



**Appeal number: FTC/52/2010**

**IN THE UPPER TRIBUNAL  
TAX AND CHANCERY CHAMBER**

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

Appellants

- and -

**GMAC UK PLC  
(formerly GENERAL MOTORS ACCEPTANCE CORPORATION (UK) PLC)**  
Respondent

**AND**

**Appeal number: FTC/05/2012**

**BRITISH TELECOMMUNICATIONS PLC**

Appellant

- and -

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

**Tribunal: Mr Justice Warren, Chamber President  
Judge Charles Hellier**

**Sitting in public in London on 1 October 2012**

**Paul Lasok QC and Eleni Mitrophanous instructed by the General Counsel and  
Solicitor to HM Revenue and Customs**

**Roderick Cordara QC and Jessica Wells for GMAC UK PLC instructed by  
KPMG LLP**

**Roderick Cordara QC and Lyndsey Frawley for British Telecommunications  
PLC instructed by BT Legal**

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**DECISION ON DIRECTIONS AND ON PERMISSION TO APPEAL**

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## DECISION

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### Introduction

1. Our decision in these cases was released on 3 August 2012 and is reported under the reference [2012] UKUT 3279 (TCC) (“**the August Decision**”). We extended HMRC’s time for appealing until after a further hearing consequent on the August Decision which was fixed for 1 October 2012. The decision which we now make follows that hearing. Defined terms and abbreviations used in the August Decision apply in this decision.
2. In accordance with section 13(11) and (12) of the Tribunals, Courts and Enforcement Act 2007 we specify the Court of Appeal in England and Wales as the relevant appellate court as respects any appeal from the August Decision in this matter.
3. Paragraph 2 of the Appeals from the Upper Tribunal to the Court of Appeal Order 2008 (“the 2008 Order”) provides:

“Permission to appeal to the Court of Appeal in England and Wales ... shall not be granted unless the Upper Tribunal or, where the Upper Tribunal refuses permission, the relevant appellate court, considers that –

- (a) the proposed appeal would raise some important point of principle or practice; or
  - (b) there is some other compelling reason for the relevant appellate court to hear the appeal.”
4. That provision applies to the appeal by HMRC in the GMAC issue. But it does not apply in relation to the BT matter, since in relation to the preliminary issues which we decided in that matter, we were not acting as an appellate tribunal.

### BT

5. As we indicated at the hearing on 1 October, we are minded to give permission to appeal to HMRC. The August Decision related to three preliminary issues in

relation to time-limits. HMRC has a real prospect of success in an appeal against our decisions on those issues. Further those issues raise matters of general importance which we think merit further consideration by the Court of Appeal. But we also made clear that a formal application for permission had to be made setting out the grounds of appeal. We gave HMRC 14 days to lodge its Appellant's notice. Upon receipt of that notice, we will make a formal decision on such an application.

## **GMAC**

6. In order to decide the Windfall Issue, we were, and remain, of the view that a reference to the ECJ is necessary for the reasons given in the August Decision. In his skeleton argument for the recent hearing, Mr Cordara submitted that a reference was unnecessary and that the Windfall Issue had, as a result of the Decision, become a purely domestic issue. This was essentially on the footing that we had held that section 22 provided the jurisdictional gateway for the domestic tribunals to give effect to GMAC's directly enforceable rights with the Property Condition and the Insolvency Condition effectively being excised.
7. We do not agree with that analysis of the Decision. The remoulding of section 22 which we discussed in the Decision arises only because of the direct effect of Article 11C(1). If HMRC are right on the Windfall Issue, there will be no need to give effect to Article 11C(1) in that way at all: rather, effect will be given to the domestic legislation as a whole in the form in which it appears on the statute book without any need for remoulding. In other words, the impact of the Windfall Issue if HMRC are right is that, in relation to GMAC and on the facts of the present appeal, GMAC cannot both rely on a remoulding of section 22 and also on its rights under the other domestic statutory provisions.
8. In order to deal with GMAC's tax appeal, we need an answer to the Windfall Issue and therefore need to make a reference. But that need is subject to this consideration; if we are wrong on either the Compatibility Issue or the Time-limit Issue, HMRC are entitled to succeed in their appeal against the decision of the First-tier Tribunal. If we knew the final answer (from the Court of Appeal or from the Supreme Court, assuming that neither of those courts considered a reference to be necessary) on those Issues then a reference on the Windfall Issue would be necessary in order to dispose finally of the tax appeal only if our decisions on both of those Issues are correct.

9. Mr Lasok submits that we should make a reference immediately. He says, correctly, that we have not yet determined HMRC's appeal from the Decision and that we should obtain a ruling from the ECJ to enable us to do so.
10. Against that course, Mr Cordara submits that a reference is premature since HMRC's position is that we are wrong on both the Compatibility Issue and the Time-limit Issue. The latter may be the subject of an appeal in the BT case. He says that both Issues can be made the subject of an appeal from us; he does not oppose the granting of permission to appeal. He submits that we should not make a reference on the Windfall Issue unless and until the Court of Appeal has addressed the Compatibility Issue and the Time-limit Issue. There will be no need for a reference in order to dispose of HMRC's appeal to us if we are held to be wrong on either of those Issues. Accordingly, we should stay the proceedings before us pending an appeal by HMRC on those Issues.
11. Mr Lasok submits that that course is not open to us. He submits that we have not made a decision which is appealable. All that we have done is to reach preliminary conclusions within the appeal and that there will no decision until we either dismiss or allow HMRC's appeal which we will be able to do only once we have made a reference on the Windfall Issue and received guidance from the ECJ. As to that, Mr Cordara submits that the August Decision does give rise to decisions which can now be appealed, namely our decisions on each of the Compatibility Issue and the Time-limit Issue.
12. It is not necessary for us to decide which of Mr Lasok and Mr Cordara is correct about whether the August Decision gives rise to any decision which can be appealed. This is because, even if Mr Cordara is right, we do not consider that it would be right to delay making a reference simply because HMRC have a right to appeal our decisions on the Compatibility Issue and the Time-limit Issue.
13. On the one hand, HMRC are entitled to resolution of their appeal to us from the Tribunal. As matters stand, we need an answer to the Windfall Issue before we can determine that appeal. In terms of timing alone, a reference will ensure that a final answer is given as soon as possible. This is because, if HMRC are forced to take their appeal to the Court of Appeal first, so that we make a reference only if we are upheld by the Court of Appeal, that reference will have been delayed by the time taken from now to a decision on the appeal; a period which will be of many months. Delay is to be avoided if possible: see Rule 2(2)(e) of the Upper Tribunal Rules.

14. On the other hand, an appeal to the Court of Appeal may eliminate the need for a reference at all. The costs of an appeal are likely to be less than the costs of a reference. What is more, if HMRC lose the Windfall Issue in the ECJ, they will wish to appeal the Compatibility Issue in any case; and if the Time-limit Issue has not been decided by the Court of Appeal by then (for instance because it is withdrawn following a settlement of BT's tax appeal), that Issue too will be subject to an appeal. That is true: but if HMRC win the Windfall Issue in the ECJ, that is likely to provide a conclusive answer in their favour in the appeal to us from the Tribunal.
15. It also needs to be remembered that the Court of Appeal may not have the last word. It is possible that either of the Compatibility Issue and the Time-limit Issue could be the subject matter of an appeal to the Supreme Court. The cost balance then begins to look very different since success for HMRC on the Windfall Issue would eliminate the need for an appeal from us so that neither the Court of Appeal nor the Supreme Court would be troubled with this case. Further, the delay point is even more significant. Logic suggests that, if a reference on the Windfall Issue is deferred pending the decision of the Court of Appeal, so too it should be deferred pending an appeal to the Supreme Court. But this would probably mean a delay of at least 2 years from today before those Issues are finally resolved leaving a need for a reference on the Windfall Issue if our decision on those Issues is upheld.
16. A middle course would be to make an immediate reference but require (subject to our jurisdiction to do so) HMRC to appeal our decisions on the Compatibility Issue and the Time-limit Issue if they want to challenge them. This would be the most effective way of reaching a speedy conclusion of HMRC's appeal to us from the Tribunal, but it could be the most expensive and use the most judicial resources.
17. We have said that we do not need to decide whether the August Decision gives rise to a right to appeal. That right arises under section 13 Tribunals, Courts and Enforcement Act 2007. This gives any party to an appeal a "right of appeal to appeal... on any point of law arising from a decision made by the Upper Tribunal other than an excluded decision". We have heard full submissions on whether the August Decision does give rise to a right of appeal, the question being whether we have made "a decision" within the meaning of section 13. We do not propose to resolve that difficult question. This is because, so it seems to us, we have wide case-management powers under Rule 5 which would enable us to achieve whichever objective we wished to achieve, that is to say in effect to force HMRC to appeal (assuming that they wish to challenge our conclusions) or to ensure that

the reference was dealt with before any decision had to be made by HMRC about an appeal. If Mr Cordara is right, we can extend HMRC's time for making an application for permission to appeal until a decision on the Windfall Issue has been made (or further order in the meantime); if Mr Lasok is right, we could, we consider, make a declaration on the effect of our decision or we could make a direction to achieve the result which would have been achieved had a direction been made directing the Compatibility Issue, the Time-limit Issue and the Windfall Issue to be heard as preliminary points.

18. In our view, the balance comes down in favour of making an immediate reference. Further, we do not consider it appropriate, subject to one point, to require HMRC to take our decisions on the Compatibility Issue or the Time-limit Issue to the Court of Appeal pending the reference of the Windfall Issue to the ECJ.
19. The point is this: the Time-limit Issue is going to be the subject matter of an appeal in the BT case. It might be said, therefore, that a challenge in the GMAC appeal to our decision on that Issue should be before the Court of Appeal at the same time; and, if that is right, it might also be said that the Compatibility Issue too should be before the Court of Appeal at the same time. There is obviously something in the point. If it were a matter for us, we would doubt the need to link the appeals on the Time-limit Issue together, still less to link together HMRC's appeal on that Issue in the BT case with their appeal on the Compatibility Issue (in relation to different and more complex facts). BT well might have something to say about linking an appeal on an unrelated matter with the appeal in its own case. But it is not a matter for us: it would be for the Court of Appeal to decide how it wishes, procedurally, to deal with the separate appeals in the two cases. In all of the circumstances, this point does not lead us to alter our view about the appropriate way forward.

### **Conclusion in the GMAC appeal**

20. Our decision in the GMAC appeal is that we should make an immediate reference to the ECJ on the Windfall Issue. If and insofar that it is necessary (that is to say on the footing that we have made a decision within the meaning of section 13) we extend, pursuant to Rule 5(3)(a) of the Upper Tribunal Rules, the time for making an application for permission to appeal under Rule 44, to 28 days after receipt from the ECJ of its decision on the Windfall Issue or further order in the meantime.

21. The precise form of the reference is a matter for us. We will deal with that after receiving GMAC's comments on the draft reference which Mr Lasok has provided on behalf of HMRC.

**Mr Justice Warren**  
**Chamber President**

**Charles Hellier**  
**Upper Tribunal Judge**

**Release Date: 22 October 2012**