, and a direction was made that the two appeals proceed together. HMRC then made an application for a direction that they be struck out on the grounds that they had no reasonable prospect of success, but the application was not pursued to a conclusion and instead, after some further procedural skirmishing, the tribunal directed that a preliminary issue be determined. That issue came before Judge Berner in June 2014.

The F-tT's decision

13. Judge Berner described the nature of the issue before him in the first three paragraphs of his decision:

> "[1] I have before me a question referred to the Tribunal in the context of the Appellants' appeals by joint application of the parties dated 9 January 2014 and directed by the Tribunal on 10 January 2014 to be a preliminary issue in these appeals.
>
> [2] The question is: 'whether the claims which are the subject of the … appeals are valid claims for the purposes of regulation 37 of the Value Added Tax Regulations 1995 (SI 1995/2518)'. That is the only question I am asked to address, but the parties agreed during the hearing that, were I to find that a valid claim or claims had been made, I should also make a finding as to the scope and extent of the claim or claims.
>
> [3] The question is expressed in terms of the validity of a claim. Nothing turns on this. The real issue is simply whether what has been done amounts to a claim at all for the purposes of the relevant statutory provisions; the word 'valid' adds nothing of substance. But it is nonetheless a convenient way of describing the dispute between the parties."

14. The essence of the taxpayers' argument before the F-tT was that it is sufficient to give notice of a claim within time even if the details are to follow at a later date. That argument was based primarily upon what was said by Roth J, sitting in this tribunal, in *Reed Employment Ltd v Revenue and Customs Commissioners* [2013] STC 1286. That case related to the amendment, or purported amendment, of an existing claim rather than to the institution of a new claim but, it was said, two observations of Roth J were relevant in this case. At [31] he said:

> "… I consider that 'claim' should here be given its ordinary meaning. In this context, it means a demand for repayment of overpaid tax. It may relate to one accounting period or many, to one particular supply or many, and to a part of the taxpayer's business or the whole of its business. There is no reason, in my view, why any of these cannot constitute a self standing claim."

15. At [33] he said:

> "… If the taxpayer making a claim says that he is not yet able to calculate the full figures and gather all the documentation as required by reg 37, but is in the course of doing so and will provide such further details as soon as possible, such further submission would not constitute a new claim but fall within the scope of the existing claim."

16. At [15] Judge Berner recorded the submission made on behalf of the taxpayers that that is precisely what the solicitors had done in their letter, by intimating claims and promising the material to support them at a later date. However, he rejected that argument on the basis that Roth J was referring, not to the initial intimation of a claim, but to a later amendment. He went on to refer to a decision of the F-tT, *Websons (8) Ltd v Revenue and Customs Commissioners* [2013] UKFTT 229 (TC), in which it was pointed out that reg 37 has nothing to do with the merits of a claim but is concerned with the formalities of making it, in order that it can be said with certainty when it was made and to what it relates. He then turned to *Nathaniel & Co Solicitors v Revenue and Customs Commissioners* [2010] UKFTT 472 (TC), a case on which (it seems) the taxpayers also relied. In that case the F-tT decided that a claim purportedly made for a stated sum did not amount to a claim within the meaning of the regulation because it contained no indication of the method by which that sum had been reached, but it added an explanation of what it perceived to be the purpose behind the requirements of reg 37. The core of its reasoning is to be found at [65]:

> "… We consider that, when regulation 37 provides that the claim must state the method by which the amount claimed was calculated, the test should be an objective one, viz did the claim contain sufficient information as to the method used to derive the amount claimed as to enable a reasonably competent VAT officer to understand the way in which the amount claimed been calculated? We consider that the necessary information is contained in the document or documents comprising the claim, or in other documents which are incorporated by reference where those other documents are already in the possession of HMRC."

17. At [21] Judge Berner expressly disagreed with those comments, making the point that the objective test to which the F-tT had referred imposed a hurdle which reg 37 did not contain. The only requirement is that the amount of the claim be stated, together with the method by which that amount had been calculated, by reference to documents within the claimant's possession. Nevertheless, he accepted the conclusion of the tribunal in *Nathaniel & Co* that the requirements of reg 37 are mandatory. It was in any event a conclusion consistent with the decision of the Court of Appeal in *R v Customs and Excise Commissioners, ex parte Building Societies Ombudsman Co Ltd* [2000] STC 892 ("*BSOC*"). In that case the taxpayer had engaged in correspondence with the Commissioners about the nature, for VAT purposes, of certain of its activities. In the course of the correspondence the taxpayer's adviser wrote a letter including the passage "I am

instructed to serve notice of claim for the VAT overpaid to date by the company since its effective date of registration. Details of the claim will be sent in due course." The Court of Appeal decided that what the adviser said did not amount to a statement of the amount of the claim or of the method of its calculation and that it therefore did not satisfy the reg 37 requirements.

18. At [24] Judge Berner said this:

> "It is evident from *BSOC*, therefore, that a purported claim (which has been described in some cases as a protective claim) which does not itself satisfy the conditions of reg 37, will not qualify as a claim for the purpose of s 80. It is not sufficient to refer to a prospective claim, without the attendant matters referred to in reg 37, with a promise the details will be sent in due course. There is no conflict between what the Court of Appeal held in *BSOC* and what Roth J held in *Reed*. There Roth J was considering what might be regarded as an amendment, by way of provision of further information, to an existing claim. That is perfectly consistent with the judgment of the Court of Appeal in *BSOC* that the mere promise of information is sufficient on its own to constitute a claim within the requirements of reg 37."

19. We think that the word "sufficient" in the final sentence of that paragraph was intended to be "insufficient".

20. The judge then turned his attention to HMRC's argument about BAS's *Elida Gibbs* claim, or purported claim. That argument was that it was a necessary inference that a claim must identify the amount claimed by reference to prescribed accounting periods. The inference stemmed, it was said, from the reference in s 80(1) to the taxpayer's having accounted to HMRC for VAT "for a prescribed accounting period"; the argument was that a claim must correspondingly also be linked to the relevant accounting period. Judge Berner rejected that argument on the grounds that the form of a claim was dictated by s 80 and reg 37, and the mandatory nature of those provisions meant that they must be regarded as exhaustive. There was accordingly no basis upon which a further requirement could be implied.

21. At [30] Judge Berner listed the principles he had derived from his analysis. We can summarise the principles as follows: a "claim" must constitute a demand for the repayment of overpaid VAT; the requirements of reg 37 are mandatory so that a claim which does not meet its requirements will not be a claim for the purposes of s 80; the requirements of reg 37 are exhaustive, and no additional requirement can be implied; and it is not sufficient to make a prospective claim promising details in the future – but as long as the reg 37 requirements are met, it does not matter that additional details are submitted in the future provided only that they do not amount to a new claim.

22. At [34] Judge Berner set out his conclusion about BAS's *Elida Gibbs* claim. As HMRC challenge his reasoning, we set it out in full:

> "I start by considering the claim or claims said to have been made by BAS. In that case I find that, applying the principles I have outlined, the Letter did constitute a claim for the purpose of s 80 VATA. It satisfied the conditions in reg 37 of the VAT Regulations in the following respects:

(a) it stated the amount of the claim (£1.29375 million), so far as it could be determined by reference to documentary evidence in the possession of BAS;

(b) it set out the method by which that amount had been calculated; and

(c) it referred to the accounts of BAS which supported the calculation."

23. He recorded at [35] that HMRC's only challenge to that claim rested upon the submission he had already rejected, namely that it did not separate the claim by reference to prescribed accounting periods, and accordingly determined that the letter of 30 March 2009 did contain a claim to that extent. He went on to observe that BAS would not be confined to a claim for 1989, since the letter expressly referred to other years. He then added that because no element of BAS's *Italian Republic* claim was included in the amount stated and, indeed, the letter merely referred to the claim without any further particulars, BAS had not complied with reg 37 in relation to that claim.

24. At [39] the judge turned his attention to BAC. He pointed out that the letter did not specify an amount, in respect of either intended claim, and for that reason alone failed to comply with reg 37. He added that he disagreed with the argument advanced by BAC that it made no sense to require an amount to be stated in a case in which the taxpayer was unable to provide a properly calculated figure and, if required to state a figure, would have to resort to guesswork. He did not consider that a guess would be sufficient to satisfy the requirements and rejected the implicit argument that in such a case the taxpayer should be excused the obligation to state an amount. Thus BAC's appeal was wholly unsuccessful.

HMRC's submissions

25. Mr Raymond Hill, counsel for HMRC, told us that he accepted, following *Reed Employment*, that it was permissible to amend a claim after it was made, including by increasing its amount, provided it was truly an amendment of an existing claim (rather than, on proper analysis, a further claim) and that the existing claim had been validly made. The F-tT was right to conclude that BAC had made no valid claim at all, and that BAS had made no valid *Italian Republic* claim. None of those purported claims met the requirements of reg 37 for the reasons the F-tT gave.

26. The argument advanced in BAC's grounds of appeal, that it was sufficient to identify the reason for making the claim while at the same time promising exact calculations when the information to support them has been obtained is unsustainable; the F-tT was right to find that the requirements of reg 37 are mandatory, and that a failure to comply with them is fatal to the intended claim. It is quite clear that the regulation imposes two distinct requirements, namely the statement of the amount and the identification of the method by which it was calculated. The argument advanced by BAC is contrary to the wording of the regulation and also contrary to what was said by the Court of Appeal in *BSOC* to the effect that merely stating that a claim will be made is not enough.

27. More recently, this tribunal had decided in *Lothian NHS Health Board v Revenue and Customs Commissioners* [2015] UKUT 264 (TCC), [2015] STC

2221 that a taxpayer making such a claim "has to show on the balance of probabilities a reasonably precise figure for unrecovered input tax" even in a case in which it has access only to limited records.

28. The purpose of the reg 37 requirements, Mr Hill continued, is to enable HMRC to determine whether the claim is justified. The requirement that the amount be specified, and the means by which it has been calculated identified, are necessary if HMRC are to do that. As the F-tT said at [27], the amount claimed will not necessarily be the amount due, because HMRC might disallow part of it or because the taxpayer, on receipt of further or better information, might himself adjust it. Even though the requirements might not be spelt out in the regulation, the tribunal was right to say in *Nathaniel & Co* that the information should be sufficient to enable a reasonably competent officer to establish whether the claim was justified. Thus although the F-tT in this case was wrong to reject what had been said in *Nathaniel & Co*, it was right to conclude that the information provided in support of BAC's *Elida Gibbs* claim and both of the *Italian Republic* claims was insufficient.

29. It is no answer that the taxpayers in this case could not fully quantify their claims before expiry of the time limit. That is the ordinary consequence of the imposition of a time limit, which is there as an aid to legal certainty. Once the time limit has expired, HMRC can be confident that no claim will be made, or at least that there is an upper limit on the value of any claim which has been made, subject to an amendment in the limited circumstances described by Roth J in *Reed Employment*. The important factor is that the making of a valid claim crystallises it; amendment is permissible only if a resulting increase amounts to a genuine amendment to the original claim. What Roth J said lends no support to the proposition that a claim can be intimated, without regard to the reg 37 requirements, and particularised later. If that proposition were right the time limit imposed by s 80(4) would be largely ineffective.

30. Although the F-tT was right to reject the *Italian Republic* claims and BAC's *Elida Gibbs* claim, it was wrong to conclude that BAS had made a valid claim under that head. The essence of its reasoning was that because BAS had specified an amount for 1989, with an indication that it proposed to apply the same method of calculation to other years, it had sufficiently complied with the statutory requirements. But that is an illogical approach; even if BAS did comply with those requirements in relation to 1989 it had manifestly not done so in relation to every other year, for which it had specified no amount. It was for that very reason that the F-tT had rejected the other claims and it was inconsistent not to apply the same reasoning to BAS's *Elida Gibbs* claim for other years.

31. Moreover, the F-tT was wrong to reject HMRC's argument that the claim for 1989 was invalid. Section 80(1) provides for the recovery of an amount of output tax which was not due but for which the taxpayer has "accounted to the Commissioners … for a prescribed accounting period". Sub-section (2) provides that HMRC are liable to credit or repay "an amount under this section on a claim being made for the purpose". Thus if one reads the two subsections together it is apparent that the claim must be made in respect of an amount related to a prescribed accounting period; it is not permissible to claim a global amount referable to several accounting periods, as BAS did in this case. A natural reading

of the provisions shows that the taxpayer must demonstrate that he has accounted for an excess of output tax in a prescribed accounting period and there is good reason for that since it enables HMRC to determine whether or not he is correct. The making of claims by reference to prescribed accounting periods is also relevant to the determination of any interest which might be due, and in ascertaining the applicable time limit, which runs from (in a case such as this) the end of the relevant prescribed accounting period: see s 80(4ZA)(a).

32. That interpretation of the legislation was consistent with what Roth J said in *Reed Employment*, at [31], to the effect that a claim "may relate to one accounting period or many". It was not a point in dispute in that case, but it is plain from the manner in which he expressed himself that Roth J had in mind the making of a claim covering several accounting periods, but nevertheless specifying separate amounts for each of those periods. Thus the making of a claim referable only to a whole year, as in this case, was not permissible and the F-tT was wrong to decide otherwise.

The taxpayers' submissions

33. Mr Ian Bridge, counsel for BAS and BAC, based his primary argument upon two principles: that the taxpayer should have an effective remedy, and that the legislation should be interpreted purposively. As to the first, he relied upon the proposition, which is uncontroversial, that national measures must not render practically impossible or excessively difficult the exercise of rights conferred by Community law. As to the second, he pointed out that the substantive right is granted by the Act and that the regulation is merely procedural. Thus to interpret it in a manner which defeats the object of the Act is not permissible.

34. When the solicitors wrote to HMRC on 30 March 2009 it was impossible for them to provide more detail of the claim than they did. The taxpayers should not be deprived of a remedy because of the difficulties facing them due to the age of their claims and their inability to access the relevant documentation. HMRC had received hundreds of *Elida Gibbs* and *Italian Republic* claims from companies in a similar position to BAS and BAC and knew very well what was the basis of calculation underlying them, and they were in a position to verify the claims notwithstanding the lack of detail. Mr Bridge acknowledged that it was important to be able to determine whether a claim had been made, in order to ascertain whether or not it was out of time, but the important factor was the making of the claim, rather than the provision of the underlying detail. If the legislation was interpreted purposively, and with a view to affording the taxpayers an effective remedy, it was apparent that the claims had been made in a manner which was sufficient to enable HMRC to process them, and that there was adequate compliance with the provisions, construed purposively.

35. The F-tT in this case had taken an excessively narrow view of what had been said by Roth J in *Reed Employment*. At [31] (quoted above) he had given a wide definition of the meaning of "claim" making it clear that it could relate to more than one accounting period, to more than one supply and to part or the whole of the taxpayer's business. What he had not said was that the claim must be compartmentalised, as HMRC maintain, but instead he left open the possibility that a claim could relate to several prescribed accounting periods without segregation between them. Even if, in this case, segregation might have been

possible after further enquiry, it was certainly impossible at the time the letter of 30 March 2009 was written. But it was nevertheless clear from that letter what claim was being made and on what basis, even if the detail was lacking.

36. What Roth J said at [33] fortified that interpretation. Although the decision in that case related to the amendment of a claim, the observation at [33] related to the original claim, and to the taxpayer who has said "that he is not yet able to calculate the full figures and gather all the documentation as required by reg 37, but is in the course of doing so." It is perfectly clear from the manner in which Roth J expressed himself that he considered such a claim would satisfy the statutory requirements. There is a distinction to be drawn between *Reed Employment* and this case on the one hand and *BSOC* on the other because in the latter case the taxpayer was found not to have made a claim at all; it was not a case of a claim lacking in amount or calculation. Here, it was perfectly clear that claims had been made and the solicitors who wrote the letter had explained that they were gathering the further information which would enable them to provide full details as soon as possible. The taxpayers here were in exactly the same position as the hypothetical taxpayer to whom Roth J had referred.

Discussion

37. We deal first with the taxpayers' argument that the claims complied sufficiently with a purposive application of the statutory provisions. We accept Mr Bridge's point that reg 37 is principally procedural, but we do not think it offers him much assistance. The critical point is that sub-s 80(2) requires a claim to be made, while sub-s 80(6) requires the claim to be "made in such form and manner" as may be prescribed; as we have said, the prescription appears in reg 37. In our view, these provisions taken together mean that a claim can be treated as a claim only if it satisfies the requirements of form and manner which are prescribed. There is no room within reg 37 for a claim to be made, without the specification of an amount or the method of calculation, but upon the basis that they will be provided later. We agree with Judge Berner that Roth J did not decide the contrary in *Reed Employment*, but was instead focusing on the character of an amendment rather than on the validity or otherwise of the original claim. To have said what he did in the context of the validity of the original claim would have been inconsistent with the decision of the Court of Appeal in *BSOC*.

38. It follows that we agree with Judge Berner that compliance with the reg 37 requirements is mandatory, and accordingly that a claim which does not satisfy those requirements is not a claim within the statutory meaning. We do not think there is anything in Mr Bridge's argument about effectiveness and purposive interpretation which changes that conclusion. We can accept that BAS and BAC were, in the particular circumstances of their case, unable to assemble the requisite information necessary for them to make a fully compliant claim before the expiry of the time limit but, as Mr Hill rightly said, the position in which they found themselves thereafter is no more than the ordinary consequence of its expiry. In other words, an effective remedy was available to the taxpayers but they failed to exercise it in time. We should add for completeness that we agree with what Judge Berner said in relation to reg 37 and *Nathaniel & Co* in [20] and [21] of his decision.

39. It is quite clear, and indeed Mr Bridge acknowledged that he could not realistically argue otherwise, that the purported *Italian Republic* claims did not comply with reg 37. We therefore agree with Judge Berner that they must fail since they did not satisfy the statutory requirements: as before, mere intimation of a claim with details to follow is not enough. We also agree with him that what BAC provided in support of its *Elida Gibbs* claim was insufficient. Although a proposed method of calculation was identified, no amount was even hinted at. We must, therefore, dismiss the appeals in relation to those parts of his decision.

40. We agree also with Judge Berner that there is nothing in reg 37 to support the proposition that a claim which relates to several prescribed accounting periods must be allocated to them individually. That, however, is not the point Mr Hill is making. His argument is derived, not from reg 37, but from s 80. Judge Berner referred to the argument at [28], but rejected it on the basis that the mandatory requirements were to be found in s 80(6) and reg 37, and because they are mandatory they must be taken to be exhaustive.

41. In our view, however, Mr Hill is right. It is clear that sub-s (1) is directed at an amount for which the taxpayer has accounted as output tax but which was not output tax due for a single prescribed accounting period. It is impossible to read the subsection in any other way. Subsection (2) then provides for a claim for repayment of "an amount under this section"; we agree with Mr Hill that the "amount" referred to here must be the same "amount" as is mentioned in sub-s (1). Thus although, as Roth J said in *Reed Employment*, it is possible to make claims relating to several prescribed accounting periods, by sending a letter or by voluntary disclosure, the taxpayer must comply with sub-s 80(6) and reg 37 in respect of each period. Even if the overall claim relates to several prescribed accounting periods a separate claim must be made for each such period, identifying that period, the amount for which repayment is sought and the method by which it has been calculated. It would, of course, be sufficient to say, if it be the case, that the same method of calculation applies to each period. It may be that it is impossible to make a precise calculation allocating an exact amount of tax to each of the prescribed accounting periods to which the overall claim refers. We would not, therefore, see any objection to a calculation which, for example, arrived at a figure for a whole year and then apportioned it equally to the accounting periods within that year. Indeed, such an approach would amount to compliance with reg 37 since equal apportionment, whether or not truly justified by the circumstances, does represent an element of calculation. That is, we think, also consistent with what this tribunal said in *Lothian NHS Health Board.*

42. That may seem a pedantic approach, and it might be said that it should be implied from the manner in which the solicitors had approached the calculation which was offered with the 30 March 2009 letter that equal apportionment over the prescribed accounting periods within 1989 was intended. However, we agree with Mr Hill that there is a purpose to the allocation of the amounts claimed to accounting periods, in part because of the impact on the calculation of any interest might be due but more particularly because of the manner in which the question whether the time limit has expired must be determined: as the F-tT said in *Websons (8) Ltd*, compliance with reg 37 represents the means by which it can be determined when a claim was made. Sub-section (4ZA) provides that the time limit for making the claim has to be determined by reference to the end of the

relevant prescribed accounting period. We do not see how that can be possible if it is permissible to make a claim without allocation to separate accounting periods.

43. The solicitors, as we have said, did not attempt to apportion the amount claimed for 1989 between the relevant prescribed accounting periods and in our view it follows that the claim did not satisfy the statutory requirements. We therefore disagree with Judge Berner on this point and must allow HMRC's appeal. It follows that we disagree with him too that the letter of 30 March 2009 contained a claim by BAS in proper form for the other years mentioned in it.

Disposition

44. HMRC's appeal is allowed and the F-tT's decision to the effect that BAS had made an effective *Elida Gibbs* claim is set aside. The appeals of BAS and BAC are dismissed.

Mr Justice Warren

Judge Colin Bishopp

Upper Tribunal Judges

Release date: 19 February 2016