TC03799

Appeal number: TC/2010/04037 & TC/2010/04039

VAT – whether appellants had made a claim for the purpose of s 80 VATA – requirements for a claim – reg 37, VAT Regulations 1995

FIRST-TIER TRIBUNAL
TAX CHAMBER

BRATT AUTO CONTRACTS LTD
BRATT AUTO SERVICES LTD **Appellants**

- and -

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS **Respondents**

TRIBUNAL: JUDGE ROGER BERNER

Sitting in public at 45 Bedford Square, London WC1 on 30 June 2014

Ian Bridge, instructed by Alan Pink Tax, for the Appellants

Oliver Conolly, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

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.

The context

4. The context in which this issue has arisen can be stated quite shortly. According to the Appellants, Bratt Auto Services Limited ("BAS") traded as a vehicle rental and self-drive hire company, and Bratt Auto Contracts Limited ("BAC") traded as a vehicle hire company whereby such hire was on long-term contract hire. BAS and BAC consider that they are entitled to repayments of output VAT under two heads. The first ("the *Italian Republic* head") is output tax declared upon the margin where the input tax on the vehicle was not deductible; that claim is under *European Commission v Italian Republic* (Case C-45/95) [1997] STC 1062. The second ("the *Elida Gibbs* head") is under *Elida Gibbs Limited v Customs and Excise Commissioners* (Case C-317/94) [1996] STC 1387, in respect of bonuses paid on demonstrator cars where the VAT on the vehicles was blocked.

5. In those circumstances, a letter dated 30 March 2009 was sent to HMRC by Darbys Solicitors LLP, acting on behalf of Mr Tim Saunders, a director of both BAS and BAC. I shall consider this letter in detail in a moment, but it is this letter which the Appellants say, and HMRC deny, is a claim or claims in respect of VAT said to be overpaid. The significance of the question is that if or to the extent that it is not a claim then the Appellants will not be able now to make any claim in respect of the relevant periods. This is because, under s 80(4) of the Value Added Tax Act 1994 ("VATA"), there is a time limit, originally three years and now four years, from the end of the prescribed accounting period for the making of a claim. The Appellants' overpayments are said to arise in respect of accounting periods ended before 1 May 2007, so any claim made now would be time-barred.

6. The three-year cap on VAT repayments which Parliament had attempted under the Finance Act 1997 to introduce into s 80(4) VATA was ruled to be invalid owing to the absence of a reasonable transitional period (see *Fleming (trading as Bodycraft) v Revenue and Customs Commissioners*; *Condé Nast Publications Ltd v Revenue and Customs Commissioners* [2008] STC 324). Subsequently s 121 FA 2008 was enacted disapplying the three-year cap for claims made in respect of accounting periods ended before 4 December 1996. It was thus that a spate of claims (known as "*Fleming* claims") came to be made for relevant periods going back as far as 1973 shortly before 1 April 2009. The letter of 30 March 2009 was intended to be such a claim for each of BAS and BAC.

The law

7. The right to recover overpaid VAT is set out in domestic law in s 80 VATA. That section relevantly provides:

> (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 that purpose.
>
> …
>
> (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.

8. The relevant regulations are the Value Added Tax Regulations 1995 ("the VAT Regulations"), reg 37 of which provides:

> A claim under section 80 of [VATA] 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.

The 30 March 2009 letter ("the Letter")

9. The Letter from Darbys Solicitors LLP refers to the *Fleming* case and states:

> "We write on behalf of our client to give formal notification of his claim on behalf of both BAS and BAC to VAT refunds. This is with regard to tax in respect of which the entitlement arose in accounting periods ending before 1 May 2007."

Later in the Letter Darbys request that HMRC take the letter as formal notice of claim in the two respects I have earlier mentioned, namely under the *Italian Republic* and *Elida Gibbs* heads, described as "potential heads of claim".

10. The Letter records that BAS and BAC had been in administrative receivership, which had now ceased, but that in consequence the relevant files, including the relevant purchase invoices, were in storage and/or might have been destroyed. It states that the accounts for the relevant years, with the evident exception of the accounts of BAC for the year ended 31 December 1989, were not in Mr Saunders' possession, but were in the course of being retrieved from Companies House. The Letter acknowledges that further documentation might be required by HMRC, and asks what might be required in that respect.

11. The substantive section of the Letter is worth setting out in full:

> "Whilst we are unable to provide exhaustive documentation at this stage, we believe the following points may be of assistance:
>
> 1. BAS had approximately 1,000 vehicles in its fleet at any one time. Typically, BAC operated with a fleet of approximately 600 vehicles. Our client purchased most vehicles at some point in time, but the fleet consisted mainly of Ford, Vauxhall, BMW, Mercedes and Rover vehicles.
>
> We have seen the tables where HMRC set out costings with regard to both claims under the Italian case and the Elida case. Our client estimates that BAS had approximately 10% of Prestige vehicles (as defined in the HMRC tables) with the bulk of the vehicles being mainly Ford, Vauxhall and Rover vehicles (defined in the tables as Volume vehicles).
>
> The vehicles from BAS were typically changed every six months. The vehicles owned by BAC were changed every 2 years – or on occasion once a year.
>
> We confirm that as the vehicles were changed every six months in BAS, the accounts reflect the depreciated value. As the vehicles were changed every six months, the true value for calculating the VAT refund is in fact double the value of the vehicles at book value, plus the percentage allowed for depreciation.
>
> We understand that HMRC will typically accept 25% depreciation annually for vehicles.
>
> With regard to BAC vehicles, these were changed every, say two years.
>
> 2. Both BAS and BAC were licensees for Hertz Rentals from 1993 onwards. Accordingly, the bonuses mentioned above were paid via Hertz, although some came direct from manufacturers and dealers. Typically, the relevant bonuses were approximately 25%.
>
> 3. We have attached the accounts for BAC [*this should be a reference to BAS*] for the year ended 31 December 1989. You will see that BAS

made a gross profit of some £2.1 million, against turnover of some £6.2 million.

However, you will see from note 10 to the BAS accounts (page 19 of the accounts) that the cost of motor vehicles was approximately £13.7 million on a net book value (after allowing for depreciation). If one were to look at the actual costs of the vehicles (which will exclude depreciation) – which is of course the correct way to analyse the transaction in order to measure the relevant VAT – then the figure of £13.75 million should be increased by £3.425 million. This equates to £17.125 million before depreciation.

Given however that vehicles were changed twice a year, then this figure of £17.125 million should be doubled to £34.25 million.

As against this, our client believes that approximately 70% of the BAS fleet were motor cars whilst the other 30% were commercial vans. We understand that commercial vans cannot be included in this claim – please confirm whether this is the case, and if so the reason.

Assuming prudently that vans cannot be included then on the above figures, our client's claim would be for the VAT element of the bonus section of £34.5 million (sic). We have already told you above that the bonus was approximately 25%. Accordingly, the bonus element was £8.625 million.

The VAT on the bonus element of £8.625 million was thus (15% of £8.625 million) i.e. £1.29375 million.

We believe the claim can be dealt with in this manner for each year when audited accounts are available. We will take steps to prepare an appropriate excel spreadsheet giving the calculation, once we receive your agreement to the same.

We confirm that a similar method would be applied to BAC. Unfortunately, we have not yet been able to obtain the relevant accounts from Companies House so we cannot calculate those figures.

We would extrapolate the claim backwards for both BAS and BAC over the period of trading.

We understand that our client's claim for a refund can date right back until 1973 for both BAC and BAS – please confirm.

Clearly, we wish to agree the most sensible method of dealing with the claim. The claim is for all years since the commencement of trade together with compound interest…"

12. The Letter concluded by saying that further information would be provided, in particular the accounts for all relevant years, subject to HMRC's requirements. A witness statement of Mr Saunders was suggested as the best evidence of the way in which the business operated.

Discussion

13. There is little direct authority on the application of reg 37 of the VAT Regulations. That regulation was, however, considered by Roth J in the Upper

Tribunal in *Reed Employment Ltd v Revenue and Customs Commissioners* [2013] STC 1286, a case on whether a later claim was an amendment to an existing claim or a new claim. Having referred to reg 37, and after pointing out that there is no statutory definition of "claim" for the purpose of s 80 VATA, Roth J said (at [31]):

> "In those circumstances, 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."

14. Agreeing with the First-tier Tribunal in *Reed* [2011] SFTD 720, at [111], Roth J, at [33], approved the test of whether a further demand for payment is an amendment of an existing claim as being "if the later claim arises out of the same subject matter as the original claim, without extension to facts and circumstances that fall outside the contemplation of the earlier claim". He said that if, subsequent to the submission of a claim, the taxpayer sends in the correction of a mistake, whether that be an arithmetical error or through the omission of some supplies that were clearly intended to be included, that would not be a new claim, but an amendment. He went on:

> "Further, 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."

15. Mr Bridge, for the Appellants, placed considerable reliance on this passage of Roth J's decision. He pointed to the terms of the Letter as a clear example of a case where the Appellants had been unable at the time of sending the Letter to calculate the full figures and gather all the relevant documentation. This had been made clear on the face of the documentation, as had the intention to provide further information. That, however, is not enough. The remarks of Roth J were directed at the issue of whether something was an amendment to what was already, in its own right, a claim. That is clear from the introductory words in the passage above "… if the taxpayer *making a claim* …" The question whether there is at the outset a claim is not answered definitively by what Roth J considered would be an amendment of an existing claim.

16. In *Websons (8) Limited v Revenue and Customs Commissioners* [2013] UKFTT 229 (TC), the First-tier Tribunal (Judge Cannan and Mrs Reyna) had to consider a strike out application on the part of HMRC, one of the grounds for which was that certain correspondence of the appellant in that case did not amount to a claim. Referring to what Roth J had said in *Reed*, the Tribunal took the view, at [44], that it was implicit from para [33] of *Reed* that some attempt had to be made to quantify the claim and/or state the method of calculation, even if full figures and further documentation were to be provided later.

17. The Tribunal in *Websons (8)* examined what it considered to be the purpose of reg 37. It said this (at [42] and [43]):

> "42. It is plainly important to be able to identify a claim for the purposes of section 80. In particular the date on which a claim is made must be identifiable and certain in order to apply the time limit in section 80(4). A claim made more than 4 years after the 'relevant date' as defined in section 80 cannot be repaid. We consider that the importance of identifying when a claim is made is one reason why regulation 37 lays down formalities for making such a claim. Regulation 37 is not concerned with the substantive validity of a claim. It is concerned with the formality of making a claim. For example a claim cannot be made orally. Otherwise there would be considerable scope for disagreement as to what was said, when and by whom.
>
> 43. Similarly it is important to know precisely what the claim relates to. It is for that reason that regulation 37 requires a claim to state the amount of the claim and the method of calculation. Those matters will help to define the scope of any claim under section 80."

18. The Tribunal went on to conclude, at [52], that for the reasons of certainty it had given it is only where a demand for payment or the assertion of a right to repayment satisfies reg 37 that it is to be treated as a claim pursuant to s 80 VATA. On the facts in that case the correspondence in question did not meet that test.

19. The question whether a taxpayer had made a claim within reg 37 was also in issue in *Nathaniel & Co Solicitors v Revenue and Customs Commissioners* [2010] UKFTT 472 (TC), in the First-tier Tribunal (Judge Brannan and Mr Perrin). In that case, the relevant correspondence stated that a preliminary examination had revealed an anticipated overpayment of £32,048.11. Although it was argued by HMRC that such a preliminary estimate was not a statement of an amount claimed, as required by reg 37, the Tribunal found it unnecessary to decide that point. It decided that, even if it were accepted that the amount stated was a statement of the amount claimed, the letter in question had contained no indication of the method used to calculate that amount. The requirements of reg 37 being mandatory, the consequence was that there had been no claim.

20. That conclusion followed from the Tribunal's finding that a two-page table of figures had not been enclosed with the relevant letter. But even if it had been, the Tribunal was not prepared to find that the table and the letter together would have satisfied the requirement under reg 37 that the method by which the amount was calculated must be stated. In this connection the Tribunal said (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 had been calculated? We consider that the necessary information must be 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."

21. With respect to the Tribunal in *Nathaniel & Co*, I do not consider that reg 37 is capable of bearing the construction afforded to it by the Tribunal. It seems to me that reference to an objective test which depends on the understanding of a reasonably competent VAT officer imposes a hurdle which reg 37 itself does not contain. The necessary enquiry is merely factual, and not qualitative. Nor do I consider that reg 37 demands that the documentary evidence that, by s 80(6), must support the claim should be included in the claim or should be in the possession of HMRC. The only requirement of reg 37 is that the statement of the amount of the claim and the method by which that amount was calculated should be "by reference to" the documentary evidence in the possession of the claimant. Although the purpose of the claim process is to provide certainty with regard to the making of a demand for repayment, there is no necessity for the claim to be comprehensive or complete, as is clear from the circumstances in which it may be amended. The claim may be, but is not necessarily, the final answer; it is no more than a claim. It will in many cases only be the start of a process during which further information will be provided and further analysis will be undertaken. There is thus no warrant for the imposition of additional hurdles to those already within reg 37.

22. On the other hand, there can be no doubt that the requirements of reg 37 are mandatory. Mr Conolly referred me to *R v Customs and Excise Commissioners, ex parte Building Societies Ombudsman Co Ltd* [2000] STC 892, in the Court of Appeal, where one of the issues was whether certain correspondence passing between BSOC and the commissioners amounted to a claim. The relevant correspondence had been directed to the determination of the status of BSOC's activities for VAT purposes, namely whether those activities were taxable. That correspondence included a letter of 18 April 1995 on behalf of BSOC applying to the commissioners for an appealable decision as to its VAT status. Rejecting the argument that the exchange of correspondence constituted a claim for the purposes of s 80 VATA, Rix LJ (with whom Mummery LJ and Nourse LJ agreed) said (at [34]):

> "BSOC submits that this concluded a claim for repayment, pointing out that the commissioners had as much information as to the quantum of BSOC's right to repayment of VAT as it had itself. However, although it can be said that the principle of a right to repayment was settled, subject to any appeal in *ICAEW*[1], I cannot see that BSOC had submitted any claim for repayment at this stage. Regulation 37 of the 1995 regulations (see above), pursuant to s 80(6) of the 1994 Act, requires a claim for repayment to be in writing and to state the amount of the claim and the method of its calculation. BSOC had complied with none of this. BSOC submits that a claim for repayment was implicit in its application of April 1995, but I do not agree. BSOC had resolved the status of its activities for the future, and, if necessary, for the past: but it had not made a claim for repayment."

[1] *Institute of Chartered Accountants in England and Wales v Customs and Excise Commissioners*, at that stage subject to a judgment of Tuckey J in the High Court [1996] STC 799.

23. In the *BSOC* case, that early correspondence regarding status was followed by a letter of 2 August 1996 from BSOC's advisers to the commissioners in which it had been stated:

> "... in order to preserve any relevant time-limits relating to the recovery of overpaid VAT or statutory interest, 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."

That letter was not regarded by Rix LJ as constituting a claim for repayment. He found, at [41], that BSOC first made its claim on 13 August 1996 when its advisers wrote to the commissioners specifying the amount of the claim and providing a schedule listing outputs and inputs quarter by quarter from 1 September 1987 (omitting in error the first return for the period July/August 1987 and thus understating the total of BSOC's possible claim) (see Rix LJ at [3]).

24. 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 that 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.

25. The distinction between requirements that are mandatory and those that are directory was discussed by Lord Steyn in *R v Soneji and another* [2006] 1 AC 340, in a very different context to that of claims for repayment of VAT. However, as described by Lightman J in *Haven Healthcare (Southern) Ltd v York (Inspector of Taxes)* [2005] STC 1662, at [8], the important principle is that the classification of statutory provisions as mandatory or directory is the end of the enquiry, not the beginning, and that the task of the court is to concentrate on the consequences of non-compliance and the place of the requirement in the scheme of the legislation or regulation and whether it was the purpose of the legislation or regulation that an act done in breach of, or non-compliance with, the legislation or regulation should be invalid.

26. I have referred earlier to the discussion by the Tribunal in *Websons (8)* of the purpose of the requirements in reg 37, including the importance of identifying when a claim is made for the purposes of the time limit in s 80(4) and the importance of knowing precisely what the claim relates to. Mr Conolly argued that HMRC is entitled under reg 37 to know the amount claimed, the method whereby such an amount was arrived at, which documentary evidence in the possession of the claimants was used, and the period to which the claim relates. Only this, he submitted, would enable HMRC to assess the merits of the claim and to decide whether to repay the claimed overpaid VAT or not.

27. Mr Conolly's argument is that the requirements for the making of a s 80 claim must be construed so as to require any claim to be sufficiently precise as to enable HMRC to make a decision whether to accede to the claim or not, or presumably to accede to the claim in whole or in part. I do not consider that reg 37 should be construed so as to impose such a strict requirement. As I have said when considering the Tribunal decision in *Nathaniel & Co*, it is not the case that the claim should in all cases be of a nature that it can be determined solely on its own merits. As Mr Conolly acknowledged, it may take a great deal of time for a claim to be concluded, and much further information and analysis may be needed. It cannot therefore be the case that the requirements for a claim to have been made must be construed by reference to the ability of HMRC to determine the claim.

28. As well as arguing that the conditions set out in reg 37 are mandatory, Mr Conolly also submitted that it was implicit from the wording of s 80(1) that a claim must set out the "prescribed accounting period" or periods for which the claim is made. I do not agree. Section 80(1) sets out the conditions for HMRC being liable to credit the claimant with an amount of overpaid VAT, one of which is that the claimant must have accounted to HMRC for VAT for a prescribed accounting period. Although a claim must be made for the purpose of s 80 (see s 80(2)), the form of the claim is expressly dictated by s 80(6) and reg 37. The mandatory nature of reg 37 necessarily means that its provisions must be regarded as exhaustive. There is no room for any implied further requirement for the making of a claim. The requirements of reg 37 are different from what might be required by HMRC in due course in order to assess the merits of the claim. This illustrates the essential difference between the requirements for the making of a claim, and the information necessary to assess and determine the claim. The latter does not dictate the former.

29. That analysis appears to be supported by the facts surrounding the relevant claim in *Guide Dogs for the Blind Association v Revenue and Customs Commissioners* [2012] UKFTT 687 (TC), in the First-tier Tribunal (Judge Sinfield and Mr Adams), at least as far as they can be discerned from the decision in that case. That case was not considering the question whether a claim had been made, but the sufficiency of the evidence to support the claim. Although I place no reliance on the decision in reaching my own views, I note that the claim appears to have been calculated on the basis of the financial statements for a "base period" of 1 April 2000 to 30 June 2007 (the decision is not entirely clear on this, as it refers both to 1 April 2000 and 1 April 2004, but it is the former date that seems correct), with the ratios arrived at in relation to that base period then having been applied to the period 1973 to 1990. Those years would have encompassed prescribed accounting periods, but the claim did not, it appears, identify each individual such period.

30. It may be helpful, before I turn to consider the terms of the Letter, if I summarise my conclusions as to the principles to be applied in determining whether a claim has been made for s 80 purposes:

> (1) For there to be a "claim" it must constitute a demand for repayment of overpaid VAT.

(2) The requirements of reg 37 of the VAT Regulations are mandatory, in the sense that, even if there is a demand for repayment, such a demand that does not comply with reg 37 will not be a claim for the purpose of s 80 VATA.

(3) The requirements of reg 37 are, on the other hand, exhaustive. It is not a requirement that the claim must set out the prescribed accounting period or periods for which the claim is made. That is part of the enquiry as to whether HMRC are liable to credit or repay overpaid VAT, but is not a requirement in order that a claim may be made.

(4) Similarly, it is not a requirement that the claim must be such as to enable HMRC to determine the issue of overpayment, or that the claim should contain sufficient information as to enable a reasonably competent VAT officer to understand the way in which the amount claimed had been calculated. (That is likely to be the case in practice in most instances, but it is not a relevant test.)

(5) It is not sufficient to refer to a prospective claim, with a promise that details will be sent in due course. However, if the demand does constitute a claim within reg 37, the fact that such a claim does not include the full figures, or has been made at a time when the claimant has not gathered all the information required, but where further details are to be provided as soon as possible, will not prevent that demand from being a claim for s 80 purposes. The question then will be whether the provision of the further information relates to the same subject matter as the original claim, without extension to facts and circumstances outside the contemplation of the original claim, and is therefore an amendment of the original claim and not a new and separate claim.

31. I have reached these conclusions of principle without regard to the principle of effectiveness, which is one of the overarching principles to be considered in the field of VAT. It was common ground, first, that national measures must not render practically impossible or excessively difficult the exercise of rights conferred by Community law, and secondly that limitation periods, such as that in s 80(4), do not of themselves offend the principle of effectiveness.

32. Mr Bridge did not seek to argue that the requirements of reg 37 offended that principle. His submission was limited to saying that the principle of effectiveness should inform a purposive interpretation of reg 37. I do not consider that adds anything to the analysis. I have found that the mandatory nature of reg 37, in that it is only demands that comply with its terms that can constitute claims for the purpose of s 80, dictates, as a matter of construction, that its terms must be regarded as exhaustive, and that there is no room for additional requirements to be implied. There is no suggestion that the specific requirements of reg 37 would make it impossible or excessively difficult for a taxpayer to make a claim. It is simply the case that a demand that meets the conditions laid down by Parliament in reg 37, in their unvarnished form, is a claim for s 80 purposes.

Decision

33. As the agreed wording of the preliminary issue recognises, this is not a case of considering an individual claim. Although there is a single Letter said to comprise the

claims, there are two claimants, each of which was separately registered for VAT. In addition (although there is some indication on the Tribunal file that the *Italian Republic* heads of claim are no longer pursued), for present purposes there are in the case of each claimant two heads of claim.

BAS

34. 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.

35. In the course of the hearing Mr Conolly confirmed to me that the only basis on which it was argued by HMRC that, to the extent of £1.29375 million, the Letter was not a claim, was that the Letter did not refer to prescribed accounting periods. I have rejected that as a requirement for a claim, and it thus follows that I find that the Letter did constitute a claim in that respect.

36. The amount stated of £1.29375, and the calculation made to arrive at that amount, related solely to the *Elida Gibbs* head of the claim and not to the *Italian Republic* head. The question is whether, notwithstanding that such a calculation related only to a particular head of claim, the *Elida Gibbs* head, the subject matter of the claim nonetheless encompassed the overpayments said to arise under the *Italian Republic* head.

37. In relation to BAS, my conclusion is that, so far as they remain relevant, the *Italian Republic* overpayments are not included within the subject matter of the claim. Although reference is made to those overpayments, they formed no part of the amount stated of £1.29375 million, and no indication was given as to the method by which such overpayments would be calculated. The mere reference in the Letter to the *Italian Republic* overpayments is not sufficient, therefore, to bring those overpayments within the subject matter of the claim of BAS. Accordingly, if further information were to be provided with respect to the *Italian Republic* claim, that would not be an amendment to an existing claim, but would be a new claim, that would be time-barred.

38. In my judgment, therefore, the subject matter of the claim by BAS is confined to the overpayments under the *Elida Gibbs* head. It is not, however, confined to the single year for which an amount was stated, as the claim is clearly stated by the Letter to extend to periods between 1973 and April 2007. To the extent that further information provided by BAS is confined to that subject matter, it will not represent a

new claim, but will be an amendment of the claim made by virtue of the Letter on 30 March 2009.

BAC

39. The position of BAC is different. It did not state an amount of its claim, and the Letter cannot therefore satisfy the conditions of reg 37. It is not sufficient for reference to be made to a method of calculation without there being a stated amount of overpaid VAT in respect of BAC itself. In relation to BAC, the Letter was no more than notification of a prospective claim, with details to be provided in due course.

40. That conclusion clearly has the potential for adverse consequences for a potential claimant who is unable, within any limitation period, to access any relevant documentation by reference to which to calculate any part of its overpayment. That would seem to me unlikely to arise in the vast majority of cases. It is the inevitable consequence of the combination of the need to make a demand for repayment and the imposition of a time limit in which to make that demand that certain potential claimants may not, for whatever reason, be able to obtain sufficient information in the time available, even though that may be a reasonable period, in order to make any relevant calculation. That, however, is not a reason to construe reg 37 otherwise than in accordance with its plain terms.

41. I should say that I do not agree with Mr Bridge when he suggests that it makes no sense to require a stated amount in the circumstances of this case, where the Letter fairly acknowledges the absence of relevant material on which to base any reasoned calculation, because the alternative would have been simply to arrive at a figure by guesswork. A figure arrived at by guesswork would not, in my judgment, satisfy the requirement, under reg 37, that it be "calculated". Such a requirement requires a more analytical and evidence-based approach than a mere guess.

Application for permission to appeal

42. This document contains full findings of fact and reasons for the decision on the preliminary issue. 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.

ROGER BERNER
TRIBUNAL JUDGE

RELEASE DATE: 10 July 2014

Amended pursuant to Rule 37 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 on 19 September 2014.