[2017] UKUT 19 (TCC)

Appeal No: UT/2015/120

VAT – Input tax – Fleming claim for recovery of input tax - Substantiation and quantification of claim – Whether the First-tier Tribunal erred in law in refusing appeal because evidence insufficient – VATA 1994, section – VATR 1995, reg 37 - Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009, rule 35 - Appeal refused.

Upper Tribunal
(Tax and Chancery Chamber)
ON APPEAL FROM THE
FIRST-TIER TRIBUNAL (TAX CHAMBER)

Between

NHS GREATER GLASGOW AND CLYDE HEALTH BOARD

Appellant

And
THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS

Respondents

Before

THE HONOURABLE LORD DOHERTY
(Sitting as a Judge of the Upper Tribunal)

Heard at The Tribunal Centre, George House, Edinburgh	**Determination Promulgated**
On 4 and 5 October 2016	**13 January 2017**

For the Appellant: David Southern QC for the Appellant, instructed by Liaison Financial Services Limited

For the Respondents: Sean Smith QC, instructed by the Office of the Advocate General for Scotland

DETERMINATION AND REASONS

DECISION

The appeal is refused.

REASONS

Introduction

1. As a result of the decision of the House of Lords in Fleming (t/a Bodycraft) v HMRC [2008] STC 324 and the subsequent amendment to the law made by the Finance Act 2008, section 121, the entitlement of traders to recover input tax for periods going back as far as 1973 (which had been removed in 1997) was restored. Claims required to be submitted by 31 March 2009.

2. The present appeal concerns a Fleming claim by the appellant health board to recover input tax relating to business activities during a 20 year period from 1974 to 1994. It is one of a number of similar appeals by health authorities in Scotland. The total sum the appellant had claimed on 30 March 2009 in respect of business activities was £3,571,517.74. Part A of the claim was for input tax of £1,501,435.49 in respect of dining room expenditure. Part B of the claim was for input tax in respect of residual business expenditure. Part C was input tax in respect of capital expenditure. Once COS (contracted out services) VAT recovered was deducted in respect of Parts B and C the resultant total claim for Parts B and C was £2,070,082.25. Since 31 March 2009 the appellant had advanced altered claims on a number of occasions. While the claim lodged on 30 March 2009 had covered a 23 year period from 1974 to 1997, one of the changes in the version lodged in February 2011 was that the final three years of the claim were removed. In its final form the altered claim was for a total of £3,444,762.39 (Joint Bundle page 101 *et seq.*).

3. The appellant maintained that each altered claim was simply a variation or modification of the claim made on 30 March 2009, but that each was fundamentally still the same claim. On the other hand the respondents contended that the changes were new and different claims which were time-barred.

4. The appellant's claims were rejected by the respondents, and the appellant appealed to the First-tier Tribunal ("FTT"). On 13 March 2015 the FTT issued its decision (Greater Glasgow and Clyde Health Board v Revenue and Customs Commissioners [2015] UKFTT 119 (TC)). Paragraph 39 of the decision stated that it contained full findings of fact and reasons.

5. The appeal was refused on the ground that the appellant had failed to prove that an amount of input tax was due to it. The FTT also held that in so far as the appellant sought to advance a claim for input tax due to a predecessor authority, Argyll and Clyde Health Board, that was a new claim which was

time-barred because no figures for that Board had been included in the claim which had been made on 30 March 2009. The appellant now appeals, with the permission of the FTT, to the Upper Tribunal ("the UT") on the basis that the FTT erred in law in refusing the appeal.

Evidence led before the FTT

6. The FTT heard evidence from three witnesses led by the appellant, namely Stephen Forsyth (a VAT Manager with Liaison Financial Services Limited and the principal witness for the appellant); Michael Shiels, assistant head of finance with the appellant; and Peter Ramsay, who oversaw the completion of VAT returns for the Victoria Infirmary from 1993 to 1999. It also heard evidence from one witness for the respondents, Miss Kathleen Langley, the officer responsible for the decisions to refuse the appellant's claims. The FTT set out the evidence in considerable detail between paragraphs 3 and 120 of its decision. For present purposes it is unnecessary to rehearse that evidence, or all of the details of the appellant's methodology, or the evidence upon which it relied in support of that methodology. While the FTT described Mr Forsyth and Miss Langley as expert witnesses, before the UT it was common ground that neither witness had given gave expert opinion evidence. Rather, Mr Forsyth had been utilised as a means of conveniently setting out for the FTT the case made by the appellant, and Miss Langley had explained the respondents' position, including its many concerns about the evidence relied upon by the appellant and methodology which it used.

The FTT's decision and findings

7. The FTT determined that its jurisdiction was "the determination of a due sum repayable by HMRC and that on the basis of evidence led" (paragraph 125). It had to "focus on calculating an exact or even approximate sum due" (paragraph 124). The onus of establishing the claim was on the appellant (paragraph 122). The FTT did not accept important aspects of the evidence which the appellant relied upon to support its claim (paragraphs 121, 129, 131, 133 - 137). In particular, it was not satisfied with the appellant's approach to apportionment between business and non-business supplies (paragraph 131); or with the appellant's reliance on only four years accounting figures, with the four years being bunched in the middle of the 20 year period and with extrapolation using the Retail Prices Index ("RPI") (paragraphs 126, 134 and 135); or with the appellant's calculation of a PESM (partial exemption special method) which involved taking the numerator and denominator from different years) (paragraphs 133 and 136). Nor was it satisfied or that all COS VAT (contracted out services VAT) had been properly identified and taken account of in the appellant's calculations (paragraph 137). The FTT also held that since a claim for input tax due to Argyll and Clyde Health Board had only been advanced after 31 March 2009, that aspect of the claim was a new claim and was time-barred (paragraphs 127-128).

8. The FTT also observed (paragraph 121) "Both parties acknowledge that a substantial sum of input VAT is repayable.", and that "it seems accepted in

principle that a substantial amount of VAT is repayable" (paragraph 123). However, before the UT it was not disputed that that had not been the respondents' position at the FTT; and as I observe below, in my opinion it is plain from Miss Langley's evidence and from counsel for the respondents' submissions to the FTT that there was no such acknowledgement or acceptance by the respondents.

Relevant statutory provisions

9. Sections 11 and 12 of the Tribunals, Courts and Enforcement Act 2007 ("TCEA") provide**:**

> **"11 Right to appeal to Upper Tribunal**
> (1) For the purposes of subsection (2), the reference to a right of appeal is to a right to appeal to the Upper Tribunal on any point of law arising from a decision made by the First-tier Tribunal other than an excluded decision.
> (2) Any party to a case has a right of appeal, subject to subsection (8).
> (3) That right may be exercised only with permission (or, in Northern Ireland, leave)
> …
> **12 Proceedings on appeal to Upper Tribunal**
> (1) Subsection (2) applies if the Upper Tribunal, in deciding an appeal under section 11, finds that the making of the decision concerned involved the making of an error on a point of law.
>
> (2) The Upper Tribunal–
> (a) may (but need not) set aside the decision of the First-tier Tribunal, and
> (b) if it does, must either–
> (i) remit the case to the First-tier Tribunal with directions for its reconsideration, or
> (ii) re-make the decision.
> …"

The FTT's decision is not an excluded decision. As already noted, the FTT granted the appellant permission to appeal.

10. Section 80 of the Value Added Tax Act 1994 ("VATA") makes provision for a person obtaining credit or repayment of an amount of VAT paid by him that was not due. Regulation 37 of the Value Added Tax Regulations 1995 ("VATR") (S.I. 1995/2518) provides:

> "37. Any 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."

11. Rule 35(3)(b) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (S.I. 2009/273) provides:

> "(3) Unless each party agrees that it is unnecessary, the decision notice must—
> …

(b) be accompanied by full written findings of fact and reasons for the decision."

Contentions for the appellant

12. Before the UT the appellant's primary ground of appeal was that the FTT's decision did not contain adequate findings in fact or reasons. The appellant was "simply in the dark" as to the basis upon which the appeal had been refused. Reference was made to rule 35 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 and to PMS International Group Plc v Magmatic [2016] UKSC 12, per Lord Neuberger PSC at paragraphs 37 - 39; Flannery v Halifax Estate Agencies Ltd CCRTF 98/02-3/2; English v Emery Reinhold & Strick Ltd [2002] 3 All ER 385, at paragraphs 16-19; Revenue & Customs Commissioners v Wakefield College [2016] STC 1219, at paragraphs 45 - 46).

13. The second ground of appeal was that the FTT had misdirected itself in law as to its jurisdiction. Given that the claim was a Fleming claim, and the FTT had found that the appellant had substantially proved its case but had not proved that a precise amount of input tax was repayable, the FTT's role ought not to have been restricted to determining if the appellant had established that a specific amount of input tax was repayable. The jurisdiction of the FTT was wider than that in those circumstances: its role was to find a just solution. While it was not suggested that Lothian NHS Health Board v Revenue & Customs Commissioners [2015] STC 2221 had been wrongly decided, *dicta* in other cases such as Customs & Excise Commissioners v Pegasus Birds Ltd [2004] STC 1509 (per Carnwath LJ at paragraph 38), Pendragon plc v Revenue & Customs Commissioners [2015] STC 1825 (per Lord Carnworth at paragraphs 47, 48, 51), and Revenue & Customs Commissioners v General Motors (UK) Ltd [2016] STC 985 (per Henderson J and Judge Sinfield at paragraphs 69 - 72), provided some support for the proposition that the FTT's jurisdiction was not as narrow as the FTT appeared to have thought.

14. The third ground of appeal was that the FTT's decision was unreasonable. Its overall conclusion was that the appellant had overpaid a substantial sum of VAT, but they were not entitled to recover any sum. Here, because the findings in fact were inadequate it was not possible to approach matters applying the normal well-established principles discussed in Edwards v Bairstow 1956 AC 14, 36 TC 207 and Giorgiou (t/a Mario's Chippery) v Customs & Excise Commissioners [1996] STC 463. That was the gravamen of the complaint under this ground. Given the overall conclusion that a substantial sum of VAT had been overpaid, it had been unreasonable of the FTT not to make further findings accepting the appellant's approach and allowing the appeal in whole or in part. It was submitted that Part A of the claim had been its strongest aspect. Counsel for the appellant recognised that Parts B and C had been more difficult for the appellant.

15. The fourth ground of appeal was that the FTT had erred in law in holding that the claim was time-barred in so far as it related to VAT paid by Argyll and Clyde Health Board. A timeous claim had been made on the part of the

appellant on 30 March 2009. The claim had been adjusted and refined since then, but it remained the same claim. Its fundamental character was unchanged. Reference was made to Reed Employment Ltd v Revenue & Customs Commissioners [2013] STC 1286; Revenue & Customs Commissioners v General Motors (UK) Ltd [2016] STC 985; Revenue & Customs Commissioners v Vodafone Group Services Ltd [2016] STC 1064; Bratt Auto Contracts Ltd v Revenue & Customs Commissioners [2016] UKUT 0090. It was accepted that no element of the claim lodged on 30 March 2009 had contained any figure which related to Argyll and Clyde Health Board. However, that had been because until 2014 the respondents had not accepted that the appellant had succeeded to any of the rights of that Board.

Contentions for the respondents

16. The FTT had not erred in law. It had been fully entitled to decide as it had.

17. It was disingenuous of the appellant to suggest that it was in the dark as to the basis of the FTT's decision. It was perfectly clear from the decision that the FTT had not been satisfied with the evidence upon which the appellant had relied in support of its claim. In particular the FTT made it clear that reliance on only four years accounts, with the four years being bunched in the middle of the 20 year period and with extrapolation using RPI, was inadequate and did not comply with regulation 37. It also made clear that it was not satisfied with the appellant's apportionment between business and non-business supplies; or with the appellant's calculation of a PESM (and in particular with its deriving the numerator and denominator from different years); and that it was not satisfied that all COS VAT had been properly identified and taken account of in the appellant's calculations. The FTT had provided sufficient findings and adequate reasons for its decision.

18. The second ground of appeal involved substantially the same argument which had been considered and rejected by Lord Tyre in Lothian NHS Health Board v Revenue & Customs Commissioners, *supra*. Lord Tyre had been correct to reject it in that case, and it should be rejected here. The FTT had not erred in law as to their jurisdiction.

19. The third ground of appeal was perplexing. Counsel for the appellant accepted that unless either the first or second ground of appeal was well-founded this ground could not succeed. As neither of the first or second grounds had merit the third ground failed. The third ground was, in any case, based on a false premise. The respondents had not accepted that a substantial sum of input tax was due to the appellant. All that the respondents had accepted was that there had been some business expenditure in the relevant years. The appellant did not come anywhere close to meeting the Edwards v Bairstow test.

20. The fourth ground was academic given the failure of the other grounds. However the FTT had not erred in law in deciding that the Argyll and Clyde Health Board aspect of the claim was time-barred. No inherited claim in respect of Argyll and Clyde Health Board business had been included in the

claim made on 30 March 2009. It was added after the expiry of the time-bar. The FTT had not erred in law in deciding that in so far as the claim related to Argyll and Clyde Health Board business it was a new claim.

Decision

21. An appeal from the FTT to the UT lies only on a point of law (s. 11(1) TCEA). The question for the UT is: as a matter of law, was the FTT entitled to reach its conclusions? (Procter & Gamble UK v Revenue & Customs Commissioners Procter & [2009] STC 1990, per Mummery LJ at paragraph 74). Unless the FTT has erred in law, or made a finding which on the evidence it was not entitled to make, the UT is bound by the FTT's findings in fact (*Edwards v Bairstow*).

22. The FTT is a specialist tribunal. When considering its decision its expertise in the particular area requires to be borne in mind. As was observed in Procter & Gamble:

> "Lord Justice Jacobs:
> …
> '11 It is also important to bear in mind that this case is concerned with an appeal from a specialist Tribunal. Particular deference is to be given to such Tribunals for Parliament has entrusted them, with all their specialist experience, to be the primary decision maker, see per Baroness Hale in *SH (Sudan)* at [30] cited by Toulson LJ.
> …
> Lord Justice Toulson:
> …
> 48 Parliament has designated a specialist Tribunal to determine these matters. In reviewing the Tribunal's decision, it is right to bear in mind the cautionary words of Baroness Hale in *Secretary of State for the Home Department v AH (Sudan) [2007] UKHL 49*, para 30, which were expressed in an asylum appeal but were clearly not intended to be limited to that area:
>
> > 'This is an expert Tribunal charged with administering a complex area of law in challenging circumstances. To paraphrase a view I have expressed about such expert Tribunals in another context, the ordinary courts should approach appeals from them with an appropriate degree of caution; it is probable that in understanding and applying the law in their specialised field the Tribunal will have got it right: see *Cooke v Secretary of State for Social Security [2001] EWCA Civ 734, [2002] 3 All E R 279* , para 16. They and they alone are the judges of the facts. It is not enough that their decision on those facts may seem harsh to people who have not heard and read the evidence and arguments which they have heard and read. Their decisions should be respected unless it is quite clear that they have misdirected themselves in law. Appellate courts should not rush to find such misdirections simply because they might have reached a different conclusion on the facts or expressed themselves differently.' "

23. Mindful of the UT's proper role, I turn to the appellant's challenges to the FTT's decision. While the appeal hearing lasted a day and a half, I find myself able to state my conclusions and reasons fairly briefly.

24. In my opinion the FTT committed no error of law.

25. I reject the contention that the appellant has been left in the dark as to the basis of the FTT's decision. On the contrary, in my opinion the FTT explained that it was not satisfied with important parts of the evidence upon which the appellant's case depended. It made it clear that it considered that the appellant's reliance on only four years accounting figures, with the four years being bunched in the middle of the 20 year period and with extrapolation using RPI, was unsatisfactory and did not comply with regulation 37 (paragraphs 126, 134 and 135). It made it equally clear that it was not satisfied with the appellant's apportionment between business and non-business supplies (paragraph 131); that it did not accept the appellant's calculation of a PESM was valid (and in particular that it was flawed because the numerator and denominator were taken from different years) (paragraph 136); and that it was not satisfied that all COS VAT had been properly identified and taken account of in the appellant's calculations (paragraph 137).

26. In those circumstances I consider it immaterial that there may have been other aspects of the evidence in respect of which the FTT did not make findings, because the findings which it did make were sufficient to explain why the claim failed. Findings on further matters would not have remedied the problems with the appellant's case which the FTT highlighted. In my view the FTT did enough to explain the basis of its decision and to comply with rule 35.

27. I am also clear that the FTT did not misdirect itself as to its jurisdiction. It proceeded on the basis that in demonstrating that an amount was due reasonable and sustainable estimation or approximation by the appellant might be legitimate. It approached the appeal - correctly - on the basis that it was for the appellant to satisfy it on the balance of probabilities that the appellant was entitled to repayment of an amount of input tax. In my opinion the FTT correctly identified the jurisdiction conferred on it by s.11(1) TCEA, and it had proper regard to the terms of s.80 VATA and reg. 37 VATR. Counsel for the appellant did not suggest that Lothian NHS Health Board v Revenue & Customs Commissioners, *supra* had been wrongly decided, or that any part of Lord Tyre's reasoning disposing of the misdirection ground of appeal was flawed. I was advised that the *Lothian* decision has not been appealed. In my opinion Lord Tyre was correct to decide as he did. I agree with his observations. In my view none of the other authorities which were prayed in aid assist the appellant with this ground of appeal. I am wholly unpersuaded that the FTT in the present case misdirected itself as to its jurisdiction or that it erred in law in following the approach that it did.

28. The third ground of appeal also fails. First, it proceeds on a false premise. It was common ground that the FTT had been wrong to record that the respondents accepted that a substantial repayment of input tax was due to the

appellant. There had been no such concession by Miss Langley (the relevant part of her evidence was noted by the FTT at paragraphs 76 and 77 of its decision) or by counsel for the respondents (see the first paragraph of paragraph 110 of the decision). Second, I agree with counsel for the respondents that the appellant does not even approach satisfying the Edwards v Bairstow test. There was no real attempt by counsel for the appellant to maintain otherwise.

29. Finally, although it is academic given my other conclusions, I am satisfied that the FTT did not err in law in its adjudication of the new claim arguments which were advanced before it. While it might have expressed itself better on this point, I think it is tolerably clear that it decided that the claim in respect of Argyll and Clyde Health Board input tax was a new claim and was time-barred; and that the other post-31 March 2009 changes to the claim did not result in a new claim or new claims but were of the nature of non-fundamental amendments or revisals to the existing claim. On both aspects the FTT appears to me to have applied the correct legal test, and to have reached conclusions which it was entitled to reach on issues which involved questions of fact and degree. The 30 March 2009 claim included no figures relating to Argyll and Clyde Health Board. If such a claim was to be advanced it required to be made by the appellant by 31 March 2009, irrespective of whether or not the respondents then disputed the appellant's entitlement to make such a claim.

30. For these reasons the appeal is refused

The Hon. Lord Doherty

Issued 13 January 2017