



TC01668

Value Added Tax - Fleming claim for unclaimed input deductions in respect of the reimbursement of employee business mileage costs for the period from 1973 to 1997 - sole point in issue being whether the Appellant had provided sufficient evidence of the facts that it had made the relevant reimbursements, and not claimed input tax in respect of the VAT element involved - Appeal allowed

FIRST-TIER TRIBUNAL

Reference no: TC/2011/01540

TAX

ALBERTO-CULVER (UK) LIMITED

Appellant

-and-

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS
Respondents

Tribunal: HOWARD M. NOWLAN (Tribunal Judge)
PHILIP GILLET

Sitting in public at 45 Bedford Square in London on 5 December 2011

Frank Henry of Alberto-Culver (UK) Ltd on behalf of the Appellant

Gloria Orinoloye of HMRC's Solicitor's Office on behalf of the Respondents

DECISION

1. This was a simple case, where only one factual point had to be determined, and where we therefore gave an immediate oral decision to the parties. This decision is thus purely confirmatory.
2. The Appellant had made a *Fleming* claim in the unusually modest amount of £17,216.88, plus interest (on a simple or compound basis according to how that matter is eventually resolved). The claim related to the Appellant's alleged failure to have claimed deductions for the VAT element when reimbursing employees for the business use of cars. In most cases the cars themselves had been provided by the Appellant so that the relevant reimbursements related principally to petrol costs when the cars were used for business mileage, along perhaps with other minor incidental expenses.
3. It was common ground between the parties that:
 - the formal claim had been properly made within the relevant time limits;
 - the VAT element in respect of the reimbursement of employees' costs in relation to business mileage was properly deductible for the periods claimed (1973 to 1997);
 - the claim was not undermined by the feature that the failure to make the claim had almost certainly resulted from fault or ignorance on the part of the Appellant, and not on account of any fault or misdirection by HM Customs & Excise;
 - the last-mentioned fact did however increase the burden on the Appellant to provide evidence both of the fact that the relevant reimbursements had been made, and that the VAT element within the reimbursements had not been deducted either at the time, or at a point in 1979 when clearly some reference was made in relation to reimbursements of mileage claims by an HM Customs & Excise officer in a visit to the Appellant (duly recorded in a visit report); and finally that
 - the burden of establishing, on the balance of probabilities, the two points mentioned in the previous bullet point fell on the Appellant.
4. The Appellant did not have actual evidence dating back to the period 1973 to 1997. It sought to establish its claim by providing evidence first from the year 2005, and then subsequently for the somewhat longer period from 2001 to 2005, that such reimbursements had been made in the whole of that period, and not claimed. The Appellant then sought to produce calculations, taking into account the reduced numbers of employees in earlier periods and the lower relevant level of costs in order to calculate the relevant numbers for the relevant period 1973 to 1997.
5. Mr. Paul Jarvis of HMRC who gave evidence accepted that he had considered the evidence for the period 2001 to 2005 and he confirmed that he agreed that in that period both relevant points (actual reimbursements, and failure to claim input deductions) were properly demonstrated.

6. Mr. Jarvis had initially rejected the claims, because the visit report in relation to the 1979 visit made some reference to the fact that there had been some discussion about the input deductions in relation to the reimbursement of business mileage, and it also appeared that the relevant visiting Officer had handed over a copy of the Customs Leaflet (the General Guide) numbered 700 and had, in the visit report, referred to the paragraph of the Guide that presumably dealt with this topic. HMRC had been unable to produce a copy of the Guide that would have been in force in 1979, but we would have been surprised if the paragraph, mentioned at least in the visit report, had not been the relevant paragraph, which would almost certainly have made clear that input claims could be made in respect of the relevant business mileage reimbursements. The visit report also indicated that its content was communicated in some follow-up letter, though neither party had a copy of that letter.

7. The essential, and simple, dispute between the parties was therefore this. HMRC contended that, particularly because reference had been made to this topic in 1979 in a visit, it appeared likely that the Appellant would then have submitted claims in future, and made a back claim for the period between 1973 and 1979. The level of the back claim would apparently have been in a very modest amount indeed, so that it was not surprising that HMRC now had no record of such a back claim having been made.

8. For its part the Appellant contended that it had not made the relevant claims, and it sought to support this contention by saying that it would have been very curious for claims to have been made in and following the year 1979, whereafter at some time before 2001 the company must obviously have changed its practice, and once again ceased to make the claims.

9. Mr. Jarvis had rejected the claims because he considered it likely that the claims would have been made on and after 1979. He had accordingly not looked in detail at the extrapolation of the figures back to the earlier period but he did say that on his cursory glance at the figures and the method, the way in which the Appellant had calculated the figures for the purposes of its claim for the period 1973 to 1997 looked reasonable.

10. Having heard the evidence and the contentions, we retired for a few minutes and immediately agreed that the claim should be allowed. We informed the parties orally that this was our decision. The reason for that decision was that, whilst an ordinarily competent company would have been expected to make back claims and to claim input deductions for the reimbursements from 1979 onwards, the visit report did indicate that the VAT claims were being assembled by someone who knew nothing about VAT, and the visit report did not record precisely what had been said about reimbursements either. The compelling fact therefore appeared to be the point advanced by the Appellant, namely that it seemed inconceivable that the Appellant would at one time have made the claims, and then implicitly ceased to make them at some point prior to 2001. This seemed to us to be so unlikely that, whilst the Appellant had been remiss in not rectifying the position after the 1979 meeting, the great likelihood nevertheless was that the claims were now valid. In other words the company had made the relevant reimbursements in the amounts claimed, had not claimed input deductions at any time in the past, and was now entitled to do so.

11. Accordingly, the Appellant's claim, in the amount mentioned above, is allowed, with interest to be paid in due course on whatever basis (simple or compound) is eventually established to be the appropriate basis.

12. This document contains full findings of fact and the reasons for our decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) Tax Chamber Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

HOWARD M. NOWLAN (Tribunal Judge)

Released: 15 December 2011