



TC03458

Appeal number: TC/2013/02043

VAT – the respondents’ discovery assessment in the sum of £28,180.17 arising from a Fleming motor margin claim of £239,277 VAT and £430,282 statutory interest and totalling £665,849 received by the appellant – the respondents did not accept that there had been any car sales in the year 1990 as originally agreed – the appellant alleged that it was running down its stock in that year – no evidence of such car sales – case dismissed.

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

THOMAS MOTORS LIMITED

Appellant

- and -

**THE COMMISSIONERS FOR HER MAJESTY’S
REVENUE & CUSTOMS**

Respondents

**TRIBUNAL: JUDGE DAVID S PORTER
MS ELIZABETH POLLARD**

Sitting in public at Alexandra House, Manchester on 14 March 2014

Mr Paul Dennison, managing Director, and Mr Alan Corry, company accountant, for the Appellant

Mrs Patricia Roberts, an Inspector, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents.

DECISION

1. Mr Paul Dennison (Mr Dennison) appealed on behalf of the Appellant, Thomas Motors Ltd (the Company) against the Respondents' (HMRC) discovery assessment of £28,180.17 comprising £13,576 VAT and £14,604.17 statutory interest. A claim for the Company's demonstration vehicles had been agreed and paid on 29 September 2008 in the sum of £665,849 comprising £235,567 VAT and £430,282 interest. The Company was the principal car dealer for the Ford Motor Company in the Blackpool area. The Ford Motor Company had withdrawn its franchise from the Company in September 1989 but had allowed the Company 12 months to wind down the franchise. The Company claimed that it had sold 160 demonstrator cars up to June 1990 and HMRC should have agreed. HMRC said that the accounts for the Company indicated that there were no demonstrator car stocks in the period and that the Company's principle business had been the sale of fuel from its forecourts.
2. Mr Alan Corry (Mr Corry), the Company's accountant, gave evidence to the Tribunal with Mr Dennison, the Company's Managing Director. Mrs Patricia Roberts (Mrs Roberts) an Inspector, appeared on behalf of HMRC. She called Mr Neil Lofthouse, an Inspector, to give evidence on behalf of HMRC and Fiona Fraser, an Inspector, to advise with regard to the margin scheme. She also produced two bundles of documents.

The Law

3. Section 121 of the Finance Act 2008 (Fleming Claims) states that a claim made under section 80 (4) of the Value Added Tax Act 1994 (the Act) can be made outside the three year cap if it relates to a period ending before 4 December 1996 and the claim was made before 1 April 2009. The Fleming Claim made by the Company was dated 1 November 2007.
4. Section 80 (4A) of the Act permits HMRC to assess output tax which has been over-credited. Section (4AA) of the Act requires that the assessment cannot be made 2 years after the later of –
- (a) the end of the prescribed accounting period in which the amount was credited to the person, and
 - (b) the time when evidence of the facts sufficient in the opinion of the Commissioners to justify the making of the assessment comes to the knowledge of the Commissioners.
5. Sections 78A (1) and 78 A (2) apply the same time scale for the re-payment of the interest.

The facts

6. Whilst we do not need to go through all the facts arising from the claim in 1973 it is helpful to understand the effect of the 'Fleming Style' claims, which related to the overpayment of VAT by the motor industry under its margin schemes. As a result of the *Marks and Spencer's* decision in relation to the failure by Parliament to allow a transitional time scale for the 3 year cap, the European Court had confirmed that the legislation was unenforceable. As a result, section 121 of the Finance Act 2008 was passed to cover the Fleming Claims.

7. Mrs Fiona Fraser (Mrs Fraser) explained to the Tribunal how HMRC had set up the repayment procedures with the Motor Industry. HMRC had been concerned that many traders would not necessarily have records dating back far enough to substantiate their claims. As a result, HMRC and the representatives of the industry had agreed a table to be used where individual traders could not identify their actual sales. It was also agreed that the Gross Profit to apply would be 6.6 %. The individual trader could, however, look at its individual business and use its actual gross profit figures. The VAT rate to be applied was the rate at the time of each calculation.

8. Mr Dennison said that The Ford Motor Company had withdrawn its franchise because it wanted to expand its sales and the Company's site was too small. He produced a newspaper article dated September 1989, which confirmed that the Company's franchise had been withdrawn from that time. The same article confirmed:

“ ..that Thomas Motors, based at Oxford Square, Marton, will carry on selling used cars from the site and will continue operating the workshops, parts department and servicing used cars. He vowed “There will be no redundancies.”

He told us that the Ford Motor Company had allowed the Company to sell off such of the cars that it still had on its site. He confirmed that the Company had purchased the cars from Stanways of Lytham, the Company's holding company, and that any cars which might have been unsold would have been returned to Stanway for sale. The Company would also deal with warranty queries and servicing.

9. Mr Dennison was anxious that sales should continue from the site as the Company planned to sell its business as a going concern. It eventually sold the site to Renault in September 1990 and he was sure that that sale had arisen as a result of the Company continuing to trade. He also explained that Ford, like other manufacturers, wanted to increase their sales. To do that they offered the larger PLC distributors substantial incentives on their rental cars. For example, if they purchased 500 cars Ford would give them a bonus, often as much as 40%. As a result, the distributors would pay the full price, but would be given a rebate at a later date representing the discount. Under cross-examination Mr Dennison confirmed that the Company's average profit would have been around 10%. He was able to confirm that there were a large number of cars in the market place at the time that the Company's franchise was withdrawn.

10. Mr Corry told us that the Company had been in negotiation with HMRC. As a result of the tables suggested by HMRC, it had been agreed that the Company had

5 sold 278 cars each year from 1974 to 1988. It had further been agreed that the Company had sold 233 of the cars in 1989. He had understood that HMRC had also agreed that 160 cars had been sold in 1990. The figures and the gross profit margin of 6.6% had been agreed, using the table. He believed that the Company would have achieved a higher percentage than that in light of Mr Dennison's observations as to the bonus from Ford. He had indicated in the Notice of Appeal that the Company had hoped to finalise its negotiations at a local level.

10 11. Mr Corry had produced a list of the employees in the Company at the end of 1989. This revealed 13 salesmen out of a workforce of 60. In a letter of 18 July 2012 he suggested that the number of cars sold in 1990 should be increased by 25 to 185. An additional claim had been made as he considered that the Company was turning its rental cars round at the rate of 3 times per year instead of the two suggested,. This had increased the sales in 1990 from 100 to the 160 figure.

15 12. Mrs Roberts cross-examined Mr Corry and suggested that the growth of car sales using his figure would have been at 27% in the year to June 1990 as against 13% in the year to 1989.

The claim reveals a sales price of £8572 in 1990

The gross profit was £566

Leaving a net profit of £8006 x 185 (the cars sold) = £1,481,110

20 The cost of sales in the accounts was £5,341,286

So that the car sales represented 27.73%

Using the same calculation for 1989 the figures are

Sale price £ 8,404

The gross profit 555

25 Leaving a net profit of £7849 x 268 (Cars sold) £2,103,532

The cost of sales in the accounts was £15,739,892

So that the car sales represented 13.36%

She suggested that it was unlikely that the car sales would have increased in the period to June 1990.

30 13. She referred the Tribunal and Mr Corry to the report of a meeting at Stanway. She agreed that neither Mr Corry nor Mr Dennison had been present. The meeting revealed that "the mark-up on new vehicle rarely exceeds 10%". Mr Corry accepted that that was probably correct. Mr Dennison had identified 10% as the average in any event.

14. Mr Neil Lofthouse (Mr Lofthouse) gave evidence. He was tasked to review the Fleming motor margin claim of £239,277 for the period 1973 to 1995. Judge Porter indicated that it was not necessary for Mr Lofthouse to give evidence with regard to all the calculations from 1973. All of those calculations had been agreed up to 1990.
5 The only issue related to the number of demonstrator cars that the Company could legitimately claim to have sold within the scheme.

15. On 9 October 2012 Mr Lofthouse had written to the Company indicating that he understood that the Company's franchise with the Ford Motor Company had terminated during 1989. The note to the accounts for the period to 31 December 1989
10 reads:

“ ...During the year the Thomas Motors Limited franchise with Ford Motor Company was terminated after 60 years of operation. This has had a significant effect on the trading of the company.”

15 He therefore advised that the recovery assessment, the subject of this appeal, would be issued for the tax and interest overpaid for 1990 only. On 24 October 2012 the Company wrote to him advising that it did not intend to claim for additional rental cars for 1990 but expected its remaining 1990 claim for 160 cars to stand. Mr Corry had stated that although the franchise had been terminated on 30 September 1989 there was a proviso that the Company would continue trading for a further 12 months.

20 16. Mr Lofthouse stated that he had reviewed the statutory accounts for the 1990 period which clearly indicated that there had been a fundamental change to the scale of the operation of the Company's business. The turnover had fallen from £16,136,627 to £5,143,473 and there was a substantial fall in the closing stock value for the vehicles from £255,957 to £42,497. Mr Corry confirmed at the hearing that the
25 figure of £42,397 did not represent the cars that the Company was seeking to claim. The reason being that this was the figure in the accounts after June, the date beyond which no claim was being made.

17. Mr Lofthouse also pointed out that there was a note on the accounts of the disposal of the majority of the freehold property interest sold in December 1990 for
30 £800,000 although completion of the sale did not take place until 28 January 1991. We note from the Directors' report to the account for for the period to 1990 states:

“The principle activity of the company in the year under review was that of motor traders and the operation of petrol forecourts.”

35 18. Mr Lofthouse noted that in a VAT visit in 1991 the turnover figure was derived from operating petrol filling stations. He considered it unlikely that the Company made any substantial purchases of vehicles during the 1990 period. In spite of that, he had not reduced the car sales for the periods October, November and December in 1989 as he accepted that the car sales would have run down once the franchise had been determined.

40 **Submissions.**

19. Mrs Roberts submitted that the Company's fortunes changed in 1989. There are numerous references in the accounts as to the termination of the franchise with the Ford Motor Company; the reduction in the turnover and level of stock and the fact that the Company was principally running petrol stations from 1990. Mr Lofthouse has accepted that the car sales would be running down from the date that the franchise finished. He has therefore allowed the number of cars for 1989 to be 233 although he considered the sales would have finished before the end of 1989. She submitted that even if further cars had been sold they would have to have been sold at less than the purchase price because they would have been cars that the Company had had for some time and by definition less easy to sell

20. Mr Dennison has conceded that the Company was no longer selling new cars. Mrs Roberts also submitted that as there was no new stock and the demonstrator's must have been retained for a longer period, the stock would have sold at a level below the purchase price. This would mean that they would not be eligible to be counted for the purpose of the scheme. As a result, the available evidence does not support the contention that the Company sold further cars from January to June in 1990. In the circumstances, the appeal should be dismissed and the recovery assessment of £28,180.17 confirmed.

21. Mr Corry submitted that even though the franchise had been terminated the Company continued to sell cars. It had retained many of the staff, who were still selling cars and dealing with repairs and warranty matters. The Company was anxious to sell the business as a going concern and for that purpose needed to maintain its level of business. It was successful in that enterprise, as it eventually sold the business to Renault.

22. The Company had purchased the cars from its holding company, Stanway, and it had arranged to pass the cars back to that Company in the event of them not having been sold by the time of the sale to Renault. The company had not lost any money and the Tribunal should decide that it had sold 160 cars in the period to June 1990 and the recovery assessment should be cancelled.

The decision

23. We have considered the law and the evidence and we have decided that there were no cars sold in the period 1 January to 30 June 1990 which were appropriate to provide a repayment for the Company and we dismiss the appeal. The claim made by the Company related to the period 1973 to 1990 and was calculated in 2007. The Company did not have any records on which it could rely and had to provide estimates. From the calculations produced to the Tribunal, it appears that the appropriate car sales were assessed at 278 vehicles for each year up to 1988. It was also agreed that the gross profit was 6.6%. All the calculations were made within the terms of the scheme referred to by Mrs Fraser and were no more than agreed estimates.

24. Mr Corry had negotiated the figures and the only area of disagreement related to the period from October 1989 to June 1990. Mr Corry had initially increased the

proposed figure of 100 to 160 cars and subsequently suggested a further 25 making a total of 185 cars. He withdrew the additional 25 cars and confirmed that the Company was prepared to settle for 160 cars and that he hoped the matter could be settled at a local level.

5 25 Mr Lofthouse revisited the sales for the period from October 1989 to June 1990. He noted that the Company had lost its franchise with Ford those accounts revealed that the loss of the franchise had occurred in September of that year; the 1990
10 accounts showed a substantial loss of business; that the Company was relying on its income from its forecourt sales of fuel: and that the property from which the business operated had been sold in December 1990. In those circumstances he did not believe that the Company had sold any cars from January 1990 and he therefore has sought to recover £28,180.17.

26. As noted in paragraph 16 from the accounts for the Company at 31 December 1989 there were £255,957 cars in stock. At the end of 1990 there were £42,397. Mr
15 Corry has accepted that those latter cars were not relevant to the calculation. On that basis if we reduce the stock by £42,397 at the end of 1989 the balance is £213,560. If the cars were valued at approximately £8000 each as agreed by the parties this represented 27 cars.

27. There is no way of knowing whether the remaining cars would have been sold at
20 a profit or sold at a discount. Nor does it appear from the stock at the end of the year that further cars had been acquired during the year. Mrs Roberts' observation at paragraph 12 above, that the sales on the figures showed an increase in the cars sold for the year to 1990, suggests that fewer cars must have been sold. As a result, we do not consider the number to be significant enough to disrupt the recovery assessment
25 and we confirm the same as to £13,576 VAT and £14,604.17 statutory interest totalling £28,180.17 and we dismiss the appeal.

28. This document contains full findings of fact and reasons for the decision. Any
30 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.

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**DAVID S PORTER
TRIBUNAL JUDGE**

RELEASE DATE: 1 April 2014