

# Three-year cap – *Fleming* – Section 121 of the Finance Act 2008

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**IMPORTANT – We have a duty of confidentiality to traders not to disclose information relating to their tax affairs to anybody without their permission.**

**As a result, we cannot discuss a taxable person's or claimant's tax affairs with a tax adviser unless we have a signed Form 64-8 from the taxable person or claimant authorising us to do so.**

**Substantial amendments and additions to this guidance are marked by sidelining.**

## **1. Background**

### **1.1 Introduction**

In 1996 and 1997, the Government introduced a three-year limitation period for repayment claims for overpaid VAT, the correction of errors and late claims for input tax.

The legislation had prospective effect in that it applied to all claims relating to accounting periods ending after the date of enactment (post-implementation periods).

It also had retrospective effect in that it applied to all claims made in relation to accounting periods that ended before the date of enactment (pre-implementation periods). This applied regardless of whether the claim was made before or after the enactment of the time limit.

### **1.2 Marks & Spencer**

In 2002 the European Court of Justice (ECJ) held, in Case C-62/00, *Marks & Spencer Plc –v- CCE* [\[2002\] EUECJ C-62/00](#); [2002] STC 1036; [2002] BVC 622 (*Marks & Spencer*), that the UK had breached principles of Community law because it had failed to provide an adequate transitional period to allow claims to be submitted for pre-implementation periods before the three-year time limit took effect.

### **1.3 Administrative transitional regime**

In an attempt to comply with the judgment in [Marks and Spencer](#), HMC&E (now HMRC) introduced an administrative transitional regime by the publication of two Business Briefs (Business Briefs 22/02 and 27/02). They invited claims under section 80 of the VAT Act 1994 for output tax overpaid before the three-year cap was brought in.

The Business Briefs did not invite input tax claims for the same periods nor did they include claims for output tax overdeclared in accounting periods for which repayment returns had been rendered.

The exclusion of input tax claims and the rejection of output tax claims that did not meet the conditions of this administrative regime led to a number of appeals to the VAT & Duties Tribunals.

## 1.4 Pre-implementation periods – Input tax

In January 2008 the House of Lords, in *CRC –v- Michael Fleming (t/a Bodycraft)* [\[2008\] UKHL 2](#); [2008] STC 324; [2008] BVC 221 (*Fleming*), held that the three-year cap must be disapplied in relation to pre-implementation periods until an adequate prospective transitional period had been provided.

On 20 February 2008, HMRC published Revenue & Customs Brief 07/08 (RCB 07/08). This RCB invited claims for input tax where the entitlement to claim deduction of that input tax arose in an accounting period ending before 1 May 1997. This invitation was repeated in [VAT Notes 01/2008](#) which were sent out with the VAT returns for the accounting periods ending on 30 April, 31 May and 30 June 2008.

## 1.5 Input tax – Date of deduction

The right to claim deduction of input tax does not arise until a person has incurred the input tax on his purchases and he has received the VAT invoice that fixes his entitlement to deduct it.

For example, if the input tax being claimed was incurred on 17 March 1997 and the invoice, or other alternative evidence, to support its deduction was only received on 20 June 1997, the input tax only becomes deductible on the return for the accounting period in which 20 June 1997 fell (see Case C-152/02, *Terra Baubedarf Handel GmbH –v- Finanzamt Osterholz-Scharmbeck* [\[2004\] EUECJ C-152/02](#); [2005] STC 525; [2006] BVC 672).

For the purposes of RCB 07/08, we take the claim to have arisen at the end of the prescribed accounting period in which the entitlement to deduct arose not on the due date of the return for that period as is provided in regulation 29(1A).

This is reflected in section 121(2) of the Finance Act 2008 which provides that the three-year cap shall not apply to claims made before 1 April 2009 where those claims relate to accounting periods that ended before 1 May 1997.

## 1.6 Pre-implementation period – Output tax

With the publication of RCB 07/08, HMRC also announced that it considered that the terms of the judgment in *Fleming* meant that the administrative regime for output tax claims had been inadequate.

As a result, claims were also invited for output tax overpaid or overdeclared in pre-implementation periods.

## 1.7 Statutory transitional period

On 18 March 2008, Parliament passed a resolution under the Provisional Collection of Taxes Act 1968 giving effect to section 121 of the Finance Act 2008 from 19 March 2008.

Under section 121 businesses were given a statutory transitional period running until 31 March 2009 during which they could make claims for:

- output tax overdeclared in accounting periods ending before 4 December 1996 (section 121(1) of the Finance Act 2008), and
- unclaimed input tax in respect of which the entitlement to claim deduction arose in accounting periods ending before 1 May 1997 (section 121(2)).



All claims made on or after 1 April 2009 are capped at four years or back to 1 April 2006, whichever is the shorter.

## **1.8 Claims for post-implementation periods**

Claims arising in accounting periods ending on or after the date of enactment of the new time limits are, and have always been, subject to the three-year cap (see *Local Authorities Mutual Investment Trust –v- CCE* [\[2003\] EWHC 2766 \(Ch\)](#); [2004] STC 246; [2004] BVC 379) and *CRC –v- Scottish Equitable Plc* (unreported) – see section 26.5 below.

## **1.9 Output tax – Claims made before 26 May 2005**

On 26 May 2005, section 80 was amended by section 3 of the Finance (No. 2) Act 2005. The result was:

- that all claims for output tax were brought within the scope of section 80, and
- all such claims were brought within the range of the unjust enrichment defence.

The following claims made before 26 May 2005 fall within the scope of this guidance:

- Any amounts overpaid by way of VAT before 4 December 1996, whether following an assessment, a payment return or a disclosure (claims made under section 80 of the VAT Act 1994);
- Any amounts overdeclared by way of output tax in repayment returns for accounting periods ending on or before 30 April 1997 (claims made under section 25 of the VAT Act 1994 and regulation 35 of the VAT Regulations 1995).

Claims made before 26 May 2005 will include, for example, claims made under Business Brief 22/02 which were rejected, where the claimant has appealed to the Tribunal and where the appeal remains live.

## **1.10 Output tax – Claims made on or after 26 May 2005**

Claims made on or after 26 May 2005 in respect of amounts brought into account or paid by way of output tax (whether on payment or repayment returns, assessments or disclosures) in accounting periods ending before 4 December 1996 fall within the scope of this guidance.

## **1.11 Output tax – Claims in relation to duplicate payments**

The relevant date for a claim to recover amounts incorrectly paid “... by way of VAT that was not VAT due to us ...” (section 80(1B) of the VAT Act 1994), is the same whether the claim was made before or after 26 May 2005. The claim must be for an amount overpaid before 4 December 1996.

This subsection also covers claims for amounts that turn out to have been wrongly paid on an assessment made under section 73(2) of the VAT Act 1994 where the assessment was made on the basis that the trader had deducted input tax that he was not entitled to. The claim must be for an assessment paid before 4 December 1996.

Claims for overdeclared output tax made on or after 26 May 2005 can only be made in respect of accounting periods that ended before 4 December 1996 so that the last prescribed accounting period for which claims may be made is that ending on 30 November 1996. In practice of course, it will depend what stagger the claimant is, or

was, on (section 121(1) of the Finance Act 2008) – see paragraph 1.9 in relation to claims made before this date.

Claims made before 26 May 2005 under section 80 can only be made for amounts *paid* before 4 December 1996. Where the amount was overpaid with a VAT return (as opposed to pursuant to an assessment or a mistaken voluntary disclosure) the effect is that the last prescribed accounting period for which such claims may be made is that ending on 31 October 1996 because the amount due on the return for that accounting period will have become payable (and will probably have been paid) on, or shortly before, 30 November 1996.

Similarly, claims for undeducted input tax may only be made in respect of input tax in respect of which the right to claim deduction arose in accounting periods ending before 1 May 1997. In practice, this will mean that the last prescribed accounting period for which claims may be made will be that ending on 30 April 1997, depending on the stagger that the claimant was on at that time (section 121(2) of the Finance Act 2008).

Output tax wrongly charged on supplies made before 4 December 1996 during an accounting period that ended after that date are not within the scope of these provisions.

By the same token, claims for input tax incurred before 1 May 1997 in accounting periods that ended afterwards are outside the terms of the Fleming provisions – see the decision of the First-Tier Tribunal in *Cable & Wireless Plc –v- CRC* [2009] UKFTT 32 (TC).

## 2. Definition of a claim?

### 2.1 What is a claim – Output tax

A claim made under section 80 of the VAT Act 1994 must meet the criteria set out in regulation 37 of the VAT Regulations 1995. It must set out **the basis of the error** and **the amount being claimed**, show **how that amount has been calculated** and the claimant **must refer to documentation or other evidence** used in the calculation of the claim (even if, in an estimation context for the period 1973-97, that is only company accounts and more recent business records confirming overpayment).

A letter simply stating that Alpha Ltd has overdeclared its output tax liability by such-and-such an amount and demanding payment of that amount does not constitute a claim. Similarly, a letter expressing an intention to claim does not constitute a claim and, as a result, does not stop the clock for the purposes of the time limit.

However, a letter that clearly sets out the basis of the claim, the amount and the method by which that amount has been calculated and does this all by reference to documents and other evidence in the possession of the claimant could, quite reasonably, be said to constitute a claim.

You should not, generally speaking, reject a claim as being invalid, simply because a trader submits a properly calculated gross claim as opposed to a net claim.

In practice though, we would expect any claim to show a full calculation of the amount due to the claimant (i.e. the overdeclared output tax) and a full calculation of amounts due to the Commissioners whether by way of assessment or by way of set-

off under sections 80(2A) and 81 of the VAT Act 1994 or section 130 of the Finance Act 2008 – see section 23 below on set-off.

If a claim is submitted without any calculation of outstanding liabilities, you should, where necessary, ask the claimant to provide it as soon as possible.

The payment or credit that is made against any claim will always be net of outstanding liabilities in accordance with sections 80(2A) and 81(3) and (3A) of the VAT Act 1994 and section 130 of the Finance Act 2008.

## 2.2 What is a claim – Input tax

Regulation 29 provides that late claims to input tax must be made “ ... as the Commissioners may otherwise allow or direct ...” and, generally speaking, they are directed by [Notice 700/45](#) to be made along the same lines as are required by regulation 37 for claims under section 80.

On that basis, we require that the claimant should **set out the basis of the error and the amount being claimed, show how that amount has been calculated** and do so **by reference to supporting documentation or other evidence**, in particular the relevant VAT invoices, used in the calculation of the claim – see [Notice 700/45](#).

A late claim for input tax must meet the requirements of regulation 29(2). That is to say, the claimant must be able to demonstrate that he incurred the input tax, that it was incurred in the course and furtherance of taxable activities of his and that he is entitled to deduct it.

Consequently, a letter that simply states that the taxable person is entitled to make a late claim to input tax in such-and-such a sum will not be treated as a claim. Similarly, a letter stating an intention to make a claim will not be seen as a claim and does not stop the clock for the purposes of the time limit.

On the other hand, a letter that clearly sets out the basis of the claim, the amount and the method by which that claim was calculated and does this all by reference to documents and other evidence in the possession of the claimant could reasonably be said to constitute a claim.

A late claim to input tax is one that is made in any accounting period after that in which the entitlement to claim deduction of it first arose. The entitlement first arises when the taxable person has both incurred the input tax and received the VAT invoice (or other evidence) to support its deduction see V1-13 for further guidance on deduction of input tax.

You should not, generally speaking, reject a claim as being invalid, simply because a trader submits a properly calculated gross claim.

In practice though we would expect any claim to show a full calculation of the amount due to the claimant (i.e. the unclaimed input tax) and a full calculation of amounts due to the Commissioners whether by way of assessment or by way of set-off under section 81 of the VAT Act 1994 or section 130 of the Finance Act 2008 – see section 23 below on set-off.

If a claim is submitted without any calculation of liabilities, you should, where necessary, ask the claimant to provide it as soon as possible.

The payment made or credit given against any claim will always be net.

### **2.3 What amendments can be introduced into an open claim?**

In quantifying a claim, you are only establishing the amount to which the claimant is entitled on the claim that he has made. Once the claim has been quantified, it will then be subject to set-off – see section 23 below on set-off for more details.

It is important to remember that while a claim remains uncompleted it can be adjusted by the Commissioners at any time and maybe adjusted upwards by the claimant only to the extent that the additional sum claimed is as a result of the same facts and matters that the original claim related to.

Thus, in relation to a claim made by Alpha Ltd on 30 June 2007, during the course of the verification of the claim, the claimant discovers, e.g., further overdeclarations of output tax in the same period that were not mentioned in his original claim. Those overdeclarations must be included in the claim but only if they are founded on, e.g., the same facts and matters as the principal claim – see paragraph 2.4.

If the amendment that the claimant is trying to introduce results from different facts and matters to that under which the original claim was made, it cannot be treated as an amendment to the original claim. It is a new claim in its own right.

For example, Alpha Ltd makes a claim on 30 June 2007 for output tax overdeclared in the accounting period ending on 30 September 2004 on a zero rated supply. On 12 July, the company discovers that it has not deducted enough input tax in that accounting period as the result of an unrelated mistake – e.g., failure to claim input tax on business related leasing charges. They cannot treat that as an adjustment to their section 80 claim but they are still in time to make a claim under regulation 29 in any event. This is because they can make such a claim at any time within three years from the due date of the return for the accounting period in which the entitlement to deduct the input tax first arose – in this scenario, 31 October 2007.

If, on the other hand, they only discover the underdeduction on 5 November 2007, they are out-of-time to make the claim and we cannot treat it as an adjustment to the section 80 claim.

Remember that the entitlement to deduct input tax arises only when a person has both incurred the input tax and received the VAT invoice (or other alternative evidence) to allow him to deduct it. Thus if Company Alpha pays for a supply to it on 17 March 2006 and receives the invoice on 23 April 2006, the entitlement to deduct will have arisen in the accounting period ending on 30 June 2006 (see Case C-152/02, *Terra Baubedarf Handel GmbH –v- Finanzamt Osterholz-Scharmbeck* [2004] EUECJ C-152/02; [2005] STC 525; [2006] BVC 672) – see V1-13 for further guidance on the deduction of input tax.

### **2.4 What constitutes a new claim?**

In its decision in *University of Liverpool* (VAT Tribunal decision 16769), the VAT & Duties Tribunal described a completed claim as:

“... a claim which:

- (a) has been met in full by the Commissioners;

(b) has been met in part by the Commissioners and the time limit for appealing against the rejection of the remainder prescribed by rule 4(1) of the VAT Tribunals Rules 1986, as amended, has expired;

(c) has been met in part by the Commissioners, the taxpayer has appealed against the rejection of the remainder, his appeal has been determined either by the tribunal or a court and the time limit prescribed for appealing against that determination has expired or the appeal has been compromised;

(d) has been rejected in full by the Commissioners and the time limit for appealing against that rejection prescribed by rule 4(1) of the VAT Tribunals Rules 1986, as amended, has expired;

(e) has been rejected in full by the Commissioners, the taxpayer has appealed against that rejection, his appeal has been determined either by the tribunal or a court and the time limit prescribed for appealing against that determination has expired, or the appeal has been compromised.

Thus any claim that follows a completed claim is a new claim. This is important where the follow-up claim is made out-of-time.

For example, Alpha Ltd makes a claim on 30 June 2007 for input tax underclaimed in the accounting period ending 30 June 2005. The verification of the claim takes some time and it is finally paid on 30 March 2008. This is a completed claim.

It is also important to note that a claim made on one set of facts or mistake is a separate claim from one made on another set of facts or mistake.

For example, Alpha Ltd makes a claim on 12 August 2007 for mistake A going back to the accounting period ending on 30 September 2004. On 25 January 2008, while the first claim is still being verified, it makes a claim for mistake B. That is a second, separate claim and can only go back to the accounting period ending on 31 March 2005 (assuming that the claimant is on stagger 1).

The decision in *University of Liverpool* was later endorsed by the Tribunal in the decisions in *John Martin Group* ([VAT Tribunal Decision 19257](#)), *The London Institute (now known as the University of the Arts, London)* ([VAT Tribunal decision 19362](#)) and *The Medical House Plc* ([VAT Tribunal decision 19859](#)).

## **3. What can be claimed?**

### **3.1 General**

Any claim under section 80 of the VAT Act 1994 will be for the output tax overdeclared. That is to say, if, for a given prescribed accounting period a person has overdeclared output tax on product A to the tune of £100,000, he can claim that £100,000.

Similarly, if he incurred input tax in respect of supplies that carry an entitlement to deduct input tax but he did not deduct it, he is entitled to make a claim for it.

All claims will be subject to the set-off provisions in section 81 of the VAT Act 1994 and section 130 of the Finance Act 2008.

Section 81(3) of the Act then requires that any amounts owing to HMRC by the claimant are set off against the amount of the claim – i.e. established debts, or debts-on-file.

Section 81(3A) brings into the equation countervailing errors in accounting periods not covered by the claim where those errors arose out of the same mistake that gave rise to the claim in the first place.

**In practice, we would expect any claim submitted under section 80 to set out the total amount of output tax overdeclared and include a schedule of the liabilities that will be required to be set off under sections 80(2A), 81(3) and (3A) of the VAT Act 1994 and section 130 of the Finance Act 2008.**

Equally, we would expect any input tax claim made under regulation 29 of the VAT Regulations 1995 to include a calculation of all amounts that we are required or entitled to set off against the claim under sections 81 and 130.

You should not, generally speaking, reject a gross claim, if it meets the criteria in regulation 37, simply on the grounds that the claimant has not calculated and disclosed his other liabilities. However, where the liabilities are not disclosed in the claim, you should ask that the claimant provide the necessary disclosure as soon as possible.

If you have reasonable grounds for believing that the claimant has not disclosed all of the liabilities that we are required or empowered to set against the amount claimed, you are entitled to refuse to pay the claim until you are satisfied either that there are no further set-offs to be made or that you have all the information you need in relation to set-offs.

In this guidance, it is only where a claim is 'rejected' in full or in part that a decision is being given that the claimant can ask to have reviewed or against which he has a right of appeal to the Tax Chamber of the First-Tier Tribunal.

### **3.2 Section 80 of the VAT Act 1994 – General**

Section 80(2A) sets against that amount claimed all other errors occurring in the accounting periods covered by the claim, i.e. all output tax underdeclarations occurring in the accounting periods claimed for and all overstatements of input tax entitlement made in those same periods.

Overstatements of input tax entitlement should include taking into account the calculation or recalculation of the deductible percentage of residual input tax which becomes necessary where a claim has been made for output tax wrongly declared on supplies that ought to have been treated as exempt.

### **3.3 Subsection (1) of section 80 of the VAT Act 1994**

Under section 80(1), claims may be made to recover amounts overdeclared as output tax on a VAT return. The most common generators of such claims are judgments of the courts holding, for example, that a given supply is not subject to VAT at the standard rate but at the zero rate. A claim by taxable persons under these circumstances would be a claim under section 80(1).

This subsection also covers claims for output tax overdeclared as a result of a failure to make an adjustment under regulation 38 of the VAT Regulations 1995 (decision of

the VAT & Duties Tribunal in *General Motors Acceptance Corporation (UK) Plc* ([VAT Tribunal Decision 19989](#) – paragraphs 75-77) – see paragraph 3.7 below.

### **3.4 Subsection (1A) of section 80 of the VAT Act 1994**

Subsection (1A) of section allows taxable persons to claim amounts paid pursuant to assessments for output tax where the assessment turned out to be for an amount that was not due as output tax.

For example, if a taxable person, who has been treating his supplies of widgets as exempt of VAT, is assessed for output tax on those supplies of widgets and it later turns out that he was treating them correctly in the first place, he can make a claim under section 80(1A) to recover the amount he paid pursuant to that assessment.

Claims made to recover amounts disclosed by a taxable person as being an underdeclaration of output tax where it later turns out that the disclosure was wrong are within the scope of this subsection.

### **3.5 Subsection (1B) of section 80 of the VAT Act 1994**

Subsection (1B) allows traders to recover amounts of output tax that have been overpaid, for example, as a result a return being paid twice.

This subsection also covers amounts paid on assessments for amounts thought to have been incorrectly deducted as input tax. For example, HMRC make an assessment against a taxable person on the grounds that he has deducted too much input tax and the taxable person pays that assessment. If, within the statutory time limits, it turns out that the assessment was wrong and that the taxable person ought not to have paid it, he can recover it under subsection (1B) of section 80.

This subsection essentially covers all overpayments of VAT that are not covered by subsections (1) and (1A) or by regulation 29 of the VAT Regulations 1995. It relates to overpayments made to HMRC that have not involved bringing an amount into account as output tax.

### **3.6 Claims to recover amounts wrongly paid pursuant to assessments under section 73(2)**

There are two Tribunal decisions on the time limits for making claims to recover amounts wrongly paid pursuant to assessments made under section 73(2) of the VAT Act 1994.

The Edinburgh Tribunal in *National Galleries of Scotland* ([VAT Tribunal Decision 19372](#)) concluded that the claim fell within section 80(1B) of the VAT Act 1994 and that the time limit started to run from the date on which the assessment was paid.

The First-Tier Tribunal in *Cable & Wireless Plc –v- CRC* [[2009](#)] [UKFTT 32 \(TC\)](#), concluded that such claims were made under regulation 29 of the VAT Regulations 1995 so that the time limit started to run from the due date of the return for the accounting period in which the entitlement to claim deduction of the input tax in question first arose.

The effect of the decision in *Cable & Wireless* is that the time limit for such claims starts to run from the due date for the VAT return for the accounting period in which the right to claim deduction of the input tax in question originally arose. This means that time will have started running against the claimant even before the assessment

was made and the time limit may have expired by the time the trader discovers that the assessment was wrongly made.

Under the *National Galleries of Scotland* decision, the time limit starts to run from the date on which the assessment was paid.

HMRC has taken the view that the decision of the Edinburgh Tribunal is to be preferred.

### **3.7 Failure to make regulation 38 adjustments**

Where a trader makes a supply and subsequently reduces the consideration for that supply he is required (under regulation 38 of the VAT Regulations 1995) to make an adjustment to his VAT account to reflect that in the next return due after the date on which the reduction was made in his business accounts.

If he does not make that adjustment, that next return will include an amount declared as output tax that is not output tax due and, as a result of that, he will have a right to make a claim under section 80.

For example, Company Alpha supplied an E-Type Widget to Company Bravo for £100 plus VAT (£17.50). Six months later, Company Alpha reduced the price of the widget to £50 and issued a credit note to Company Bravo for £50 plus £8.75 VAT. Regulation 38 requires that Company Alpha reflects that adjustment in the next return after the change of consideration was entered in the business records. If that isn't done, the return is in error because it includes an amount declared as output tax that wasn't due as such. The result is that Company Alpha has a claim under section 80(1) of the VAT Act 1994.

Clearly, these claims would normally be capped. However, like any other section 80 claim, they benefit from the judgment of the House of Lords in *Fleming*.

Before 1 January 1978, there was no provision in Community legislation or in national legislation for such adjustments to be made. The right was established when the Sixth VAT Directive (77/388/EEC) took effect at the beginning of 1978. The UK legislation was enacted, in the VAT (Accounting and Records) Regulations 1989 which took effect on 1 January 1990.

As a result, no claim under section 80 for amounts overdeclared as a result of a failure to make what is now an adjustment under regulation 38 can go back to any accounting period ending before 1 January 1978.

### **3.8 Late claims for input tax**

It is important to remember that any claim for input tax in relation to any given accounting period can only be for the input tax that that person would have been entitled to deduct from his output tax liability taking into account any output tax liability that was not accounted for on the VAT return(s) in respect of which the claim is being made.

If a claimant has not declared, or has underdeclared, his output tax liability for a given accounting period, he will only be able to claim input tax for that accounting period to the extent that his unclaimed input tax entitlement exceeded his undeclared output tax liability.



This is not a set-off within the meaning of section 81 of the VAT Act 1994 and the character or nature of the mistake or mistakes that led to the underdeclaration of output tax liability and the understatement of input tax entitlement is irrelevant. It is simply a question of what the taxable person is entitled to claim by way of a late claim for input tax by virtue of the requirements in VATA permitting deduction of input tax entitlement from output tax liability.

You should not refuse a properly calculated gross claim simply on the grounds that the claimant has not provided a schedule of other liabilities. However, where the liabilities are not disclosed in the claim, you should ask that the claimant provide the necessary information as soon as possible.

At the end of the day, if you are not satisfied that the claimant has disclosed all of the liabilities in the accounting periods for which he has claimed, the claim will not be paid.

It is also important that we are told of any other liabilities that must, or can, be set off under Section 81 of the VAT Act 1994 and Section 130 of the Finance Act 2008.

**In practice, we would expect any claim submitted under regulation 29 to set out the total amount of input tax underclaimed and include a schedule of all of the errors that occurred in the accounting periods claimed for as well as the liabilities that will be required to be set off under section 81(3) and (3A) of the VAT Act 1994 and section 130 of the Finance Act 2008 – see section 23 below for more details.**

At the end of the day, if the liabilities are not disclosed, the claim will be rejected.

Before paying the claim, you should check that no further liabilities (established debts in relation to any of HMRC's taxes) have arisen since the claim was made.

### **3.9 Claims by assignees and transferees**

Where a person who has, e.g., overdeclared his output tax liability (the original creditor) or understated his input tax entitlement has transferred the right to make that claim to another person (the current creditor), the current creditor is entitled to make the claim in exactly the same way as would be the case if the original creditor had retained the right to make the claim himself but subject to the set-off provisions of section 133 of the Finance Act 2008.

## **4. Claims handling**

### **4.1 General**

RCB 07/08 required all potential claimants to submit claims to the Fleming Claims Team in Leeds subject to the criteria set out in this guidance.

The team in Leeds will decide whether a claim is valid in principle and send claims out to appropriate assurance staff for verification.

In this guidance, it is only where a claim is 'rejected' that a decision is being given that the claimant can ask to have reviewed or against which he has a right of appeal to the Tax Chamber of the First-Tier Tribunal.

## 4.2 Burden of proof

The burden of proof is on the claimant to show that he has a claim. It is not on HMRC to prove that he doesn't.

This means that the claimant must be able to show that it is more likely than not that he made the mistake on which his claim is founded. The claimant must be able to produce some evidence – circumstantial or otherwise – to support his assertion that a mistake was made which led to him overstating his output tax liability or understating his input tax entitlement.

A person making a late claim to input tax has to satisfy us that he has failed to deduct the input tax that he is claiming. It is not for us to show that he has not. Regulation 29(2) also requires a person making a claim to input tax to be able to provide evidence to support the claim.

We are entitled, when dealing with claims, to satisfy ourselves that the overdeclaration has been made and that the amount claimed is accurate and we are entitled to refuse to make a payment against the claim until we are so satisfied (see the judgment of the High Court in *R (on the application of UK Tradecorp Ltd) –v- CCE* [2004] EWHC 2515 (Admin); [2005] STC 138; [2005] BVC 128).

You shouldn't need to refer to authorities for this proposition but, just in case you do, there is authority in *Dickinson –v- Minister of Pensions* [1952] 2 All ER 1031, in which Ormerod J held:

“It is axiomatic in the administration of our law that, if a person thinks that he has a claim against another person or against a Minister, the duty is on him to establish that claim. The mere fact that an Act of Parliament which establishes a right does not state that that duty is on him, must automatically establish the duty on him to prove what he thinks is his right before he can succeed in his claim.”

See also *Tynewydd Labour Working Men's Club –v- CCE* [1979] STC 570; [1979] 1 BVC 282, *Kalron Foods Ltd –v- CRC* [2007] EWHC 695 (Ch); [2007] STC 1100; [2007] BVC 509 and *Brady (Inspector of Taxes) –v- Group Lotus Car Companies Plc & Anor* [1987] STC 184.

## 4.3 Standard of proof

The claimant has to prove his claim *on a balance of probabilities*. He has to convince us, or the courts, by reference to relevant and appropriate evidence that it is more likely than not that he made the mistake that he says he made and that that mistake is grounds for the claim that he is trying to vindicate.

The nature of this standard of proof was summarised by Denning J in *Miller –v- Minister of Pensions* [1947] 2 All ER 372, at 374 where he said:

“In cases falling under art 4(2) and art 4(4) (which are generally cases where the man was fit on his discharge, but incapacitated later by a disease) there is no compelling presumption in his favour, and the case must be decided according to the preponderance of probability. If at the end of the case the evidence turns the scale definitely one way or the other, the tribunal must decide accordingly, but if the evidence is so evenly balanced that the tribunal is unable to come to a determine conclusion one way or the other, then the man must be given the benefit of the doubt. This means that the case must be decided in favour of the man unless the evidence against him reaches the same degree of cogency as is required to discharge a burden in a civil case. That degree is well settled. It must carry a reasonable degree

of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say: “We think it more probable than not,” the burden is discharged, but, if the probabilities are equal, it is not.” [Emphasis added]

In discharging a burden of proof on a balance of probabilities, the claimant has to show, not that it is possible that the mistake was made but that it is probable. Moses J put it like this in his judgment in *Marks & Spencer Plc –v- CCE* [1999] STC 205 at 241:

“Marks and Spencer criticised the tribunal for failing to draw a distinction between proof to the satisfaction of the tribunal and questions of possibilities or probabilities. The standard of proof is the normal standard of proof in any civil case. The distinction is false. It is true that if a fact is merely a possibility then the commissioners would not have satisfied the tribunal on the balance of probability. But where the tribunal finds that a fact is probable it is finding that that fact is established. There is no true dichotomy. Once a fact is established as probable it is a fact upon which the tribunal may draw appropriate inferences.” [Emphasis added]

In *Leonard –v- Blanchard (Inspector of Taxes)* [1993] STC 259, Nourse LJ said:

“As to the first of those objections, Mr Goodfellow has pointed out, correctly, that the commissioners found that in each of the years of assessment the taxpayer’s total flying hours were considerably less, in some years nearly 50% less, than the contract maximum. While accepting that this objection may not have been sound, I can see no answer at all to the judge’s second objection, which can be expressed more generally by saying that it is impossible, without evidence, to infer that if the taxpayer had presented himself for work on any of his 147 days off he would have been found work outside the United Kingdom on those days. I can see that there might have been evidence to show that that would have been the case, at least in part. But it is impossible, on the balance of probabilities, to arrive at that conclusion on inference alone. The taxpayer has not proved his case.” [Emphasis added]

None of these things can be achieved if the claimant adduces no relevant evidence at all in support of his claim.

This standard of proof applies to the assertion that the claimant has a claim in the first place as well as to the amount being claimed.

See also *In Re Doherty (Original Respondent and Cross-Appellant) (Northern Ireland) Appellate Committee* [2008] NI 292; [2008] UKHL 33; [2008] 4 All ER 992; [2008] 1 WLR 1499.

#### **4.4 Evidence**

It is important to remember that there is no definitive list of what can be used as evidence. A claimant can put before us absolutely anything that he believes supports his assertion that he has a claim and that the claim is worth £x. It may turn out not to be relevant, but you should consider everything that is put forward as evidence.

If we have a judgment of the courts that holds that the supply of X-Type Widgets is exempt and the evidence is that a claimant has always treated his supplies of X-Type Widgets as taxable at the standard rate, e.g., because all of the records that he has show that to be the case, that may well constitute evidence to show that he made the same mistake in those years for which he doesn’t hold records. Other evidence, such as Companies House accounts, may then help us come to some estimate of the extent of the claim.

Where a person is making a claim on the basis of a one-off accounting error – he failed to adjust his output tax liability for cash-backs or bounced cheques, etc. – he must be able to produce evidence to support that assertion. In the example in the preceding paragraph, the judgment acts, in effect, as circumstantial evidence which, together with the behavioural evidence in the existing accounts and records, suggests that it is more likely than not that the mistake was made in the accounting periods for which the claim was submitted. In this example, there is no circumstantial evidence and we cannot infer, without other evidence, that the claimant did make the mistake that he says he made. If the claimant holds records in relation to other incidences of the same mistake, that constitutes behavioural evidence and should be taken into account.

Evidence going to the extent of the claim is just as important as evidence establishing the claim. If a claimant has evidence that establishes a mistake but has no evidence at all on the amount, the establishment of his mistake alone will not be sufficient grounds for making a payment.

If a claimant asserts that he failed to adjust his VAT account for bounced cheques between 1978 and 1996, he must be able to produce evidence to support that assertion; especially if the evidence is that he has made the necessary adjustments for the last six years (the period for which he is required, under paragraph 6 of Schedule 11 to the VAT Act 1994, to keep his records).

If a claimant is claiming output tax that he has wrongly declared on the sale of X-Type Widgets and he has made that error for the past six years, it is probably reasonable to conclude that it is more likely than not that he made the same mistake beyond that date – subject to any evidence that there might be showing changes in trading patterns and practices, accounting software or practice, etc. and subject, of course, to him being able to produce evidence on the amount of the claim (quantum).

If the same claimant makes the same claim but his current records show that he has only treated his X-Type Widgets as taxable at the standard rate for the last two years, that rather suggests that his claim is baseless.

Evidence can be documentary and behavioural and, in an ideal world, one would hope to see a little of each. What must be stressed is that where a person simply writes to us saying that he overdeclared £500,000 on the sale, for example, of newspapers between 1973 and 1996 and provides no evidence at all (documentary or otherwise) to support that assertion, we should reject the claim. It is bare assertion. There is no reason (court judgments, etc.) why he would have treated newspapers as standard rated other than as the result of a 'personal' mistake.

A signed affidavit by the claimant is not on its own evidence sufficient to support a claim. We rely, on this point, on the *dicta* of Moses J (as he then was) in *Marks & Spencer Plc –v- CCE* [1999] STC 205 at 245 where he said that expert evidence may be put before the court but it cannot be used on its own to support a claim. It can only be used in support of factual evidence.

#### **4.5 Evidence – Motor trade claims**

Motor trade claims made under the judgments in *Elida Gibbs* and *Italian Republic* are not unevidenced claims. In late 2002 and early 2003, the Motor Trade Unit of Expertise, in co-operation with the Retail Motor Industry Federation (RMIF) and the Society of Motor Manufacturers and Traders (SMMT) and PWC drew together all of the evidence available on how the various manufacturers treated the transactions in

question. Knowing that the relationship between manufacturers and dealers is dictatorial – and absent any evidence to the contrary – we accepted that all dealers of a given manufacturer treated the relevant transactions in relation to that manufacturer's cars in a given way.

In effect, we have sufficient evidence in the relevant tables to enable us to calculate *Elida Gibbs* and *Italian Republic* claims by motor dealers although you still need to be satisfied that::

- The claimant was registered for VAT;
- The claimant traded as a dealer of the manufacturer or manufacturers he said he was; and
- The amount claimed has been substantiated.

If a dealer or manufacturer wishes to step outside the guidance produced by the Motor Trade Unit of Expertise, they must produce their own evidence.

#### **4.6 Electronic folder**

It is always worth going through a claimant's folder on EF (assuming, of course, that the claimant is still registered for VAT). Anecdotal evidence suggests that there is a relatively high likelihood of finding documentation that is relevant to the claim and which may either support it or refute it.

#### **4.7 Third party evidence**

There is growing evidence that claimants are using evidence from third parties to quantify their claims. For example, we have seen a number of cases in which a developer has made a claim under Business Brief 07/00 (*Rialto Homes PLC* (1999) VAT TR 16340) using the trading patterns and information of another developer as a basis for the calculation of his claim.

This is not acceptable as evidence to support a claim.

It is one thing to produce information from the governing body or trade body of a given trade sector as evidence to fill out the claimant's own evidence and information but it is quite another for Jack to use information relating to Jill's business practices and patterns to calculate his claim for output tax overdeclared on the sale of his pails.

#### **4.8 Departmental errors**

Unless there is evidence to the contrary, we will assume that compliant taxpayers operated in accordance with HMRC's view of the law and guidance as it was at the time to which a Fleming claim relates. Where that view of the law was subsequently overturned by a judgment of the courts, absent evidence to the contrary, we shall work on the basis that the claimant corrected the position with effect from the end of the next prescribed accounting period after the date of the judgment.

You are entitled to refer to the claimant's compliance history in coming to a judgement on whether the claimant should be put to proof that he made the mistake that is the basis of the claim. If the claimant has a poor compliance history, it is not necessarily unreasonable to conclude that he would not have complied with the relevant guidance.

In reviewing a claimant's compliance history, you should take into account his entire history. You might discover, for example, that he was extremely compliant in the

past and that his compliance level has fallen in recent years. In these circumstances, it might be reasonable to conclude that the claimant did comply with departmental guidance during the accounting periods covered by the claim.

The burden remains on the claimant to prove the amount of his claim (the quantum), whether by reference to business records or by an acceptable estimation method (see paragraph 4.9 below).

#### **4.9 Estimated claims**

Where, because of the passage of time, records have not been retained for periods before 1996/97, we will accept estimated claims provided that the assumptions on which the estimates have been based are reasonable and sustainable and are based on some evidence. The assumptions used in the estimation of a claim might appear perfectly reasonable but if they are not based on any evidence, they are worthless.

In any estimated claim, there are a number of things that you must look out for:

- There must be sufficient evidence, including reference to the claimant's own trading accounts or other records where available, to show that the overdeclaration of output tax liability or the understatement of input tax entitlement did occur. You cannot estimate the amount of a claim on the basis of no evidence at all;
- The claimant must be able to show, using the evidence referred to above, that it is more probable than not that the error that forms the basis of the claim did, in fact, occur;
- The claimant must have spelled out the assumptions that underlie the estimation. You should check and challenge all material assumptions. They must be sustainable. It is probably not reasonable, for example, to assume that the percentage of employees who are given company cars now is the same as the percentage who were give them in 1973;
- If a claimant is attempting to submit a new calculation of an old claim, the new calculation must be based on evidence and must be subject, at the very least, to the same scrutiny as any other claim. The claimant has to satisfy you that the original calculation was wrong. If the original claim was made in the '90s, for example, it is reasonable to assume that the original claim was made on the basis of contemporaneous evidence. Why was that calculation less accurate than the calculated estimate that is being submitted so many years later?
- Claims based on estimates that are founded on a 'straight-line' calculation using, e.g., information from recent years, must be challenged. A great deal has changed in the years between 1973 and now. Using current trading patterns to calculate claims for Fleming periods is almost certainly going to give a wrong result;
- It may be worth consulting a Compliance Accountant for his or her views on the manner of estimation; and
- Estimations based on the creation of some sort of nebulous average trader are also unacceptable. Such devices are being used in order to construct claims for claimants who have no evidence at all. Such claims should be assessed each on its own merits, attempts to merge them into an 'average trader' should be strongly resisted and, in the absence of any evidence relating to the claimant's own asserted over statement of output tax or under deducted input tax, they should be rejected.

It is worth remembering that there may be evidence in EF which supports, or refutes, some or all aspects of the trader's claim.

You should challenge all material assumptions on which estimated claims are founded. Ask the claimant to explain the assumption and why he thinks that it is reasonable. If you have doubts, seek advice; whether from CT&VAT, Central Policy or the relevant Unit of Expertise or Trade Sector Advisers (TSAs).

A claimant who knowingly, or recklessly, overstates his claim could be committing an offence under section 72(3) of the VAT Act 1994 or 167 of the Customs & Excise Management Act 1979 and in appropriate cases you should follow normal referral procedures through your linked Evasion Referral Team (ERT).

Even if the behaviour wasn't demonstrably dishonest, it may fall within the scope of section 167(1) if it can be shown to have been reckless.

**Please remember that you are required to reject a claim that, following investigation, is not found to be supported by reasonable evidence.**

#### **4.10 Evidence and estimation – [Kretztechnik](#) claims**

When you are dealing with *Kretztechnik* claims, it is worth discussing the claim with your local Compliance Accountant and checking:

- The claimant's Share Premium Account;
- Whether the share issue in question was no more than a group re-structure – in which case the VAT on the costs incurred is likely to have been negligible
- Whether the Company Secretariat retained 'The Bible' (all the papers relating to the share issue) which is often kept for many years beyond the statutory 6 year requirement for business records. You should always ask the claimant to produce this when dealing with such claims.

Claims in relation to share issues occurring before 1 April 1987 are unlikely to have any basis. Guidance for traders in Customs' Public Notices at the time was that share issues could be ignored for the purposes of calculating deductible input tax unless the trader was in the business of dealing in shares – see Appendix 1 for details.

**Important:** It is entirely likely that some such claims have already been paid. If you know of, or discover, claims that have been, or may have been, wrongly paid, you should make an assessment to recover the wrongly paid amount under section 73(2) of the VAT Act 1994. You should also assess to recover the wrongly paid statutory interest under section 78A of the Act – see paragraphs 33.3, 33.4 and 33.5 below.

#### **4.11 Undertakings given under Business Brief 13/06**

There is no longer any requirement for claimants to sign an undertaking as a condition of payment of their claims.

Furthermore, RCB 07/08 released from the terms of the undertaking any claimants who provided signed undertakings in relation to claims that have already been paid.

Traders who enquire about the status of the undertaking should be told that they are no longer enforceable.

## 4.12 Duplicate claims

There is growing evidence that traders (and their advisers) who have already made claims which have been settled and paid are submitting recalculated, and larger, versions of those claims, often with no reference made to the earlier claim.

**You *must* check when dealing with claims that no previous claim has been submitted.**

If you discover that a claim that you are dealing with is a 'duplicate', you should check all correspondence with the claimant and his agent for any reference to the earlier claim.

It is possible that an offence has been committed under section 72(3) of the VAT Act 1994 or section 167 of the Customs & Excise Management Act 1979 and in appropriate cases you should follow normal referral procedures through your linked Evasion Referral Team (ERT).

Even if the behaviour wasn't demonstrably dishonest, it may fall within the scope of section 167(1) if it can be shown to have been reckless.

## 4.13 Changes in policy on handling of claims

It has come to our attention that some tax advisers are suggesting to officers that in discussions between them and HMRC, HMRC has said that the policy in relation to this, that or the other type of claim is different to what is written in this guidance.

All such suggestions are to be ignored.

It is, of course, true that the Department is in ongoing discussions with the tax advisory firms about the handling of Fleming claims.

However, if our position in relation to any aspect of the handling of these claims changes from what is written in this guidance, that change will be communicated to you by Tax Administration Advice in Central Policy as soon as it is practicable to do so and this guidance will be amended and re-released.

## 4.14 Liability of supplies

If you are not sure whether the claimant's view of the liability of his supplies is correct, you should ask for copies of correspondence with HMRC giving the liability ruling or, in the absence of any such correspondence, check with the relevant policy team (probably CT&VAT). Exemption of supplies by 'cultural bodies' could be a good example of a situation where this might be necessary.

## 4.15 Overturned judgments

It appears to be becoming increasingly common for some tax advisors to argue that their client's claim should be tested and verified on the basis of the case law as it stood at the time when the claim would have been made had there been a transitional period when the three-year cap was introduced.

**All claims must be tested against current case law.**

You should check that the claim is not based on a judgment that was found against HMRC in, for example, the High Court or Court of Appeal, but which was finally overturned in our favour. The judgment in *CCE –v- Primback Ltd* [\[2001\] EUECJ C-](#)



[34/99](#); [2001] STC 803; [2001] BVC 315 which overturned the judgment of the Court of Appeal in *Primback Ltd –v- CCE* [1996] STC 757 is a good example of this.

It is also worth noting that it is our view that the judgment of the Court of Appeal in *CCE –v- Wellington Private Hospital Ltd & Ors* [1997] STC 445 has effectively been overturned by the judgment of the ECJ and House of Lords in *Card Protection Plan Ltd –v- CCE* [1999] STC 270 and *Card Protection Plan Ltd –v- CCE* [2000] UKHL 4; [2000] STC 174 respectively.

Claims founded on such judgments should be rejected.

#### **4.16 Effective date of registration and deregistration**

You must check that the claimant was registered for VAT in the accounting periods for which he is claiming.

A number of claims have been submitted for accounting periods going back to 1 April 1973 despite the fact that the claimant was not registered for VAT until many years later.

If such claims are submitted recklessly or deliberately it is possible that an offence may have been committed section 72(3) of the VAT Act 1994 or section 167 of the Customs & Excise Management Act 1979 and in appropriate cases you should follow normal referral procedures through your linked Evasion Referral Team (ERT).

Even if the behaviour wasn't demonstrably dishonest, it may fall within the scope of section 167(1) if it can be shown to have been reckless.

#### **4.17 VAT registration numbers**

We may not be able to reject a claim simply because a claimant is unable to produce the VAT registration number under which the output tax was overdeclared or the undeducted input tax was incurred.

Where a claimant has been unable to produce his VAT registration number, you should ask for alternative evidence to show that he was registered for VAT in his own name. Annual accounts will show annual turnover. One risk here is that the claimant may have been part of a VAT group for which the representative member has already made a valid claim.

If you are satisfied the claimant was registered for VAT in his own name throughout the period of claim, that doesn't mean, of course, that we accept the quantum or, indeed, that he necessarily made the mistake that gave rise to the claim – see paragraphs 4.4, 4.8, 4.9 and 4.10 above. It simply means that we accept that he was registered for VAT for the periods or years for which he has been able to produce evidence.

That doesn't mean, of course, that we accept the quantum or, indeed, that he necessarily made the mistake that gave rise to the claim – see paragraphs 4.4, 4.8, 4.9 and 4.10 above. It simply means that we may accept that he was registered for VAT for the periods or years for which he has been able to produce evidence that his turnover was above the VAT registration threshold.

The claimant must also be able to satisfy us that it is more likely than not that his supplies were not disregarded as a result of his being registered as a member of a

VAT group. Clearly if his supplies of goods or services were disregarded, there will have been no output tax declared or overdeclared on them by the claimant.

If the supplies in respect of which the claim was made are of a type that would normally be supplied to a final consumer, one might reasonably conclude that the claimant would still have a claim even if it had been a member of a VAT group in the past – see also the guidance on VAT group treatment at section 14 below.

If, on the other hand, the supplies that are the subject of the claim are of a type that a company might regularly make to an associated company (such as administrative or management services), it will be important to satisfy yourself that the company wasn't a member of a VAT group for the accounting periods in question.

In either event you will need to be satisfied that any VAT group of which the claimant may have been a member doesn't still exist.

#### 4.18 VAT rates

You must ensure that the claim is based on the correct VAT rates for the accounting periods in question for which see the table below.

Periods	Standard	Fraction	Higher	Fraction	Reduced	Fraction
1/4/73 28/7/74	10%	1/11	-	-	-	-
29/7/74 18/6/79	8%	2/27	-	-	-	-
18/11/74 12/4/76	-	-	25%	1/5	-	-
12/4/76 18/6/79	-	-	12.5%	1/9	-	-
18/6/79 31/3/91	15%	3/23	-	-	-	-
1/4/91 Present	17.5%	7/47	-	-	-	-
1/4/94 31/8/97	-	-	-	-	8%	2/27
1/9/97 Present	-	-	-	-	5%	1/21

The higher rate was levied on petrol from 18 November 1974 and its scope was extended on 1 May 1975 to cover:

- Domestic electrical appliances;
- Radios;
- TV's;
- Hi-fi equipment;
- Pleasure boats;
- Aircraft;
- Towing caravans;
- Photographic equipment;
- Furs; and
- Jewellery.

You should also note that between 1 April 1973 and 1 April 1974, confectionery, soft drinks, ice cream, crisps and the like were taxable at the zero-rate.

#### 4.19 Ultra vires correction of errors

Evidence has come to light in the form of an old 1996 letter from a tax advisor to one of his clients which suggests that between 18 July 1996 and 26 November 1996 (Budget day), traders may have made 'error corrections' under regulation 34 of the VAT Regulations 1995 that they were not entitled to make.

The situation was that the claimant had made a claim for six years worth of overdeclared output tax. The claim was capped at three years in the expectation that legislation would soon be enacted to give effect to the cap and almost half of the amount claimed was rejected. The letter said:

"... we believe that an opportunity may exist to recover the balance of the claim, being [in excess of the £2,000 limit permitted under regulation 34 of the VAT Regulations 1995] if the VAT return for the period ending on 31 October 1996 (which should be a VAT return resulting in a payment due to Customs) is submitted prior to the date of the Budget on 26 November 1996.

We believe that the opportunity exists under current legislation by utilising the provisions of section 81(3) which allows the taxpayer to set off amounts due from Customs against payments due to Customs. The draft legislation relating to the three year cap does not appear to allow Customs to enforce an assessment to recover the amount set off and therefore allows the taxpayer to retain the amount."

This is wrong on a number of levels. First, of course, we were wrong to cap the claim in advance of the enactment of resolution made by Parliament on 3 December 1996 under the Provisional Collection of Taxes Act 1968 – see the judgment of the High Court in *R –v- CCE ex parte Kay & Co Ltd & other applications* [1996] EWHC Admin 245.

The claim should have been paid in full and then a recovery assessment made to claw back the three out-of-time years once the parliamentary resolution had been enacted.

Second, the author's interpretation of section 81(3) of the VAT Act 1994 is wrong. Section 81(3) requires us (HMRC) to set against any amount that we might owe to a claimant, any outstanding liabilities that he has to us. It only works that way round.

Third, the proposal contained in the letter ignores the fact that the only provision under which a taxable person may correct his VAT account by including it in his next VAT return is regulation 34 of the VAT Regulations 1995. Under regulation 5 of the VAT (Accounting and Records) Regulations 1989, there was a £1,000 limit on such corrections. By the time of the enactment of the 1995 VAT Regulations that had been increased to £2,000.

In short, what was being proposed here was completely *ultra vires*.

We do not know how many clients this proposal was made to nor how many of them accepted it.

When verifying claims, you should keep an eye out for (a) anomalous drops in the amount declared on returns for accounting periods ending between 18 July 1996 and 26 November 1996; i.e. where the amount shown as due on the return is unusually

low for the claimant and (b) any correspondence or documentation on EF relating to error corrections made, or proposed to be made, between the above dates.

You might also keep an eye out for anomalous increases in repayment returns rendered between those dates.

If you have concerns that a claimant may have taken advantage of this proposal you should follow it up with further enquiries.

If you can establish that it is more likely than not that this proposal was adopted, the amount 'set-off' under the proposal should be deducted from the amount claimed in the Fleming claim.

#### **4.20 Withholding of payment of claims**

A significant number of claims made in the course of the Fleming transitional period were made on the basis of judgments of the courts that are still the subject of litigation.

Normally speaking, where we have an authoritative judgment against us, we will pay claims and make protective recovery assessments which will only be enforced in the event that the judgment which caused us to pay the claims is subsequently overturned.

However, there may be cases where you should consider withholding payment on the grounds that the protective recovery assessment does not afford us sufficient protection. Accepting that there is always a possibility that a claimant's business might fold between the time when his claim is paid and the time when we come to enforce the protective assessment, if, at the time when you are preparing to authorise payment of the claim, there are reasonable grounds for concluding that the claimant will not be able to repay the claim a few years down the line, you should consider withholding payment of the claim until such time as the litigation is finally determined against us ... if it is.

That might be the case where, for example:

- The claimant's business is insolvent, in liquidation, in administration, etc.;
- The claimant has ceased trading and has no apparent income or assets or insufficient income or assets to cover the amount of any recovery assessment;
- The claimant is a shell or dormant company with no apparent income or assets or insufficient income or assets to cover the amount of any recovery assessment;
- The value of the claim is greater than the value of the business itself.

If such a claimant is impatient for repayment of his claim, it may be worth carrying out further investigation to explain that impatience.

If you are satisfied that there are sufficient grounds for withholding payment of the claim, payment should be made conditional on the claimant providing us with some sort of reassurance such as:

- The provision of a bank guarantee; or
- Payment of the claim into an escrow account.

These are not necessarily the only reassurances that you should be prepared to accept but they are the most obvious ones and the most secure.

## 5. Claims by motor traders

### 5.1 General

Claims are likely to be made by motor dealers for overdeclarations made in relation to bonuses given by the manufacturers to the dealers (see *Elida Gibbs Ltd –v- C&E Commrs*, [1996] EUECJ C-317/94; [1996] STC 1387; [1997] BVC 80) and for output tax overdeclared on the sale of demonstrator vehicles under the second hand scheme (see *EC Commission –v- Italian Republic* [1997] EUECJ C-45/95; [1997] STC 1072; [1997] 1 ECR 3605; [1997] BVC 536).

Many of these will be claims which were not made at the time and most, if not all of them will be estimated. Unless the claimant has his own contemporary records, claims should be calculated in accordance with the guidance and tables published by the Motor Trade Unit of Expertise in consultation with the Society of Motor Manufacturers and Traders (SMMT) and the Retail Motor Industry Federation (RMIF) – but see paragraphs 4.4 and 4.9; the claimant still has to establish the viability of his claim. These tables can be obtained from the Motor Trade Unit of Expertise. The Elida Gibbs Tables are available on the HMRC website by clicking on this [link](#).

A person who does not want to calculate his claim in accordance with the above mentioned tables must be able to base a calculation on his own records.

Where a person who has already made *Elida Gibbs* or *Italian Republic* claims that have been paid and are now closed makes a new claim on the grounds that the tables did not give him his full entitlement, he must be able to provide evidence to support the second claim – see also paragraphs 4.4 and 4.9 on evidence and the estimation of claims. Clearly, the new claims must have been made in time as well – see sections 26 and 27.

### 5.2 Duplicate claims or rival claimants

You should be aware that there are areas in which we are getting duplicate or competing claims for the same money – two claimants asserting that the right to claim the refund is theirs.

The two obvious examples are to be found among the claims from NHS Trusts and *Rialto* claims.

Among the NHS Trust claims, there are cases where both the Strategic Health Authority and one of more of the NHS Trusts to which it transferred its functions in the early '90s are making claims for input tax that was incurred and not deducted or output tax overdeclared. The SHAs insist that the right to make the claim was not assigned to the NHS Trusts with the transfer of functions and the NHS Trusts argue that the right to claim was assigned.

With the *Rialto* claims there is a danger that we have claims both from the sub-contractor who supplied the soft landscaping services and from the developer to whom those services were supplied – see section 6 of this guidance.

There must also be a risk, in any case where a claimant insists that the right to make a claim has been assigned to him, that the person who allegedly assigned that right to him might also have made a claim.

In such cases, where there appears to be relatively clear evidence to show that the right has, or has not, been assigned, you should pay the claim to the person who, according to that evidence is the rightful claim, make a protective recovery assessment for the amount paid and reject the other claim.

The protective recovery assessment will protect us against the possibility that the person whose claim is rejected challenges our decision and wins.

## **6. Rialto claims**

### **6.1 Background**

On 18 May 2000, Customs published Business Brief 07/00 which invited claims on the basis of the decision of the VAT & Duties Tribunal in *Rialto Homes Plc* (VTD 16340). The Business Brief invited claims not only from those businesses (the VAT registered suppliers) which had wrongly charged VAT on their supplies of soft landscaping to developers (claims under section 80) but also from those (the developers and customers) to whom it had been wrongly charged.

There was, and is, no legal basis for claims to be made to HMRC other than under section 80 of the VAT Act 1994 by the VAT registered suppliers (for amounts wrongly declared as output tax) because the only person who is entitled under law to claim amounts wrongly brought into account as output tax is the person who brought it into account or some other person to whom the right to make that claim is assigned.

Nor was, or is, there any scope under section 25 of the VAT Act 1994 and regulation 29 of the VAT Regulations 1995 for the customers (the developers) to make claims for those amounts as input tax because of the block provided for in Article 6 of the Value Added Tax (Input Tax) Order 1992 and the decision of the Tribunal in *Rialto* did nothing to disapply that block.

However, we recognise that the Business Brief has created legitimate expectations among the developers (the customers) that must be protected.

### **6.2 Claims that have been paid**

Where claims have been made under Business Brief 07/00, whether by the landscaper or the developer, and paid, no action should be taken to recover the amounts paid.

That does not mean, however, that where you discover that a claim ought not to have been paid, e.g., because it turns out that there were no supplies of soft landscaping or that the claim was poorly calculated, you should not take action to recover the amount paid under the claim.

It simply means that we should not take recovery action where the only reason for doing so is that Business Brief shouldn't have invited claims from developers.

Where recovery assessments are made, they should be made under section 80(4A) of the VAT Act 1994 against landscapers (subject to the time limits in section 80(4AA)) and under section 73(2) the VAT Act against developers (subject to the time limits in section 73(6), (6A) and 77(1)).

### **6.3 Double claims**

As a result of the terms of the Business Brief it is entirely possible that we will have had claims from those at either end of a transaction. That is to say, it is possible that, for the same series of transactions, we shall have had a claim both from the person who wrongly charged the VAT and the person to whom it was wrongly charged.

With immediate effect, when dealing with *Rialto* claims, you should do your best to ensure that there is no competing claim from the other end of the transaction.

Where both claimants have already claimed and already been paid, there is little you can now do and no recovery action should be taken except for reasons unassociated with the mistake in Business Brief 07/00 (i.e. inviting claims from 'customers' who have no statutory claim against us).

Where a claim has been made by a developer and paid and we are now dealing with a claim by a landscaper, we cannot resist the landscaper's statutory claim and it should be paid subject, as ever, to verification, time limits, etc..

Where a claim has been made by a landscaper and paid and we are now dealing with a claim from a developer, you should reject the developer's claim on the grounds that our liability in relation to the transactions in question has been discharged.

Where we have 'open' claims from both the landscaper and the developer, you should process the claim from the landscaper and reject the claim from the developer on the grounds that we are only liable once on any given transaction.

Clearly, where there has been no claim from the landscaper, a claim from the developer can be processed in accordance with the legitimate expectation created by Business Brief 07/00 and this guidance.

### **6.4 Closed claims**

If a person made a claim that was refused under our previous guidance or made a claim that was paid and then clawed back by way of recovery assessment under the same guidance, he will only be able to reverse that decision to refuse the claim or claw it back if the matter is still open – i.e. subject to review or appeal.

If he did not exercise his right to a review or to appeal to the First-Tier Tribunal and the thirty-day time limit has now expired, the matter is closed and no steps should be taken to re-open it.

## **7. Protective claims**

In the run-up to 1 April 2009, a substantial number of 'protective claims' were submitted based on as yet unsettled litigation.

A person only has a claim, whether under section 80 of the VAT Act 1994 or regulation 29 of the VAT Regulations 1995, if we accept that he has overstated his output tax liability or understated his input tax entitlement. Where we are litigating a liability point and either there is no authoritative judgment or the standing judgment is in our favour, we will not have conceded that the claimant has a claim.

Claims made on a protective basis should be rejected. They should not be held on file.

If the claimant wishes to protect his position vis-à-vis the claim, he has the right to appeal to the Tax Tribunal.

## 8. Abusive claims

There is a good deal of case law of the ECJ holding that:

It is ... settled case-law that Community law cannot be relied on for abusive or fraudulent ends – see, *IS Fini H* [2005] [2005] EUECJ C-23/03; ECR I-1599, paragraph 32, and *Halifax and Others* [2005] EUECJ C-255/02; [2006] ECR I-1609, paragraph 68.

This approach has been adopted by the House of Lords in *Pirelli Cable Holding NV – v- IRC & other appeals*, [2006] UKHL 4; [2006] STC 548; [2008] BTC 526.

On the one hand, a Member State may not rely on its failure to implement a provision of EU law. On the other, businesses and individuals who seek to rely on the direct effect of an EU provision cannot “cherry pick” in order to produce an advantageous result.

If a person relies on the direct effect of an EU provision, that provision must be given its full effect. A claim which relies on only one part of a provision to the unjustified advantage of the claimant is abusive.

The term ‘abusive claim’ as used here means that the claimant has sought to use EU legislation or the case law of the ECJ (or UK legislation and case law intended to implement the EU provisions) in order to obtain a result which is contrary to the intentions of the EU legislator and contrary to the intention of the ECJ. Such a result constitutes an unjustified tax advantage.

A simple example of such a claim might be where, after a judgment that supplies of x are exempt rather than taxable, a trader makes a claim for the output tax that he overdeclared on his supplies of x but doesn’t declare the input tax that he deducted wrongly on the understanding that his supplies were taxable.

The rationale behind the claim is that the claimant has a Community law right to recover the overdeclared output tax and that HMRC are not entitled to recover the input tax because they cannot rely on their failure to implement Community law properly.

You will also find claims made on the reverse basis. Supplies that were thought to be exempt have been held to be liable to VAT at the standard rate. The claimant submits a claim for the input tax that he would have been entitled to deduct if he had treated his supplies as taxable but he takes no account of the countervailing liability for output tax.

We have also seen claims made on that basis but stretching back to years for which the claimant wasn’t registered for VAT. Their logic, such as it is, is that if they’d known that their supplies were taxable, they would have registered for VAT and, as a result, they would have been able to deduct their input tax.

Such claims should be rejected and brought to the attention of [Bob Mintoft](#) or [Nick Dean-Webb](#) of Anti-Avoidance Group.



## 9. Unjust enrichment

### 9.1 Invocation of the defence in relation to Fleming claims

Whilst the passage of time may make it difficult effectively to invoke the unjust enrichment defence against Fleming claims, there is no reason in principle why we may not consider rejecting for unjust enrichment any claim made on or after 26 May 2005.

You should certainly consider its invocation in relation to claims for output tax overdeclared on supplies made to VAT registered traders who were entitled to deduct the wrongly charged output tax as input tax – whether in whole or in part (see paragraph 7 of the judgment of Lloyd LJ in *CRC –v- Baines & Ernst Ltd* [2006] EWCA Civ 1040).

### 9.2 Resubmission of pre-1997 claims

If you are dealing with a claim **which was made on or after 26 May 2005** and was originally submitted back in 1996 or 1997 and capped, you ought to consider invoking the unjust enrichment defence, even if it was not considered at the time the original claim was dealt with.

If, when the original claim was made, we only repaid, for example, 50% of the uncapped amount on the grounds that payment of anything more than that would lead to the unjust enrichment of the claimant, that same percentage ought to be applied, in the absence of evidence to the contrary, to any claim for amounts which were withheld under the capping provisions.

If unjust enrichment was considered in relation to the original claim and it was decided that payment would not unjustly enrich the claimant, it is likely that that decision will also apply to the new claim.

### 9.3 Repayment returns

Since 26 May 2005, the unjust enrichment defence can be invoked against all claims for output tax including those for output tax overdeclared on repayment returns.

## 10. Judgment of the House of Lords in *Marks & Spencer Plc –v- CRC* [2009] UKHL 8; [2009] STC 452; [2009] BVC 106

Prior to 26 May 2005 (when the law was changed), the unjust enrichment defence could only be applied to payment traders and not repayment traders. In its judgment in Case C-309/06, *Marks & Spencer Plc –v- CRC* [2008] EUECJ C-309/06; [2008] STC 1408; [2008] BVC 577, the European Court of Justice held that this was discriminatory. In light of the recent House of Lords judgment in *Marks and Spencer*, the unjust enrichment defence should no longer be used against any claim made before 26 May 2005, even where the claimant suffered no loss as a result of having made the overcharge of VAT.

In other words, claims that were made before 26 May 2005 and that are still open should not be subjected to the unjust enrichment defence.

However, the law was changed with effect from 26 May 2005 in relation to any claim made on or after that date so that the unjust enrichment defence now applies to all

claims for overdeclared output tax. The ECJ has acknowledged that the amended legislation is no longer discriminatory (see paragraphs 69 and 77 of the Advocate General's opinion and paragraph 53 of the judgment in *Marks & Spencer Plc –v- CRC* [2008] EUECJ C-309/06; [2008] STC 1408; [2008] BVC 577).

**Any claim made under the amended section 80 can be rejected for unjust enrichment even if it relates to accounting periods ending before the enactment of the changes – see paragraph 10.1 below.**

## 10.1 Retrospective application of the defence

The defence can be invoked against claims made on or after 26 May 2005 even where the claim relates to accounting periods ending before that date. In his opinion in *Weber's Wine World Handel GmbH –v- Abgabenberufungskommission Wien*, [2003] EUECJ C-147/01 the Advocate General addressed the retrospective application of the unjust enrichment defence and said:

“66. A national rule which does no more than preclude unjust enrichment is compatible with Community law.

67. Where such a rule applies to claims in respect of situations which arose before its enactment, that effect does not seem to me incompatible with Community law. On the one hand, in so far as it seeks to preclude unjust enrichment, it in fact precludes only enrichment which would have occurred after its enactment, provided that there is no provision for recovery of any amount already reimbursed. On the other hand, there can in any event be no legitimate expectation of any such enrichment, since the very concept of legitimacy cannot embrace what is unjust.”

## 10.2 Claims made on or after 26 May 2005

All claims for overdeclared output tax made on or after 26 May 2005 may be subject to the unjust enrichment defence. That is regardless of whether the claim relates to an accounting period for which a payment return was rendered or to one for which a repayment return was submitted.

As is clear from paragraph 10.1 above, it does not matter that the accounting periods for which the claim was made ended before 26 May 2005.

As a result, *all* claims made under Business Brief 13/06 (published on 24 August 2006) and under Revenue & Customs Brief 07/08 during the transitional period running from 19 March 2008 to 31 March 2009 may be subjected to the unjust enrichment defence.

## 11. Quantification of a claim – Output tax

### 11.1 What is HMRC liable for on a claim?

It is important to note that it is for the claimant to satisfy us that he has made the overdeclaration of output tax that he is claiming. It is not for us to show that he has not. The law provides that HMRC will be liable to credit an amount to a claimant where he:

“...**has accounted** to the Commissioners for VAT ... and **has brought into account** as output tax **an amount** that was not output tax due ...” [emphasis added]

The law does not provide that HMRC shall be liable where it appears to them that a person might have wrongly brought an amount into account as output tax. It provides

that we shall be liable where he **has** brought an amount into account, etc. Furthermore, the reference to 'an amount' is equally important. It requires, in effect, that the amount is exact, specific, accurate – see paragraph 4.2 for guidance on the burden of proof.

We are entitled, when dealing with claims, to satisfy ourselves that the overdeclaration has been made and that the amount claimed is accurate and we are entitled to refuse to make a payment against the claim until we are so satisfied (see the judgment of the High Court in *R (on the application of UK Tradecorp Ltd) –v- CCE* [2004] EWHC 2515 (Admin); [2005] STC 138; [2005] BVC 128). This case related to a claim for input tax but the logic applies equally to any claim made against HMRC.

HMRC is only liable for the net overdeclaration of output tax after all liabilities that can or must be set off have been taken into account.

As well as a calculation of the overdeclaration being claimed, claims must include a calculation of any underdeclarations that have not previously been declared regardless of whether they fall within the same accounting periods as those for which the claim was submitted.

Section 80(2A) brings into account any other errors that occurred in the accounting periods for which the claim was submitted, section 81(3) brings into account any 'debts-on-file' and 81(3A) brings into account any errors that occurred in accounting periods not covered by the claim where those other errors arose out of the same mistake that gave rise to the claim.

Where a claimant makes a gross claim and refuses to disclose, or calculate, underdeclarations that he knows or suspects he has made, you should refer to section 8 above on abusive claims.

**Under no circumstances** should a claim be paid until (a) we are satisfied that the overdeclaration was, in fact, made and (b) the quantum of the claim has been properly verified.

## 11.2 Payment of claims

You should check that there are no outstanding liabilities that should be set off against the claim before you authorise payment.

There are a number of elements that must be set off under sections 80(2A) and 81(3) and (3A) of the VAT Act 1994 and section 130 of the Finance Act 2008 before the claim is finally paid – see section 23 below on set-off for more details.

Payment must not be made where:

- The claimant has not succeeded in demonstrating that he made the overdeclaration of output tax for which he is claiming;
- The claimant has not been able to demonstrate that the amount being claimed is sustainable;
- You have not been able to establish the extent of the claimant's outstanding liabilities to your satisfaction.

## **12. Quantification of a claim – Input tax**

### **12.1 What is HMRC liable for on a claim?**

HMRC is only liable for the net underdeduction of input tax after all liabilities have been taken into account.

As well as a calculation of the undeducted input tax being claimed, claims must include a calculation of any underdeclarations that have not previously been declared.

If he has not declared, or has underdeclared, his output tax liability for a given accounting period, he will only be able to claim input tax for that accounting period to the extent that his unclaimed input tax entitlement exceeded his undeclared output tax liability. This is not a set-off within the scope of section 81 of the VAT Act 1994 and the character or nature of the mistake or mistakes that led to the underdeclaration of output tax liability and the understatement of input tax entitlement is irrelevant. It is simply a question of what the taxable person is entitled to claim by way of a late claim for input tax by virtue of the requirements in VATA permitting deduction of input tax entitlement from output tax liability.

If you are not content, you should write to the claimant refusing to pay the claim unless information is provided on countervailing errors that we are required, or entitled, to set off. You should explain that you are not rejecting the claim at this stage but refusing to make payment on the grounds that you cannot be satisfied that the amount being claimed is not excessive. If that further information is not forthcoming within 90 days of the date of your letter, you should reject the claim and inform the claimant of his rights.

Where a claimant makes a gross claim and refuses to disclose, or calculate, underdeclarations that he knows or suspects he has made, you should refer to section 8 above on abusive claims.

No claim should be paid until you are content either that all outstanding liabilities have been taken into account or that there are none.

### **12.2 Payment of claims**

You should check that there are no outstanding liabilities that should be set off against the claim before you authorise payment.

There are a number of elements that must be set off under section 81(3) and (3A) of the VAT Act 1994 and section 130 of the Finance Act 2008 before the claim is finally paid – see section 23 below on set-off for more details.

Payment must not be made where:

- The claimant has not succeeded in demonstrating that he incurred the input tax that he is claiming and that he failed to deduct it;
- The claimant has not been able to demonstrate that the amount being claimed is sustainable;
- You have not been able to establish the extent of the claimant's outstanding liabilities to your satisfaction.

## 13. Who can claim?

### 13.1 General

The only person who is entitled to make a claim, whether under section 80 of the VAT Act 1994 or under section 25 of the VAT Act and regulation 29 of the VAT Regulations 1995, is:

- the person who (1) accounted for the output tax or (2) incurred the input tax in the course and furtherance of his taxable activities; or
- a person to whom the right to make the claim has been assigned or transferred by that person.

That does not mean, of course, that the claim may not be made by a person acting for the claimant, such as an accountant, solicitor or tax adviser. You should ensure however, that the person acting for the claimant has submitted a signed Agent Authority Form 64-8.

**We cannot discuss a claimant's tax affairs with a tax adviser unless we have a signed Form 64-8 from the claimant authorising us to do so.**

## 14. VAT group treatment

### 14.1 General

Treatment of two or more bodies corporate as a group for VAT purposes under section 43 of the VAT Act 1994 creates a single taxable person – see the judgment of the High Court in *CCE –v- Kingfisher Plc* [1994] STC 63.

That taxable person operates through the representative member of the group for the time being and it is the representative member who is:

- Deemed to carry on any business activities carried on by any member of the group (section 43(1))
- Deemed to have made or received any supplies made by or to any member of the group (section 43(1)(b));
- Liable for any VAT due on any of those supplies or any of those business activities (section 43(1));
- Entitled to deduct any input tax incurred on any of the supplies deemed to have been received by him.

The result is that the taxable person, for the purposes of section 80 of the VAT Act 1994 and regulation 29 of the VAT Regulations 1995, is the company acting in the capacity of representative member at the time when a claim is made.

### 14.2 Claims by VAT groups

Where an overdeclaration of output tax or underdeclaration of input tax is made by a VAT group, the entitlement to claim remains with the representative member of that VAT group for as long as the group remains in existence. This applies regardless of any changes in the composition of the VAT group. Thus the only person who can make a claim for output tax overdeclared or input tax underclaimed by a member of a VAT group is the company that is the representative member of the VAT group at the time when the claim is made.

For example, in a group consisting of Alpha Ltd, Bravo Ltd, Charlie Ltd, Delta Ltd and Echo Ltd, Alpha Ltd is the representative member. Bravo Ltd, Charlie Ltd, Delta Ltd and Echo Ltd are subsidiary members. Charlie Ltd overdeclares his output tax entitlement and that is reflected in the return rendered by Alpha Ltd in its capacity as representative member. Shortly afterwards, Alpha Ltd and Charlie Ltd leave the VAT group and are replaced by Foxtrot Ltd and Golf Ltd. Golf Ltd takes over as the representative member. A couple of years after the overdeclaration was made the group's tax adviser discovers the error. The person who should make the claim is Golf Ltd and the person to whom the claim should be paid is the company that is the representative member at the time when the claim is paid even if that has changed since the claim was made.

This is so because section 43 of the VAT Act 1994 deems the representative member to have carried on the business of all of the subsidiary members and to have made and received all supplies of goods and services made by or to them. Section 43 also holds the representative member responsible for the VAT affairs of every member of the group.

If a company that is now treated as a member of a VAT group discovers that it made an overdeclaration of its output tax liability (or indeed an understatement of its input tax entitlement) before it became a member of the group, the claim should be made by that company using its previous VAT registration number and any payment arising out of the claim should be made to that company, not to the representative member of the VAT group.

Please remember that all subsidiary members of a VAT group are liable jointly and severally with the representative member for the period during which they were members of the group.

### **14.3 Movement between VAT groups**

On 1 April 1973 Abel Ltd forms a VAT group with Baker Ltd, Charlie Ltd, Dog Ltd, Easy Ltd and Fox Ltd (VAT group 1). Abel Ltd as the representative member of the group throughout.

On 8 January 1987, Fox Ltd leaves that VAT group and joins another one of which George Ltd is the representative member (VAT group 2).

It subsequently turns out that Fox Ltd has mistakenly treated certain of its supplies as taxable which ought to have been treated as exempt.

The right to claim the output tax overdeclared on Fox Ltd's supplies in accounting periods ending between 1 April 1973 and 8 January 1987 vests in the representative member, for the time being, of VAT group 1. The right to claim the output tax overdeclared in accounting periods ending between 8 January 1987 and 4 December 1996 vests in the representative member, for the time being, of VAT group 2.

Fox Ltd is not entitled to make the claim for any of the accounting periods in question while the two VAT groups continue in existence.

If VAT group 1 is dissolved, the entitlement to claim for accounting periods ending between 1 April 1973 and 8 January 1987 reverts to Fox Ltd. Similarly, if VAT group 2 is disbanded, the right to claim for accounting periods ending between 8 January 1987 and 4 December 1996 will revert to Fox Ltd.

Please note that this applies equally for input tax claims under section 25 of the VAT Act 1994 and regulation 29 of the VAT Regulations 1995.

#### **14.4 Claims for accounting periods falling after the disbandment of a VAT group**

Once a VAT group has been disbanded, any rights to claim that vested in the representative member while the group existed, revert to the individual members of the group – see the decisions of the VAT & Duties Tribunal in *Triad Timber Components Ltd* (1993) VATTR 384 and *Proto Glazing Ltd* (VTD 13410).

These were both Bad Debt Relief cases. The supplies for which no payment was received were made while the group treatment continued and the claims were made after its disbandment. The Tribunal in *Proto Glazing*, applying *IRC –v- Metrolands (Property Finance) Ltd* [1981] STC 193 at 208, held that once the group has been disbanded, the legal fiction created by section 43 of the VAT Act 1994 ceases to have applied. The result was that the person entitled to make the claim is the person who in reality made the supply that was never paid for.

This applies equally where a number of companies are treated as members of a VAT group which is disbanded when those companies become members of another VAT group.

For example, Abel Ltd, Baker Ltd, Charlie Ltd and Dog Ltd are treated as a group for VAT purposes with Abel Ltd as the representative member (VAT group 1). While that group continues in existence, any claim must be made by Abel Ltd.

That group is disbanded and the four companies are treated as members of another VAT group (whether pre-existing or new) with Easy Ltd, Fox Ltd, George Ltd and Hypo Ltd of which Fox Ltd is the representative member (VAT group 2).

Claims relating to accounting periods covered by VAT group 1 should be made by the individual companies to whom those claims relate in the real world.

Claims relating to accounting periods covered by VAT group 2 should be made by the representative member of that group – Fox Ltd.

### **15. Companies registered in divisions**

Where an overdeclaration of output tax or underclaim of input tax is made by a division of a company that is registered for VAT in the names of its divisions, the claim should be made by the division that made the overdeclaration or underclaim. That is because the VAT account that is in error is that of the division in question.

If the divisional registration is cancelled and the company is once again registered for VAT under a single number, overdeclarations or underclaims made by any divisions that were previously separately registered and now form part of the single registration can be claimed by the company.

Where an overdeclaration or underclaim is made by a company that was previously registered for VAT under a single number and is now registered in the names of its divisions, the claim should be made by the division which has the VAT registration number of the company before it registered in the names of its divisions or by the headquarters division.

If you do get a claim from a division of a company that is registered in the names of its divisions, you must check that there have been no identical or similar claims submitted by any of the other divisions of the same company.

## **16. Claims by partnerships**

### **16.1 English general partnerships**

A partnership is an unincorporated association governed by the Partnership Act 1890 and comprises a number of partners.

Partnerships do not have legal personality. It is the partners jointly who carry on the business of the firm and they who bear the liability for the debts and obligations of the firm.

A partnership cannot sue or be sued in the name of the firm and all rights and obligations lie with the individual partners.

While the partnership continues in existence, claims must be made by one of the partners and repayments must be paid into the partnership's trading account. There is therefore a risk of duplicate claims being made. You will need to ensure that only one payment to the partnership is made.

One would normally expect the claim to be made in the name of the partnership, i.e. the firm name or the name which is shown on the VAT register for the claimant. However, a claim for overdeclared VAT under section 80 of the VAT Act 1994 by a partnership can be claimed by any person who has signed the Form VAT2 for that partnership and has not notified us in writing under regulation 5 of the VAT Regulations 1995 that he has ceased to be a partner. However, if you know the person making the claim has ceased to be a partner, you will need to ensure that he has only claimed for the period during which he was a partner and that there have been no other competing or duplicate claims made by any of the other partners.

Once the partnership has been dissolved, claims may be made by any person who acted as a partner in the firm, for any period during which he acted as a partner. For instance, if a partnership of Mr Alpha, Mrs Bravo and Miss Charlie overstates its output tax liability and, shortly thereafter, is dissolved, the claim may be made by Mr Alpha, Mrs Bravo or Miss Charlie either jointly or individually. As in the other situations discussed above, you will need to be aware of the possibility of duplicate claims.

If output tax is overdeclared by a partnership comprising Mr Alpha, Mrs Bravo, Miss Charlie and Mr Delta and, after a year, Miss Charlie and Mr Delta leave so that there only remains a partnership of Mr Alpha and Mrs Bravo which is disbanded a year later, Mr Alpha and Mrs Bravo can claim for overdeclarations made during the entire life of the partnership whereas Miss Charlie and Mr Delta can only claim for the periods during which they were partners.

You should be very careful, when dealing with claims from partners of firms that have been dissolved or claims from ex-partners of existing firms, to ensure that claims are not duplicated. You should be able to find the names of all partners, past and present, and their periods of membership of the firm on the VAT2 forms on Electronic Folder.



## **16.2 Scottish general partnerships**

Under section 4(2) of the Partnership Act 1890 "...In Scotland a firm is a legal person distinct from the partners of whom it is composed ...". As a result, it is in the firm that any right to make a claim under section 80 vests and not in the partners as individuals.

Thus a claim may only be made under section 80 by the firm and payment may only be made to the firm.

Care should be taken when dealing with claims by partners of firms which have become dissolved in Scotland. Payment should be made to "the dissolved firm of ...". If objection is taken to this, for example because the bank account in the name of the firm has been closed, you should be satisfied that the partner making the claim has the authority of the other partners and that there is no duplication of claims.

## **16.3 English limited partnerships**

A limited partnership is a partnership constituted under the Limited Partnership Act 1907 and comprises a number of partners who are general partners and a number who are limited partners. Limited partnerships will be registered on the Register of Limited Partnerships kept by the Registrar of Companies. If it is not so registered it should be treated as a general partnership with all partners being treated as general partners.

As in the case of English general partnerships, limited partnerships do not have legal personality. It is the general partners who carry on the business of the firm and they who bear the liability for the debts and obligations of the firm. The limited partners are not involved in the running of the business and are only liable for debts to the extent of the capital that they have introduced into the partnership.

A limited partnership cannot sue or be sued in the name of the firm and all rights and obligations lie with the individual general partners – not the limited partners.

While the partnership continues in existence, claims must be made by one of the general partners and repayments must be paid into the partnership's trading account.

However, once the partnership has been dissolved, claims may be made by any person who acted as a general partner in the firm, for any period during which he acted as such.

You should be very careful, when dealing with claims from partners of firms that have been dissolved or claims from ex-partners of existing firms, to ensure that claims are not duplicated. You should be able to find the names of all general partners, past and present, and their periods of membership of the firm on the VAT2 forms on Electronic Folder.

You should also ensure that any claim from a limited partnership is made by one of the general partners and not by any of the limited partners.

## **16.4 Scottish limited partnerships**

As with Scottish general partnerships, limited partnerships in Scotland have legal personality separate from the persons that comprise them (section 4(2) of the Partnership Act 1890 and section 3 of the Limited Partnership Act 1907).

As a result claims are to be made by, and are payable to, the firm.

Care should be taken when dealing with claims by partners of firms which have become dissolved in Scotland. Payment should be made to " the dissolved firm of ...". If objection is taken to this, for example because the bank account in the name of the firm has been closed, you should be satisfied that the partner making the claim has the authority of the other partners and that there is no duplication of claims.

## **16.5 Limited liability partnerships**

Section 1(2) of the Limited Liability Partnership Act 2000 provides that:

“(2) A limited liability partnership is a body corporate (with legal personality separate from that of its members) which is formed by being incorporated under this Act; and—

...

references to a limited liability partnership are to such a body corporate.”

The result is that claims under section 80 of the VAT Act 1994 or regulation 29 of the VAT Regulations 1995 may only be made by, or on behalf of, the limited liability partnership (LLP) and repayments can only be made to the partnership.

Ex-partners cannot make claims for amounts overdeclared by way of output tax by an LLP after it has been dissolved.

A limited liability partnership will be registered on the Register of Limited Liability Partnerships maintained by the Registrar of Companies. If they are not registered, they should be treated as general partnerships with all partners holding the rights and liabilities of general partners.

## **17. Death, insolvency and incapacity – General**

Where a claim is submitted by a taxable person before he dies, becomes insolvent or incapacitated and, at the time of his dying, becoming insolvent or incapacitated that claim has still not been paid, it may only be pursued by the executor, trustee in bankruptcy, administrator, liquidator, etc.

Furthermore, payment should only be made to the representative rather than to the taxable person himself directly. That is so notwithstanding the fact that it was the taxable person who initiated the claim.

## **18. Claims on behalf of deceased persons**

### **18.1 England & Wales**

Claims submitted on behalf of deceased persons are, in principle, good claims. A deceased person's personal representative remains appointed and will continue to be his personal representative for the duration of his lifetime.

Other than the time limits imposed by section 80(4) of the VAT Act 1994 and regulation 29(1A) of the VAT Regulations 1995 (subject, of course, to section 121 of the Finance Act 2008), there are no time limits imposed on the personal representative.

Generally speaking, claims made on behalf of deceased persons should be made by the executor.

Claims that have been wrongly refused on the basis that they could only be made while the estate was still in the process of being wound up cannot be resurrected. Any attempt by the claimant to do so would constitute a new claim and would be subject to the time limits in section 80(4) of the VAT Act 1994 and regulation 29(1A) of the VAT Regulations 1995.

## **18.2 Scotland**

The position in Scotland is the same as in England and Wales. That means that any claim must be made by, and paid to, the person appointed as the executor by the testator or by the courts.

## **19. Claims made on behalf of companies that have been dissolved, wound up or struck off the Register of Companies**

### **19.1 Validity of claims**

Claims made on behalf of companies that have been dissolved, wound up or struck off are not valid claims unless the right to make the claim has been assigned to the person making it. If the right to make the claim has not been assigned before the company is dissolved, wound up, or struck off, it becomes 'ownerless goods' (bona vacantia) and is the property of the Crown (see 19.3 below).

Claims made by companies that are said to have been restored to the register should be rejected on that basis – see paragraph 19.4 below.

### **19.2 Claims already approved in principle or paid**

Until the middle of 2009, some claims made on behalf of dissolved companies were treated as valid, provided that both the claim, and the application for the restoration of the company to the Register of Companies, had been made before 1 April 2009. This relaxation was intended to overcome the practical difficulties some companies experienced in completing the process of restoration before the expiry of a claim deadline.

Following requests that this treatment should be extended to companies that had not made a restoration application until after a deadline, we have reviewed our approach and sought legal advice on the point. Given that the right to make such a claim is owned, and can only be exercised, by Treasury Solicitors, we cannot exercise any discretion in this area.

However, where claims have already been accepted on the basis that steps have been taken to restore the company to the register before the expiry of a claim deadline, you should continue to verify the claim with a view to payment, subject, of course, to the claimant company actually being restored to the Register.

No action should be taken to recover amounts that have already been paid in cases where the claimant company was restored to the Register on the basis of our assurance that the claim would be processed after restoration.

This only applies where the claimant has a letter from us saying that we will verify the claim once the company has been restored to the register.

### 19.3 Ownerless goods (*Bona vacantia*)

If a company still owns assets when it is dissolved, struck off or wound up, those assets become ownerless goods (*bona vacantia*) and revert to the Crown. Specifically, such property reverts to:

- The Treasury Solicitor (for companies with their registered office in England and Wales);
- The Solicitor to the Duchy of Cornwall (for companies with their registered office within the territory of the Duchy);
- The Solicitor to the Duchy of Lancaster (for companies with their registered office within the territory of the Duchy);
- The Queen's and Lord Treasurer's Remembrancer (for companies with their registered office in Scotland); or
- The Crown Solicitor for Northern Ireland (for companies with their registered office in Northern Ireland).

The right to make a claim to recover overpaid VAT is an asset.

Guidance on dissolved companies and *bona vacantia* can be found on the Treasury Solicitor's and the Companies House websites at:

- <http://www.bonavacantia.gov.uk/output/dissolved-company-guidelines.aspx>; and
- <http://www.companieshouse.gov.uk/about/gbhtml/gp4.shtml>.

The guidance above on the burden of proof (4.2), standard of proof (4.3) and evidence (4.4) applies to these claims as it does to all the others.

### 19.4 Restoration of companies to the Register of Companies

Where you are faced with a claim made by, or on behalf of, a company that has been restored to the Register of Companies or where the 'claimant's' representative is preparing to make such an application, there are a couple of things that you will need to bear in mind.

The first is that when the company was wound up, liquidated, dissolved, etc., unless action was taken to assign the right to make any outstanding claims before it was dissolved, that the right to make any Fleming claim will have reverted to the Crown as *bona vacantia*.

The second point is that the restoration of a company to the Register does not, of itself, have the effect of validating acts done 'on behalf of' the company at a time when it was not, in fact, on the Register. Under section 1032(3) of the Companies Act 2006, the courts have the power, in an order restoring a company to the Register, to explicitly validate acts done on the company's behalf prior to its restoration – see for example, the judgment of the Court of Appeal in *Tymans Ltd –v- Craven* [1952] 2 QB 100; [1952] 1 All ER 613.

However, such an order cannot reverse the *bona vacantia* process. From the date of the company's dissolution, the right to make the claim has vested in the Crown and nobody but the relevant Crown representative can exercise that right. If the right to

make the claim has not been exercised before the expiry of any time limit (31 March 2009 in this case), the right expires and cannot be brought back to life.

The result is that restoration of the company to the register will not restore the right to make the claim to the company.

## 20. Bankruptcy & insolvency

Where a natural person has become bankrupt, the person acting on his behalf, for example, the trustee in bankruptcy (or other person appointed under the Insolvency Acts), is the person who acts for the claimant under regulation 9 of the VAT Regulations 1995. Claims should not be accepted from anyone other than the claimant's personal representative.

Where a company goes into administration or into liquidation, it will be the administrator, liquidator, receiver or other Insolvency Practitioner (IP) (the person appointed under the Insolvency Acts) who (in accordance with regulation 9 of the VAT Regulations 1995) will act for the claimant. Claims should not be accepted from anyone other than the IP.

You should only accept claims from anyone other than the personal representative or IP if you have a Form 64-8 signed by that person nominating another person to act for the claimant. In the absence of a signed Form 64-8, a claim made by somebody other than the personal representative or IP should be rejected as being invalid.

## 21. Incapacity

Claims made on behalf of somebody who is incapacitated should only be accepted from that person's legally appointed personal representative, e.g., the person with the power of attorney to act for the incapacitated person. It is that person who, under regulation 9 of the VAT Regulations 1995 stands in the shoes of the incapacitated person for VAT purposes.

As in the case of claims made in cases of death, bankruptcy or insolvency, claims may only be accepted from someone other than the legally appointed personal representative where we have a Form 64-8 signed by the personal representative nominating another named person to handle the claim.

In the absence of a signed Form 64-8, a claim made by somebody other than the legally appointed personal representative should be rejected as being invalid.

## 22. Claims where right to claim has been transferred or assigned

### 22.1 General

Until the Court of Appeal handed down its judgment in *CRC –v- Midlands Co-operative Society Ltd* [2008] EWCA Civ 305; [2008] STC 1803; [2008] BVC 414, it was generally believed that the only person who could make a claim to recover any amount overdeclared by way of VAT was the person who actually made the overdeclaration or overpayment and this view was endorsed by the VAT & Duties Tribunal in its decision in *Shendish Manor Ltd* (VAT Tribunal Decision 18474).

In her judgment in *Midlands Arden LJ* concluded that a right to make a claim under section 80 of the VAT Act 1994 is property for the purposes of the Law of Property

Act 1925 and that, as such, it can be assigned, transferred or sold under section 136 of that Act. This judgment effectively restates and confirms for the purposes of UK law the judgment of the European Court of Human Rights in *SA Dangeville –v- France* [2002] ECHR 419; [2003] STC 771; [2005] BVC 630 in which the court concluded that the right to make a VAT claim was a 'possession' within the meaning of Art. 1 of Protocol 1 of the European Convention on Human Rights – see also the judgment of the ECHR in *Bulves AD –v- Bulgaria* [2009] ECHR 143.

Because the right to make a claim is property it can be transferred, assigned or sold and, if it can be transferred, assigned or sold, it can be enforced by somebody other than the person who actually made the overdeclaration of output tax. The person who made the overdeclaration of output tax is known in the legislation (section 133 of the Finance Act 2008) as the original creditor and the person to whom the right to make the claim is assigned is referred to as the current creditor.

Whilst it is perfectly possible for the right to make a claim to be transferred, assigned or sold as property **in its own right**, it will probably be quite rare. You should satisfy yourself that the original creditor has not already made the same, or a similar, claim.

If you get a claim from a person other than the person who made the overdeclaration of output tax or incurred the undeducted input tax, you must check that that person does, in fact, have the right to make the claim.

If he can produce no evidence to show that the right to claim has been assigned to him, you should simply reject the claim. The burden of proof is on the claimant to show that he has the right to make the claim.

The question of whether the right to claim has been transferred, assigned or sold will be a question of fact.

## **22.2 Transfers of businesses as a going concern**

It is likely that the most common situation in which you will come up against assigned rights to claim will be where a person has transferred his entire business as a going concern. You will need to establish, by reference to deeds of transfer, contracts, etc, exactly what it was that was transferred to the transferee.

Where a business is transferred as a going concern and the transfer is covered by a Form VAT68 so that the VAT registration number of the transferor is transferred to the transferee, you should proceed on the premise that all rights, entitlements and liabilities in relation to VAT have been passed to the transferee.

Where there is no form VAT68 but the Sale & Purchase Agreement (SPA) purports to transfer all of the business assets, liabilities, etc. you should proceed on the assumption that the right to make any claims for overdeclared output tax (under section 80 of the VAT Act 1994) was transferred.

As a general rule of thumb, it is not unreasonable to work on the basis that if the SPA purports to transfer all of the assets, liabilities, rights and property, it is probably fair to conclude that the right to make any output tax claims will have been transferred. If, on the other hand, the SPA contains what appears to be an exhaustive list of what was being transferred and the right to make output tax claims is not on that list (whether explicitly or implicitly), you can reasonably conclude that it has not been transferred.

## 22.3 Section 80 claims – Assignment of the right to claim

The right to claim amounts overdeclared as output tax can be transferred under section 136(1) of the Law of Property Act 1925.

You should note that the sale of shares in a company does not, of itself, lead to the transfer of the right to make a claim. If Abel Ltd sells its share in Baker Ltd to Charlie Ltd, any rights that Baker Ltd has to claim overdeclared output tax will remain with Baker Ltd.

You should also note that the movement of a company into, or out of, a VAT group does not necessarily involve the transfer of any rights to claim to or from the representative member of that group.

For example, Dog Ltd overdeclares its output tax liability and subsequently becomes a member of a VAT group of which Easy Ltd is the representative member. The right to claim the overdeclared output tax remains with Dog Ltd (under its old VAT registration number) unless Dog Ltd makes explicit provision for the right to claim to be assigned to Easy Ltd.

If, after leaving the VAT group Dog Ltd discovers that it overstated its output tax liability while it was treated as a member of Easy Ltd's VAT group, it cannot make a claim to recover that money. That claim vests in Easy Ltd as the company that accounted for the VAT in its capacity as representative member of the VAT group ... unless Easy Ltd makes explicit provision for the assignment of the right to claim to Dog Ltd – see also the guidance above on claims and VAT groups at section 14.

## 22.4 Input tax claims – Assignment of the right to claim

The default position is that the right to claim deduction of input tax vests in the person who made the supplies of goods or services to which the input tax was attributable.

The right to claim deduction of input tax is always assigned from the transferor to the transferee where a business is transferred as a going concern within the meaning of section 49 of the VAT Act 1994 and the transferee takes over the VAT registration number of the transferor.

More generally, because the right to make a claim is property it can be transferred, assigned or sold and, if it can be transferred, assigned or sold, it can be enforced by somebody other than the person who actually incurred the input tax and failed to deduct it. The person who actually incurred the input tax is known in the legislation (section 133 of the Finance Act 2008) as the original creditor and the person to whom the right to make the claim is assigned is referred to as the current creditor.

Whilst it is perfectly possible for the right to make a claim under regulation 29 to be transferred, assigned or sold on its own as property **in its own right**, it will probably be quite rare.

If you get a claim from a person other than the person who incurred the input tax, you must check that that person does, in fact, have the right to make the claim. If he can produce no evidence to show that the right to claim has been assigned to him, you should simply reject the claim. The burden of proof is on the claimant to show that he has the right to make the claim.

The question of whether the right to claim has been transferred, assigned or sold will be a question of fact. You should satisfy yourself that the original creditor has not made the same, or a similar, claim.

## **22.5 Claim assigned on or after 25 June 2008**

Where a person assigns the right to make a claim on or after 25 June 2008, that claim, when it is finally exercised, will be subject to the set-off provisions in section 133 of the Finance Act 2008. See the section 23 on set-off below for more detail.

## **22.6 Claim assigned before 25 June 2008**

Rights to claim assigned before 25 June 2008 are not subject to the provisions of section 133 of the Finance Act 2008. In the case of output tax claims, however, the treatment of the claim will depend on when the right to make the claim was assigned – see paragraphs 22.7 and 22.8.

## **22.7 Section 80 claims – Claim assigned before 26 May 2005 – What is assigned?**

If the right to claim was assigned before section 80 was amended by section 3 of the Finance (No. 2) Act 2005 with effect from 26 May 2005, what the assignor (or original creditor) will have assigned to the assignee (or current creditor) is the right to make a net claim for the amount paid by way of VAT that wasn't VAT due. For example, if the original creditor had made the claim himself before 26 May 2005, he would have made a claim, for example, for the overdeclared output tax, less any overclaimed input tax.

Verification of such claims, as with any claims by assignees, will necessitate the examination of the books and records of the original creditor.

If the original creditor assigns the right to make that claim to another person, it is the right to make the claim that he would have been able to make himself that he has assigned. The current creditor can only make a claim for the net overpayment. Once that has been calculated, by reference to the records of the original creditor, payment of the claim will be subject then to the set-off provided for in section 81 of the VAT Act 1994 and section 130 of the Finance Act 2008 so that all outstanding tax liabilities of the current creditor are set off against the amount due under the claim.

## **22.8 Section 80 claims – Claim assigned between 26 May 2005 and 24 June 2008**

If the original creditor assigned the right to claim on or after 26 May 2005 but before 24 June 2008, he will have assigned the right to make a claim for the gross overdeclaration of output tax.

Section 80 as amended requires that a claim be made for the total amount of overdeclared output tax. Subsection (2) provides that the Commissioners are liable to credit to the claimant with whatever remains after subsection (2A) has been applied to set off against the amount claimed, all the liabilities that are required to be set off against the amount due under the claim.

Subsection (2A) sets against the gross output tax overdeclared all other errors that occurred in the accounting periods covered by the claim.



Thus where the right to make a section 80 claim was assigned between 26 May 2005 and 24 June 2008, what is assigned is the right to receive the amount for which we would be liable under the terms of section 80 in general and under section 80(2A) in particular – the net overdeclaration.

However, the set-offs in section 81(3) and 81(3A) only require the set off the debts (assessed or unassessed) of the person actually making the claim.

Thus, for example, Alpha Ltd overdeclares output tax to the tune of £5,000,000 on supplies that ought to have been treated as exempt from VAT. He has deducted something like £3,000,000 in input tax in relation to those supplies in the accounting periods for which he has claimed. He also has an unpaid VAT assessment of £500,000 and associated liabilities in accounting periods for which he hasn't claimed of a further £500,000. If Alpha Ltd made the claim itself, it would receive only £1,000,000.

However, if the right to make the claim is assigned to Bravo Ltd, that changes slightly. Bravo Ltd now has a right to make a claim for £5,000,000 less the £3,000,000 wrongly deducted input tax – a net of £2,000,000. We cannot take into account the £500,000 assessment and the £500,000 other associated liabilities because, without the application of section 133, the provisions of section 81 can only be applied to the liabilities of the person making the claim. Bravo Ltd has a couple of unpaid VAT assessments for £100,000 each and that's it. Bravo Ltd will get £2,800,000 back on the claim.

## **23. Set-off**

### **23.1 General**

Once the claim has been quantified you must make sure that the claim is not paid before the required set-offs are made – see paragraph 23.3 where the right to claim has been assigned to another person.

There are a number of elements that must be set off under section 80(2) (for section 80 claims only), section 81(3) and (3A) of the VAT Act 1994 and section 130 of the Finance Act 2008 before the claim is finally paid.

The liabilities that you should be looking to set off, and which ought to have been disclosed by the claimant when he made his claim include, but are not limited to:

- any unpaid assessments (whether for VAT, interest, surcharge or penalty) for any accounting periods;
- any unpaid VAT returns for any accounting periods;
- any underdeclarations of output tax arising in the accounting periods claimed for;
- any overstatements of input tax entitlement made in the accounting periods claimed for;
- any overclaim of input tax, for accounting periods not claimed for, that arose out of the same mistake that led to the claim;
- Any underdeclaration of output tax, for accounting periods not claims for, that arose out of the same mistake that gave rise to the claim
- Any outstanding debts in relation to any of the other direct and indirect taxes.

The overstatements of input tax entitlement will clearly include any input tax that was wrongly deducted on the mistaken assumption that the supplies to which it was

attributable were taxable and, in almost all cases, that will mean recalculating the deductible percentage of residual input tax. This will be particularly important where the claimant was originally thought to have been fully taxable.

You should also check that no further liabilities have arisen since the claim was made. You will find further details on the policy on set-off and the mechanics of accounting for it in the Debt Management and Banking Manual at:

<http://home.inrev.gov.uk/dmbmanual/DMBM700000.htm>.

Please note that the application of the set-off provisions can only ever reduce the claim to zero. The fact that the liabilities may exceed the entitlement under the claim does not create a liability.

### **23.2 Set off and VAT groups**

Where a claim is made by a company that used to be a member of a VAT group that has since been disbanded, that company will continue to be liable, by way of set-off, for any outstanding debts of the VAT group, e.g., write-offs, unpaid assessments, etc.. Contact Debt Management & Banking or check the [DMB Manual](#).

Whilst it is true that, once a group is disbanded, the legal fictions created by section 43 of the VAT Act 1994 cease to have applied, the joint and several liability set out in section 43(1) is not part of the legal fiction and continues to apply after the dissolution of the group.

### **23.3 Claims by assignees and transferees**

Where a claim is made by a person (the current creditor) other than the person who actually overdeclared his VAT liability (the original creditor), you will first have to establish the origin of the claim from the claimant who made the overdeclaration that is being claimed.

If the claimant refuses to disclose the origin of the claim, it should be rejected outright. No claim will be paid until it has been verified and if you are unable to identify the person who made the VAT overdeclaration that is being claimed, you cannot verify it.

Once you have established the identity of the original creditor, you will need to go through his accounts to verify the extent of the overdeclaration. Any of the original creditor's accounts that were used to quantify the claim can be disclosed to the current creditor under the provisions of section 18(2)(a)(i) of the Commissioners of Revenue & Customs Act 2005.

As with any claim, it is for the claimant to show that the mistake that led to the claim was, in fact, made and that the amount claimed is accurate.

Under section 133 of the Finance Act 2008, the provisions of section 81(3) and (3A) of the VAT Act 1994 and section 130 of the 2008 Finance Act can be applied to the payment to be made to the current creditor as if it were being made to the original creditor.

If all of the outstanding liabilities of both the original and the current creditor exceed the amount due on the claim, you should simply pay nothing on the claim and set the sum considered due against the outstanding liabilities.

Please note that you cannot hold the current creditor otherwise liable for the outstanding liabilities of the original creditor except as provided for by section 130 Finance Act 2008 in relation to settlement of the assigned claim.

## **24. Payment of claims**

No money should be paid until you are satisfied that the claim has been properly quantified and the required set-offs have been made.

Under no circumstances should any amounts be paid to claimants 'on account' unless you are satisfied that entitlement has been firmly established in relation to the amount to be repaid. Outstanding debts and liabilities and associated unassessed liabilities must be set off against the amount due under the claim before any payment or credit is made.

## **25. Appeals**

### **25.1 Claims refused and already subject to appeal**

It is very likely that many of the existing claims that you will have to deal with will be claims that have been rejected where the claimant has appealed to the Tribunal. Many, if not all, of them will have been stood over pending the House of Lords' judgment in *Fleming*.

You should liaise with the Solicitor's Office staff to ensure that the original decision capping the claim is withdrawn. The Appellant should be told that the claim is being referred to the Fleming Claims Team for verification. The Appellant should be invited to withdraw the appeal.

You should also make it clear that the fact that we have withdrawn our original decision in principle does not, of itself, mean that they will be paid anything under the claim. It is entirely possible that, on verification, it turns out that there was no overdeclaration of output tax or underclaim of input tax.

However, if it does happen that we end up taking the view that nothing is payable under the claim, that will be a new decision and will be appealable under section 83(c) or (t) of the VAT Act 1994 as appropriate.

### **25.2 Appeals against rejection of claims**

The rejection of claims made under section 80 of the VAT Act 1994 and regulation 29 of the VAT Regulations 1995 is subject to a right of appeal under section 83(t) and 83(c) respectively.

All appeals should be dealt with in accordance with the guidance in Appeals, Reviews & Tribunals Guidance at <http://home.inrev.gov.uk/artgmanual/index.htm>.

## **26. Time limits – Expiry of transitional period**

### **26.1 All claims made on or after 1 April 2009 will be capped at four years**

The legislation states that claims must be made before 1 April 2009. This means that claims "made" after midnight on 31 March 2009 are out-of-time and should be rejected.

In this context “made” is to be interpreted in a way that is consistent with our published guidance on the submission of error correction in the VAT Assessment and Error Correction Manual 7410, which states:

“You should normally accept the date on a letter or form VAT652 notifying an error, or the date of an entry adjusting an error in the VAT account, unless you have reason to believe that the error correction procedures are being manipulated.”

## 26.2 Date stamping of claims

In order to ensure that no in-time claims would erroneously be recorded as having been received late and to provide supporting evidence to help decision making on cases of possible abuse, all post rooms received guidance on the date-stamping of claims received by hand or through the public post to ensure the correct recording of the date a claim was received.

Claims in post boxes when first opened each morning were date-stamped with the date of the day that box was last opened as the earliest possible time of receipt (i.e. post already in post boxes on Wednesday 1 April before the post was delivered should have been date stamped 31 March, post already in post boxes before the post was delivered on Monday 6 April should have been post marked as received 3 April).

## 26.3 What does this mean in practical terms?

In practical terms this means you can immediately accept as being made in time:

- claims made by fax or email where the date and time of the communication indicates that it was received before midnight on the 31 Mar;
- claims made by hand which are date stamped as being received on 31 Mar or earlier;
- postal claims dated 31 Mar or earlier which are date stamped as being received on or before 6 April (to allow for delivery by public post)

## 26.4 What should I do if a claim appears to be out of time?

You should first contact the Fleming Team who will check their database to ensure that an identical in-time claim has not been recorded. This is because some claims were submitted by more than one channel (public post, fax, email) and an identical claim may have been recorded with an earlier date of receipt than indicated on the paperwork you are reviewing.

After confirming the absence of an identical claim with an earlier date you may reject as being out of time:-

- any claim dated and received on or after 1 April.
- any **emailed, faxed or hand delivered** claims with a date of receipt on or after 1 April.

If you are dealing with a **postal claim** dated before the 1 April 2009 but date stamped as being received later than 6 April then you should exercise your judgment as to whether it is likely that the letter was posted before 1 April and/or whether it is possible that the claim may have been backdated in an attempt to subvert the statutory deadline.

In making this judgment you should consider all the available evidence and in cases of doubt should consider asking the trader for alternative evidence (e.g. from their post-room or from any postal receipt obtained from The Royal Mail etc) that would support their case. Where you are satisfied that the claim is out-of-time it should be rejected.

Where you have evidence to suggest that claims have been backdated to subvert the statutory deadline you should contact the Fleming Claims Team for further advice.

## **26.5 Can we accept out-of-time claims?**

Under section 121 of the Finance Act we have no vires to accept any claim made on or after 1 April 2009. As a result, there is no scope for giving extensions of time for making claims.

Nor does the law permit us to pay claims that are made outside the time limits contained in section 80(4) of the VAT Act 1994 or regulation 29(1A) of the VAT Regulations 1995.

## **27. Time limits – Scottish Equitable**

### **27.1 Order of the Inner House of the Court of Session**

On 2 July 2009, the Inner House gave its order in the litigation between HMRC and Scottish Equitable Plc. In that order, the court refused our application for a reference to the ECJ under Art. 234 EC but upheld our appeal against the decision of the VAT & Duties Tribunal of January 2006.

The court held that:

“...it was wrong for the Tribunal to hold that the absence of appropriate transitional provisions attached to the amendment to s 80 of VATA 1994 by s 47 of the FA 1997 required the Tribunal completely to disregard the provisions of the latter legislation and treat the previous, unamended provisions of VATA as continuing in force. ... It was well recognised that national legislation which was not in compatibility with EC law was not void or generally unenforceable. The supremacy of Community law simply meant that a right enjoyed under Community law prevailed, for its holder, over competing provisions of national law. The position was succinctly set out by Lord Walker of Gestingthorpe in the opening paragraph of his opinion (paragraph [24] of the reports) in *Fleming v HMRC* (2008) UKHL 2; (2008) 1 WLR 195.

Secondly, the Tribunal had failed to recognise, in the context of the need for appropriate transitional provisions, the distinction between accrued rights and subsequently arising rights. The need to disapply arose only respecting accrued rights at the time of the legislative amendment. It could not be argued that the disapplication extended to rights to re-payment accruing in the future.”

### **27.2 Current case law on the point**

This means that the case law in Scotland and in England and Wales now agrees that the judgment of the ECJ in *Marks & Spencer Plc –v- CCE* [2002] EUECJ C-62/00; [2002] STC 1036 does not have the effect of setting aside the time limit to the extent that it is applied to claims that arose after its enactment. Put another way, claims that accrued after the date on which the three-year cap was enacted are properly capped.

The two judgments are *CRC –v- Scottish Equitable* (unreported) and *Local Authorities Mutual Investment Trust –v- CCE* [2003] EWHC 2766 (Ch); [2004] STC 246 – the former relating to an output tax claim and the latter to an input tax claim.

It is also worth noting Lord Neuberger's conclusion on the effect of the absence of a transitional period at paragraph 104 of his judgment in *Fleming*, where he says:

“[104] In my opinion, the period of disapplication (or, to be strictly accurate, the beginning of the end of the period of disapplication) has not yet arisen. Subject to one point, I would have thought that it would be a matter for Parliament to legislate prospectively for a specific transitional period, or for the Commissioners to communicate in clear terms, a final period during which claims for input tax arising before 1 May 1997 could be made. The possibility of legislation speaks for itself. The possibility of the Commissioners giving what amounts to an extra-statutory concession was said on behalf of the respondents to be insufficient. I do not agree. Provided that the Commissioners allow a sufficiently long period, which is effectively communicated in sufficiently clear terms to those registered for VAT, that would suffice.”

### **27.3 Status of the three-year cap (now four-year cap)**

Claims for the Fleming periods (accounting periods ending between 1 April 1973 and 4 December 1996 for output tax claims and between 1 April 1973 and 1 May 1997 for input tax claims) made on or after 1 April 2009 (see section 26 above) should be refused as being out-of-time.

Similarly, claims for Scottish Equitable periods (accounting periods ending between 5 December 1996 and 31 March 2006 for output tax claims and between 1 May 1997 and 31 March 2006 for input tax claims) should also be refused as being out-of-time.

All claims made on or after 1 April 2009 are now capped at four years or to accounting periods ending on or after 1 April 2006 whichever is the shorter.

## **28. Output tax claims**

Claims for overdeclared output tax are capped at four years under section 80(4) of the VAT Act 1994 as amended by Article 2 of the Finance Act 2008, Schedule 39 (Appointed Day, Savings and Transitional Provisions) Order 2009, SI 2009/403 and subject to transitional provisions of Article 6 of the Order – i.e. any accounting period ending on or before 31 March 2006 is out-of-time.

Thus, on 31 March 2009, the earliest accounting period for which a claim could be made under section 80(1) was that ending on 31 March 2006.

On 30 April 2009, the earliest accounting period for which a claim could be made under section 80(1) was that ending on 30 April 2006.

Similarly, on 31 October 2009, the earliest accounting period that can be claimed for will also be that ending on 30 April 2006.

However, by 30 April 2010, the four-year time limit will have come fully into effect so that a claim made on that date can go back to the quarter ending 30 April 2006.

## **29. Input tax claims**

Late claims for undeducted input tax are capped at four years under regulation 29(1A) of the VAT Regulations 1995 as amended by regulation 3(c) of the VAT

(Amendment) Regulations 2009, SI 2009/586 and subject to regulation 29(1B) (inserted by regulation 3(d) of those regulations) – any accounting period for which the return due date fell on or before 31 March 2006 is out-of-time.

Thus, on 31 March 2009, the earliest accounting period for which a claim could be made under regulation 29 of the VAT Regulations 1995 was that ending on 28 February 2006 (for which the due date of the return was 31 March 2006).

On 30 April 2009, the earliest accounting period for which a claim could be made under regulation 29 was that ending on 31 March 2006 (the due date of the return for that period being 30 April 2006).

Similarly, on 31 October 2009, the earliest accounting period that can be claimed for will also be that ending on 31 March 2006.

However, by 30 April 2010, the four-year time limit will have come fully into effect so that a claim made on that date can go back to the quarter ending 31 March 2006.

## 29.1 Appeals & applications for stand over

There are currently no 'lead' cases behind which to stand appeals against refusals of claims for Scottish Equitable periods.

There have been those who have suggested that the ECJ case (judgment delivered on 21 January 2010) in *Alstom Power Hydro –v- Valsts Ienemumu Dienests (State Tax Authority)* (Case C-472/08) is an appropriate case behind which to stand Scottish Equitable type appeals. It is not. Not least of all because the judgment has now been delivered and has upheld the imposition of time limits to claims for deduction of input tax on repayment returns.

It has been suggested that direct tax litigation being conducted in *Trustees of the BT Pension Scheme –v- CRC (Foreign Income Dividends Group Litigation Order)* is an appropriate lead case for these appeals. Once again, the suggestion appears to be flawed. There is, it seems, little or no argument in this case over the imposition of time limits.

There has also been some suggestion that these appeals might be stood over behind the litigation in which the judgment of the First-Tier Tribunal in *Marks & Spencer Plc –v- CRC (sub nomine Marks & Spencer Plc –v- Halsey (Inspector of Taxes)* [2009] UKFTT 64 (TC); [2009] SFTD 1 is the latest judgment. However, such suggestions are misguided. At paragraph 49 and 50 of their judgment, Judges Avery Jones and Gammie QC said:

“[48] The European jurisprudence has recently been analysed in detail by the House of Lords in *Fleming v HMRC* and *Condé Nast v HMRC* [2008] STC 324, [2008] 1 WLR 195 from which Lord Neuberger of Abbotsbury derived the following propositions (at [79]):

- (a) it is open to the legislature of a Member State to impose a time limit within which a claim for input tax must be brought: *Marks & Spencer II* para 35 ...
- (b) it is further open to the legislature to introduce a new time limit, or to shorten an existing time limit, within which such a claim must be brought, even where the right to claim has already arisen (an “accrued right”) when the new time limit (a “retrospective time limit”) is introduced: *Marks and Spencer II* paras 37 and 38 ...
- (c) any such time limits must, however, be “fixed in advance” if they are to “serve their purpose of legal certainty”: *Marks and Spencer II*, para 39 ...

- (d) where a retrospective time limit is introduced, the legislation must include transitional provisions to accord those with accrued rights a reasonable time within which to make their claims before the new retrospective time limit applies: *Marks and Spencer II*, para 38 and *Grundig II* [*Grundig Italiana SpA v Ministero delle Finanze* (Case C-255/00) [2003] All ER (EC) 176, [2002] ECR I-8003], para 38;
- (e) In so far as the legislature introduces a retrospective time limit without a reasonable transitional provision (as in *Grundig II*) or without any transitional provision (as in *Marks and Spencer II*), the national courts cannot enforce the retrospective time limit in relation to accrued right, at least for a reasonable period; otherwise, there would be a breach of Community law: *Re Claimants under Loss Relief Group Litigation Order* [2005] UKHL 54 at [16]–[17], [2005] STC 1357 at [16]–[17];
- (f) the adequacy of the period accorded by the transitional provision (“the transitional period”) is to be determined by reference, inter alia, to the principles of effectiveness and legitimate expectation: *Marks and Spencer II*, paras 34 and 46, and *Grundig II*, para 40; in particular, it must not be so short as to render it “practically impossible or excessively difficult” for a person with an accrued right to make a claim: *Marks and Spencer II*, para 34, and *Grundig II*, para 33;
- (g) it is primarily a matter for the national courts to decide whether the length of any transitional period is adequate, although the ECJ will give a view if the transitional period is “clearly” so short as to be inconsistent with Community law: *Grundig II*, paras 39 and 40;
- (h) the absence of a transitional period of adequate length is not, however, automatically fatal to the enforcement of the retrospective time limit: *Grundig II*, para 41;
- (i) where there is no adequate transitional period, it is for the national court to fashion the remedy necessary to avoid an infringement of Community law: *Marks and Spencer II*, para 34, *Grundig II*, paras 33, 36, 40, and 41, *Autologic*, paras 16 and 17, and the ECJ’s decision in *Metallgesellschaft Ltd v IRC and A-G; Hoechst AG v IRC and A-G* (Joined cases C-398/98 and C-410/98) [2001] STC 452, [2001] Ch 620, para 85 ...
- (j) that remedy would, at least normally, be to disapply (perhaps only for a period) the operation of, the retrospective application of the new time limit to claims based on accrued rights: *Marks and Spencer II*, paras 34 to 41, and *Grundig II*, paras 38 to 40 and especially (with regard to temporary disapplication) para 41.’

**[49]** Our case is not on all fours with either of these two main lines of cases. First, the appellant has made a claim in order to assert what it considered to be a Community right, but which domestic legislation said was not, within the reasonable time limit laid down by domestic law. The ECJ held that it had a right but a narrower one than it had claimed, so that the original claim was defective and the same claim made later would have succeeded but for the (reasonable) domestic law time limit, which the legislation gave power to HMRC to extend at its discretion. Would the ECJ say that the principle of effectiveness was breached because that exercise of the right was rendered impossible or excessively difficult if the person was not permitted to re-exercise the right after the ECJ’s judgment? We consider that it would. The situation differs from the first line of cases in that the person did assert his right within the reasonable time limit. The case for applying the principle of legal certainty is much weaker because the state knows that the person has exercised the right, and has done so in order to ascertain whether the right exists, so that re-exercising the right will not come as any surprise. This is even more so when the legislation envisages that there will be circumstances in which the time limit may be extended. And, like the second line of cases, this is solely a transitional problem for the appellant who raised the issue of whether it had a right. Anyone else will come within the first line of cases and lose the right by failing to assert it even though not knowing about the existence of the right. Chadwick LJ has given us a strong hint, although obiter, that European law would permit the appellant to re-exercise the right. We do not agree with Mr Ewart that Chadwick LJ had misunderstood the second line of cases when he had decided *Condé Nast* only four months before the hearing in this case. It must have been apparent to him that this case was not the same as the second line of cases but



he must have seen similarities in that they were both transitional problems caused by domestic legislation expressly providing that the Community right could not be exercised at the appropriate time. The fact that this case is not on all fours with *Condé Nast* does not mean that what he said was necessarily wrong. Accordingly, we consider that the principle of effectiveness requires that the appellant should be able to make a new claim for group relief in place of the one that we have decided was invalid within a reasonable time after the ECJ judgment, particularly so where the legislation specifically envisaged that there are cases in which the time limit might be extended.”

The judgments in neither of these cases will answer the question that is posed by the appeals in these cases; i.e. whether the absence of a transitional period when the three-year time limit was introduced in 1996/97 has the effect that the Commissioners cannot rely on it at all in relation to any claim until it has been enacted again from scratch with a transitional period – see paragraph 27.2 for the current case law on this point.

If you are dealing with an appeal against the refusal of a claim for Scottish Equitable periods, your instructions to the Solicitor's Office should be:

To resist any application for stand over behind a lead case (on the grounds that there isn't one);

- To consider applying to the Tribunal for a direction under rule 8(3)(c) of the Tribunal Procedures (First-Tier Tribunal) (Tax Chamber) Rules 2009; and
- In the event that that application is unsuccessful, to have the appeal proceed to hearing.

## 30. Statutory interest

### 30.1 No entitlement

Where the claim relates **solely to taxpayers errors** discovered after the House of Lords judgment in *Fleming* was released (23 January 2008), there will be **no entitlement to SI** irrespective of whether it relates to claims for periods pre or post 18 July 1996 (output tax) and 01 May 1997 (input tax). Although such a claim may be valid there has been no financial disadvantage to the taxpayer caused by the capping error.

However should there be an unreasonable delay in repaying the claim (e.g. after processing the Fleming claim payment is delayed, or the Fleming claim involves periods pre July 1996 or May 1997 and they are incorrectly capped) the taxpayer will be entitled to claim SI under VATA section 78(1)(d) for the delay suffered.

HMRC gave a commitment to make a decision on all Fleming claims by 31<sup>st</sup> March 2011 therefore Statutory Interest should not automatically be paid for the period from when the claim was received until its authorisation. If a request is received for Statutory Interest in respect of these periods the Tax Administration Advice Team in Liverpool must be contacted for advice.

### 30.2 Entitlement

Was there or would there have been an entitlement to Statutory Interest (SI) on the original claim? Was SI paid on the amount of the claim that was repaid?

If **yes** then that entitlement will still apply to the remainder of the original claim that wasn't paid due to the three-year cap, any part of a claim that wasn't submitted or a full claim that was never actually submitted due to the capping legislation.

If **not** then there may now be an entitlement to SI due to the M&S ECJ capping judgment against the Department, which confirmed that the enactment of the three-year cap with retrospective effect constituted an official error. Theoretically the earliest effective date of the error would be 18 July 1996 (for output tax) and 01 May 1997 (for input tax); the unlawful enactment of the three-year cap without a transitional period. **However, when the errors were discovered will have a bearing on the start date of any entitlement to SI.**

### **30.3 Start and end dates for payment of SI**

**Remember – Although the error occurred on 18 July 1996 or 01 May 1997 (depending on whether it's output tax or input tax) it does not necessarily mean that this will be used as the start date for calculating statutory interest. All cases must be treated individually and businesses can only be compensated for the time that they were financially disadvantaged due to HMRC's error.**

The applicable period for payment of SI is determined by subsections (4), (5), (6) or (7) of section 78. This depends on the legislation under which the entitlement arose, i.e. 78(1)(a), (b), (c) or (d). (See paragraph **A** for s78(1)(a) and (b))

**A. Where the entitlement to SI existed on the original wrongly capped claim i.e. pre claim official error**, the applicable period is easily determined. SI will be payable from the official error commencement date as already ascertained by the original claim, and extended up to the date payment of the remainder is authorised (these claims will have already taken account of the relevant legislation i.e. section 78(1)(a) or (b) VATA).

**B. Where there was no official error other than that of the 18 July 1996 (output tax) or 1 May 1997 (input tax), entitlement to SI arises solely from the delay in receiving the previously capped sum caused by the capping error.** SI in this instance will fall within section 78(1)(d) VATA – suffered delay in receiving payment of an amount due to him in connection with VAT.

**C. Where there is combination of capping errors as in B above and a liability error by HMRC which post dates the enactment of the three-year cap entitlement to SI will arise for two different reasons.** This may result in section 78(1)(d) applying to the capping errors and section 78(1)(a) (overdeclared out put tax) or (1)(b) (failure to claim a VAT credit) applying to the subsequent liability errors.

### **30.4 Claims falling within paragraph C.**

Care will be required in determining the start dates for the SI calculation. For the capping errors the guidance already outlined at **B** will apply. For the liability errors by HMRC in order for section 78(1)(a) to apply the claimant will need to confirm when he accounted for the output tax which was not output tax due; or in order for section 78(1)(b) to apply confirm when he failed to claim a VAT credit under section 25 VATA.

e.g. For a claim made in July 2008 involving both capping errors and a liability ruling against HMRC made in June 2008 SI will be payable as follows:

- the portion of the claim subject to the cap error only, as SI is due under section 78(1)(d), the guidance on the practical application of section 78(1)(d) outlined below should be followed,
- the portion of the claim which involves a liability ruling against HMRC made in June 2008; SI will be due under section 78(1)(a) output tax or section 78(1)(b) (input tax) and payable from the commencement date of the official error on a period by period basis. This could possibly be as far back as 1973 or be limited to shorter period (say periods 01/08 to 04/08) if liability law was found to be incorrect for a just a short period

### 30.5 Practical application of section 78(1)(d)

The applicable period for section 78(1)(d) cases is determined by subsection (7). It starts with the date on which, if not for the error we would reasonably have expected to authorise payment of the amount concerned and ends with the date the payment is authorised.

For those claims falling within paragraph B (tax payer errors subject to the three-year cap) in practice this will mean:

Where the original claims were made and with hindsight wrongly capped, the error will have occurred when we failed to authorise the full payment. Therefore any SI now payable on the balance of the claim will run from the original "authorisation" date until the new date of **authorisation**.

Where only part of a claim was submitted due to the capping legislation, SI will be payable from the original authorisation date. It will end with the date payment of the balance of the claim is **authorised**.

Where no claim was submitted **because of the capping legislation**, following the House of Lords judgment in Fleming in January 2008, it is no longer necessary to evidence when a claim for the principal sum of tax would have been submitted. **However for SI purposes the situation is different.** It is necessary to determine the period the claimant was financially disadvantaged by the cap error, so in order to do this we need to know when the claimant discovered his errors (late claim to input tax or overdeclared output tax). This is because it is not logical (nor supported by section 78) to pay SI for a period starting before the claimant discovered his errors. (This is what would happen if the SI was automatically calculated from 18 July 1996 or 1 May 1997.)

SI will therefore be payable from a **deemed reasonable authorisation date**. This is because the law provides for the interest to commence from the date the claim would have reasonably have been expected to be authorised for payment if not for the error and in this scenario there isn't a date as a claim was never submitted, so it is necessary to judge when payment could have been made. It will end with the date payment of the amount is actually **authorised**. See examples 1 and 2 below.

**Example 1** A taxpayer was aware in 1998 that he had not claimed input tax credit on his returns in periods 02/95 and 05/95 but did not submit a claim because they were subject to the cap; he submits a claim prior to 31 March 2009, interest would be due from a deemed authorisation date in 1998. The date would be based on when we would have reasonably been expected to repay the claim if not for the cap. The taxpayer will need to confirm that he discovered his errors in 1998 and but couldn't claim because of the cap.

**Example 2** A taxpayer became aware in 2003 he had overdeclared output tax in periods 03/96 to 12/96 but did not submit a claim because it was “capped”; he submits the claim in 2009, interest would be due this time from a deemed authorisation date in 2003. As with example 1 the claimant would again need to confirm he discovered his errors in 2003.

## 30.6 Recovery assessments

Where repayments of previously recovered amounts are to be made because the recovery assessment is subsequently considered to have been wrong in law, the applicable period for payment of SI will depend on whether or not SI was paid on the original repayment before it was recovered and if it was recovered with the tax.

- If SI was paid on the original repayment and subsequently recovered at the time the tax was recovered the start date for SI will be the same as it was when it was originally paid, but will end with the date repayment of the recovered amount is **authorised**.
- If SI was not recovered with the tax, the start date for SI will be the date the recovery assessment was paid, and will end with the date repayment of the recovered amount is **authorised**.
- If SI was never paid the start date for SI will also be the date the recovery assessment was paid, and will end with the date payment is **authorised**.

## 30.7 Further Information

An audit trail should be kept of all claims, on which SI is paid, including the ‘decision making process’ and the amount paid. The records should also be clearly noted with the OA reference number of the overdeclaration on which SI was paid.

All decisions regarding SI must contain an offer of a review and include appeal rights, in accordance with the latest guidance (which includes compound interest) on Central Policy’s intranet site (news archive 31st October 2009)

Detailed guidance on Statutory Interest can be found via the VAT Refunds Manual [VR9510](#) (although you should be aware that this guidance is due to be updated). The Tax Administration Advice Team based in Queens Dock, Liverpool, has policy responsibility and you should contact them if you need further guidance on the statutory interest element of claims (including the calculations).

# 31. Compound interest

## 31.1 Claims for compound interest

Requests for payment of interest on a **compound** rather than simple basis should be dealt with separately from Statutory Interest and met with the following response:

“HMRC takes the view that restitutionary claims for interest/compensation are excluded by section 78 and [section 80 of the VAT Act 1994] and/or [Regulation 29 of the VAT Regulations 1995.] Therefore [your client –name of business if a tax adviser wrote in], or [name of the businesses] has no right to a payment of compound interest. It has received simple interest under section 78 at a rate calculated by a formula set down in statute viz the Air Passenger Duty and Other Indirect Taxes (interest rate) Regulations 1998 and no further interest is due. In the High Court judgment in Littlewoods, Mr Justice Vos upheld the view that the statutory scheme within the VAT Act 1994 that dealt with refunds of VAT and interest was

comprehensive and exhaustive and provided for simple interest and nothing further was due. In a previous Upper Tribunal decision, the Tribunal took the view that even if there was a community law right to compound interest, it could not be read into section 78 of the VAT Act 1994, and therefore only simple interest was payable. In all the circumstances, HMRC will oppose any requests for compound interest or appeals' claiming that compound interest is due."

Alternatively, where a business is claiming compound interest in relation to a current dispute which has, or might, result in Tribunal and/or court proceedings, the wording used should be as follows:-

"HMRC take the view that restitutionary claims for interest/compensation are excluded by section 78 and [section 80 of the VAT Act 1994] and/or [Regulation 29 of the VAT Regulations 1995.] These provide a statutory scheme covering refunds of over declared VAT and under claimed input tax credit with payment of simple interest. In the High Court judgment in Littlewoods, Mr Justice Vos upheld the view that the statutory scheme within the VAT Act 1994 that dealt with refunds of VAT and interest was comprehensive and exhaustive and provided for simple interest and nothing further was due. In a previous Upper Tribunal decision, the Tribunal took the view that even if there was a community law right to interest, it could not be read into section 78 of the VAT Act 1994, and therefore only simple interest was payable. This means that [your client -name of the business-if a tax adviser wrote in], or [name of the business] has no right to a payment of compound interest. In the circumstances, HMRC is resisting, and will resist claims for compound interest during Tribunal and court proceedings."

#### **THE WORDING MUST NOT BE ALTERED**

Top and tail the letter as suitable. However, **on no account should businesses be invited to appeal to the Tax Tribunal within 30 days if they are not happy with our response.** This is because there is ongoing litigation as to what is an appealable decision.

If any appeals are received they will be dealt with by the Appeals and Review Teams who have guidance on how to handle them and will liaise with our Solicitor's office. However you should not state that it is not an appealable matter since the decision whether to appeal or not is solely a matter for the taxpayer.

If you have any queries about any of the above and/or receive further correspondence after sending out this letter please contact TAA.

### **31.2 Late appeals**

Many (but not all) of the requests for compound interest relate to claims for refunds that were paid many years ago, together with statutory simple interest. Although these claims may be out of time we no longer apply for strike out of such late appeal applications. We agree to stand these appeals behind the Compound Interest Project (CIP) litigation if the taxpayer requests it. However at the same time we will let the Tribunal know that we consider the appeal to be out-of-time.

## **32. Fleming claims and statutory interest – Liability to Corporation Tax and Income Tax**

It has been suggested by some that, as a matter of legal principle, receipts of refunds of VAT credited to the profit and loss account are outside the scope of Corporation Tax. We do not share this view, not least of all because there is no legal authority to

support this proposition. It is also important to remember that what is being repaid to the claimant is not, and never was, VAT.

It was wrongly accounted for 'by way of VAT'.

The financial accounts prepared at the time are commonly prepared on a VAT exclusive basis and therefore the original turnover and Case 1 profits were reduced by the excessive amount incorrectly accounted for as VAT.

The repayment to a trader of amounts wrongly declared as VAT is simply returns to that trader of amounts which, but for the mistake, would have formed part of his trading receipts.

The repayments represent sums that arose from the sale of goods or services in the ordinary course of a trader's trading activities. The fact that amounts were paid to (the former) Customs and Excise in the belief that they were output tax properly due on those supplies does not alter their trading character for Case 1 purposes.

Statutory Interest received in relation to these repayments is interest for tax purposes. While the interest does not arise from any loan relationship as defined by section 81 of the Finance Act 1996 because it does not arise from the lending of money, section 100 of that Act operates to bring interest on money debts within the scope of the loan relationship rules.

The period to which a payment relates is the period in which it would properly be recognised under Generally Accepted Accountancy Practice.

The treatment of these claims for Income Tax purposes is essentially the same as it is for Corporation Tax purposes.

## **33. Recovery assessments**

### **33.1 General**

If you discover that a claim has been wrongly paid, and you are still within the relevant time limits, you should always make an assessment to recover the repayment.

Claims wrongly paid under section 80 of the VAT Act 1994 can be recovered under section 80(4A) of the VAT Act 1994.

Claims wrongly paid under regulation 29 of the VAT Regulations 1995 can be recovered under section 73(2) of the VAT Act 1994.

Wrongly paid statutory interest can be recovered under section 78A of the VAT Act 1994.

### **33.2 Section 80(4A) assessments**

Section 120 of the Finance Act 2008 has made amendments to the time limits in relation to recovery assessments made under section 80(4A) of the VAT Act 1994.

The effect of the amendment is that where you discover that a claim under section 80 has been paid and ought not to have been, you can make an assessment to recover it within two years after the later of:

Two years after the end of the accounting period in which the mistaken payment was made; or  
Two years after the date on which the evidence of fact sufficient to justify the making of the assessment came to your knowledge.

This means that you can make an assessment within the first two years after the end of the accounting period in which the claim was paid regardless of whether the facts on which the payment was based have changed.

Where a claim is paid and it turns out that the facts upon which the claim was paid were wrong, you have two years from the date on which those new facts came to the 'Commissioners' knowledge' to make an assessment to recover it. If you are making an assessment under this time limit, it does not matter how long ago the payment was made.

These changes took effect in relation to any assessment made on or after the 19<sup>th</sup> of March 2008.

Provided that you are still within the time limit, if it turns out that your original assessment was too low, you can make a supplementary assessment under sections 80(4C), 78A(6) and 77(6) of the VAT Act 1994.

For more detail and the procedures for making these assessments see the guidance in the VAT Assessments & Error Correction Manual at [VAEC4010](#) to [VAEC5010](#).

### **33.3 Section 73(2) assessments**

Section 120 of the Finance Act 2008 has amended the assessment time limits as they relate to assessments made under section 73(2) of the VAT Act 1994 by the insertion of a new subsection (6AA) into section 73.

The effect of the amendment is that where you discover that a late claim for input tax has been paid where it ought not to have been, you can assess to recover it within:

Two years after the end of the prescribed accounting period in which the claim was wrongly paid; or  
One year after the evidence of facts sufficient to justify the making of the assessment came to our knowledge and four years from the end of the prescribed accounting period in which the mistaken payment was made.

As with assessments under section 80(4A), you can make a recovery assessment within two years after the end of the accounting period in which the money was wrongly paid, repaid or credited, regardless of whether the facts have changed since the payment was made.

Where a the amount has been paid, repaid or credited and it later turns out that the facts on which the payment were based were wrong – and that on the new facts, it would not have been paid, etc. – any recovery assessment must be made within one years after that new evidence came to the 'Commissioners' knowledge. Such assessments can only be made to recover amounts paid, repaid or credited in accounting periods that ended less than three years previously.

These changes took effect in relation to any assessment made on or after the 19<sup>th</sup> of March 2008.

Provided that you are still within the time limit, if it turns out that your original assessment was too low, you can make a supplementary assessment under section 77(6) of the VAT Act 1994.

For more detail and the procedures for making these assessments see the guidance in the VAT Assessments & Error Correction Manual at [VAEC4010 to VAEC5010](#).

### **33.4 Assessments under section 73(2) of the VAT Act 1994 – Accounting period to assess**

There are still three different views on which prescribed accounting period must be assessed when making an assessment under section 73(2) to recover an amount wrongly paid on a claim.

In its judgment in *CCE –v- Croydon Hotel & Leisure Co Ltd* [1996] STC 1105, the Court of Appeal held that assessments under section 73(2) must be made for the accounting period in which the claim for input tax was made. This was supported by the judgment of the Court of Appeal in *University of Sussex –v- CCE* [2001] EWHC 485 (Ch); [2001] STC 1495 in which Neuberger J, as he then was, concluded that a late claim for input tax belonged in the accounting period in which it was made.

However, in its judgment in *CCE –v- DFS Furniture Company Ltd* [2004] EWCA Civ 243; [2004] STC 559, the Court of Appeal took the view that such assessments should be made for the accounting period in which the claim for input tax was paid.

In view of this uncertainty, where you are issuing assessments under section 73(2) and the accounting period in which the claim was made and that in which the claim was paid are different, you should issue three assessments for the same amount.

The preferred assessment should be made for the prescribed accounting period to which the claimant attributed the input tax when he made his claim.

The assessment for the accounting period in which the claim was made should be treated as an alternative assessment and should not be enforced.

A third assessment – and second alternative assessment – should also be made for the accounting period in which the claim was paid if this is different from the accounting period in which the claim was made. This assessment should not be enforced either.

There is no reason to be concerned if you have treated the assessment for the accounting period in which the claim was made or the one in which was paid as the preferred assessment so long as all of the assessments that need to be made have been made.

You can use the standard letters on SEES for this purpose.

For more detail and the procedures for making these assessments see the guidance in the VAT Assessments & Error Correction Manual at [VAEC4010 to VAEC5010](#).

### **33.5 Assessments under section 78A of the VAT Act 1994**

Section 78A(1) empowers us to make an assessment to recover any amount wrongly paid by way of statutory interest under section 78 of the VAT Act 1994.



Any such assessment must be made within two years from the date on which evidence of facts sufficient to justify the making of the assessment comes to our knowledge.

Provided that you are still within the time limit, if it turns out that your original assessment was too low, you can make a supplementary assessment under sections 78A(6) and 77(6) of the VAT Act 1994.

For more detail and the procedures for making these assessments see the guidance in the VAT Assessments & Error Correction Manual at [VAEC4010 to VAEC5010](#).

## **34. Form of claims**

### **34.1 What do we want with the claims?**

Claims must be made in writing and must include:

- a statement of the amount being claimed;
- the method of calculation in as much detail as possible;
- the reason for the claim;
- the prescribed accounting periods in respect of which claims are being made, allocating amounts to periods;
- a schedule of the evidence in the possession of the claimant by reference to which the claim was made;
- the dates on which any overpayments, such as assessments, were made;
- a copy of any original claim (where appropriate);
- copies of documents, schedules, etc. used in support of the claim;
- the reasons why the claimant will not be unjustly enriched, where appropriate, if a repayment is now made (since 26 May 2005, HMRC can invoke the unjust enrichment defence against all output tax claims. This defence cannot be invoked against late claims to input tax).

### **34.2 Further information required**

If a claim is submitted without some of the above and with no explanation for its absence, you should establish from the claimant why it is missing and, where possible, ask for it to be provided.

It is, of course, worth remembering that there may be evidence on EF which supports, or denies, the taxpayer's claim.

### **34.3 Processing Forms VAT642**

Where, as will always be the case with claims dealt with under this guidance, a claim contains periods which are more than six years old you should enter the 'period reference' as 00/00, the 'type code' as 0 and the 'attribution code' as 9. Officers will need to write the actual periods in respect of which the claims are made on the output document. Failure to follow these steps will lead to the system rejecting the form on the basis that it is out of time.

## 35. Statistical information

### 35.1 Information to be compiled on receipt of claim

It is very important that we record certain information centrally so that we can keep abreast of the potential cost to the revenue of the claims arising out of the House of Lords' judgments and our handling of it. To that end, on receipt of a claim at the 'Fleming Claims Team', the following information on the claimant should be recorded.

- the name;
- VAT registration number;
- the amount being claimed;
- date of claim;
- whether claimant is 'controlled' by the Large Business Service;
- trade sector of claimant;
- nature of claim (i.e. input tax or output tax);
- source of claim (for example the judgment on which it is founded, ruling from HMRC (with date), discovery of mistake in accounts (with date), etc.).

### 35.2 Information to be sent to the Fleming Claims Team (Leeds) by those verifying claims

Once the claim has been processed and either approved or rejected, in part or in total, the following information must be sent to the Fleming Claims Team (Leeds):

Where it has been approved in total:-

- confirmation of the amount paid;
- the amount of statutory interest; and
- date on which the payment was authorised

Where it has been approved in whole or in part:-

- amount approved;
- amount rejected and reason for rejection (for example, unjust enrichment, wrong calculation, accounting periods after enactment of new time limit, etc.);
- the amount of statutory interest; and
- date on which the payment was authorised.

## 36. Contacts

### 36.1 Fleming Claims Team

Pauline Walsh (Walsh, Pauline {LC Eastern England} or pauline.walsh3@hmrc.gsi.gov.uk) will be playing the leading role in the 'Fleming Claims Team' which will be at the centre of the processing of claims made under Revenue & Customs Brief 07/08 and section 121 of the Finance Act 2008. She can be contacted by phone on 0114 253 7955.

Claims being transferred to the Fleming Claims Team should be sent to the EF in-tray '**Fleming Claims Team**', Ref. **FLEMING**.

## **36.2 Further information**

If you have any problems or questions in relation to claims made under Revenue & Customs Brief 07/08 or section 121 of the Finance Act 2008 you should contact Error Correction Policy Team, Central Policy, Tax Administration and Advice, 4th Floor South West, Queens Dock, Liverpool, L74 4AA. You should also forward copies of any appeals against the rejection of these claims to the Tax Tribunal to Error Correction Policy Team (at 'TAA, Support Unit (CenPOL TaxAdminAdvice)').

Withdrawn

## Fleming Claims and 'Kretztechnik' Share Issues – Aide Memoire

Dates	C&E view of liability of share issues at the time		Standard method	Likely recovery of input tax on costs relating to share issue
01/04/73 - 31/03/84	Issues to UK/EC	exempt.	No direct attribution. All input tax residual. Residual claimed on outputs basis. Option to reclaim I/T on goods for resale in same state and treat balance as residual. <b>Businesses issuing their own shares must exclude the value of the share issue from their exempt and total supplies.</b>	I/T on share issues will have been treated as residual and claimed in line with the standard method in place at the time. Valid Fleming claims unlikely.
01/04/84 - 31/03/87	Issues to UK/EC	exempt.	No direct attribution. All input tax residual. Residual claimed on outputs basis. (No longer an option to reclaim I/T on goods for resale in same state and treat balance as residual.) Direct attribution permissible with C&E approval. <b>Businesses issuing their own shares must exclude the value of the share issue from their exempt and total supplies.</b>	If a business was otherwise fully taxable it would have achieved 100% recovery of its input tax relating to a share issue. A partly exempt business would automatically have treated the input tax on such a share issue as residual. Valid Fleming claims unlikely.

Dates	C&E view of liability of share issues at the time		Standard method	Likely recovery of input tax on costs relating to share issue
01/04/87 - 31/03/92	Issues to UK/EC	exempt.	<p>Direct attribution to taxable and exempt.</p> <p>Residual claimed on basis of 'use' - any method acceptable except multiple calculations or outputs-based which required C&amp;E approval.</p> <p>Notice 706 example PE calculation was based on ratio of taxable input tax to total input tax.</p>	<p>If any of the shares were issued to non-EU counterparties, e.g. US bank, Channel Islands investment fund, etc., then tax should have been treated as residual and recovered at 100% if fully taxable or residual rate if not.</p> <p>Valid claims possible but evidence, including the shareholder register should be sought, as well as evidence of the actual treatment applied to expenses in subsequent periods.</p>
01/04/92 31/12/92	Issues to UK/EC	exempt.	<p>Direct attribution to taxable and exempt.</p> <p>Residual claimed on outputs basis.</p> <p>Certain incidental transactions could be excluded from the values calculation including share issues.</p> <p><u>Note:</u> Businesses using the previous standard method could continue to operate it if they wished - C&amp;E would automatically approve it on next visit.</p>	<p>If any of the shares were issued to non-EU counterparties, e.g. US bank, Channel Islands investment fund, etc., then tax should have been treated as residual and recovered at 100% if fully taxable or residual rate if not.</p> <p>Valid claims possible but evidence, including the shareholder register should be sought, as well as evidence of the actual treatment applied to expenses in subsequent periods.</p>

Dates	C&E view of liability of share issues at the time	Standard method	Likely recovery of input tax on costs relating to share issue
01/01/93 - 30/11/94	<p>Issues to UK/EC exempt. outside scope with right to recover (specified supply).</p> <p>(Change in liability of supply w/e/f 01/01/93 to bring UK legislation fully into line with EC place-of-supply rules..)</p>	<p>(No change to the standard method.)</p> <p>Direct attribution to taxable and exempt.</p> <p>Residual claimed on outputs basis.</p> <p>Certain incidental transactions could be excluded from the values calculation including share issues.</p>	<p>If any of the shares were issued to non-EU counterparties e.g. U.S. bank, Channel Isles investment fund etc. then tax would have been treated as residual and recovered at 100% if fully taxable or residual rate if not.</p> <p>Valid claims possible, but evidence of shareholder register at issue should be sought.</p>
01/12/94 - 30/04/97 (final date to which Fleming claims for unrecovered input tax can be made).	<p>Issues to UK/EC exempt. outside scope with right to recover (specified supply).</p>	<p>Reg 103 amended to include anti-avoidance measure to deal with share issues on basis of 'use'.</p> <p>Direct attribution to taxable and exempt.</p> <p>Residual claimed on outputs basis.</p> <p>Certain incidental transactions could be excluded from the values calculation including share issues.</p>	<p>Input tax on all share issues recovered on the basis of 'use'.</p> <p>As the issue of shares is not a supply, Reg 103 should not have been applied. Input tax on share issues should have been treated as residual.</p> <p>Valid Fleming claims possible. Although it is also possible that businesses could have <i>over</i>-recovered input tax in these circumstances.</p>