Neutral Citation: **[2023] UKUT 00249 (TCC)**

Case Numbers: UT/2022/000043
UT/2022/000028

**UPPER TRIBUNAL**
**(Tax and Chancery Chamber)**

Rolls Building, Fetter Lane, London EC4

*VAT – margin claim for demonstrator cars settled by agreement under section 85 VATA in 2006, with quantum agreed on basis of tables published by HMRC showing margins they would be prepared to accept in the absence of records – those tables subsequently amended, allowing larger claims – further claims made to recover the difference – whether settlement of "the Appellants' claim for overpaid VAT" in the section 85 agreement precluded such further claims*

**Heard on:** 27-28 February 2023
**Judgment date:** 13 October 2023

**Before**

**JUDGE PHYLLIS RAMSHAW**
**JUDGE KEVIN POOLE**

**Between**

**CAMBRIA AUTOMOBILES (SOUTH EAST) LIMITED**
**INVICTA MOTORS LIMITED**

**Appellants**

**and**

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

**Respondents**

**Representation:**

For the Appellants: Peter Mantle, Counsel, instructed by DMC Partnership Limited

For the Respondents: James Puzey, Counsel, instructed by the General Counsel and Solicitor to His Majesty's Revenue and Customs

## DECISION

### INTRODUCTION

1. Claims were made to HM Customs & Excise in June 2003 ("the 2003 claims") in respect of the Appellants (respectively "Cambria" and "Invicta", and together "the Companies") to recover historical overpaid VAT arising out of the CJEU *Italian Republic* case (see [5] below) in respect of demonstrator vehicles. The 2003 claims were rejected and appeals against that rejection were notified to the VAT Tribunal. Before the appeals were heard, and after various adjustments were made following lengthy negotiations, the 2003 claims were settled in March 2006 by agreement between the parties under section 85 Value Added Tax Act 1994 ("VATA") ("the Section 85 Agreement").

2. Subsequently the quantum of the 2003 claims was considered to have been understated, because of errors in the tables originally published by HM Customs & Excise which showed the basis upon which they were prepared to accept *Italian Republic* claims. These tables had formed the basis of the 2003 claims. New claims were then submitted by the Companies to HMRC[1] in March 2009 ("the 2009 claims"), seeking to recover the shortfall in the original 2003 claims.

3. HMRC ultimately rejected the 2009 claims. Appeals against this rejection were notified to the First-tier Tribunal (the "FTT") in 2009 and 2010 but the appeals were stayed for other reasons. Ultimately the stays were lifted and the appeals were heard by the FTT. In a decision dated 9 November 2021 ("the Decision"), the FTT (Judge Popplewell) decided (in summary) that the 2009 claims were precluded from being brought by virtue of the Section 85 Agreement, they amounted to an abuse of the process of the FTT and therefore ought to be struck out as having no reasonable prospects of success.

4. Cambria and Invicta appeal against that decision.

### THE FACTS

5. The FTT made extensive and detailed findings of fact, but for present purposes the brief summary of the facts and the dispute between the parties set out at paragraphs [1] to [5] of the Decision gives a sufficient outline:

> 1. This case concerns VAT and, in particular, whether HMRC's decision to reject claims made by the appellants in 2009 for overpaid VAT on the sale of demonstrator motor vehicles sold by the appellants between 1973 and 1996, is correct.
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> 2. During the course of the appellants' business between 1973 and 1996, they sold ex demonstrator vehicles and accounted for VAT on the profit margin of those vehicles sold at a profit, in line with HMRC's interpretation of the law at that time. As a result of the European Court of Justice decision in *Commission v Italian Republic C-45/96* HMRC (or as they were then, HM Customs & Excise ("Customs")) accepted that the sales of ex demonstrator motor vehicles were exempt from VAT and consequently motor dealers could seek to reclaim overpaid output tax pursuant to Section 80 VAT Act 1994 ("Section 80").
>
> 3. On 26 June 2003 the appellants brought overpayment claims under Section 80 (the "2003 claims"). Customs decided to reject these claims and the appellants appealed against that decision. Those appeals were the subject of

[1] In this decision, "HMRC" refers either to the Commissioners for Her (or, as the context requires, His) Majesty's Revenue and Customs or their predecessor body the Commissioners of Customs and Excise, as the context requires.

> an agreement under Section 85 VAT Act 1994 (the "Section 85 agreement") which was entered into at the end of March 2006.
>
> 4. On 25 March 2009 the appellants brought further overpayment claims under Section 80 (the "2009 claims"). HMRC decided to reject those claims and the appellants appealed against that decision. It is these appeals which I have to decide.
>
> 5. The issues in a nutshell are these. The appellants say that on the authority of the Court of Appeal decision in *John Wilkins* [2010] EWCA Civ 923 ("*John Wilkins*") that it is possible to bring second or successive overpayment claims under Section 80 provided that those claims have something new to say. The 2009 claims do have something new to say when compared to the 2003 claims. The 2009 claims were not covered by the Section 85 agreement which only covered the 2003 claims, nor are they abusive when tested against the principles set out in the House of Lords decision in *Johnson v Gore Wood* [2002] 2 AC 1 ("*Gore Wood*"). HMRC's view is that even if *John Wilkins* is authority for the foregoing proposition, the 2009 claims do not have anything new to say. Furthermore, the 2009 claims which are based solely on a different method of calculating the overpayment, are covered by the Section 85 agreement and any overpayment claims for the same period and for the sale of the same cars cannot now be reopened. Furthermore, the 2009 claims are abusive when tested against the *Gore Wood* principles.

6. The full text of the Section 85 Agreement referred to at [3] in the Decision is set out as an appendix to this decision.

7. The basis of calculation of both the 2003 claims and the 2009 claims requires a little more explanation. Following the ECJ decision in *Italian Republic*, HMRC (recognising that few traders were likely to have kept records back to 1973 to enable them to calculate claims accurately) consulted with trade bodies and ultimately published tables, divided into three categories of vehicle ("prestige", "volume" and "other") accompanied by notes explaining the basis on which claims for the marques held by the trader should be calculated using those tables. These tables are colloquially referred to as "the Italian tables" (amongst other names). These tables included, critically, "typical sale price" and "profit per unit" figures in respect of each year from 1973 to 1996 for each of the three categories of vehicle.

8. The 2003 claims also included claims for repayment in respect of an entirely different matter, around the historic VAT treatment of manufacturer bonuses following the *Elida Gibbs* decision of the ECJ in 1995. Those claims were settled (also under the Section 85 Agreement) and there has not been any attempt to make further claims arising from the same facts. They do not form part of the current proceedings.

9. The 2003 claims (insofar as they arose from the *Italian Republic* case) were based on the original Italian tables.

10. Subsequently, the Companies became aware that HMRC acknowledged there were errors in the Italian tables, more specifically that the profit margin figures had been based on averaging figures for only the last three years of the 24 year period covered by them, and did not take into account the impact of car tax and other economic factors for periods prior to November 1992. The detail is not material, but the consequence for the Companies was that in re-computing their claims on the basis of amended methodology to address the deficiencies in the published Italian tables, they considered that their original claims had been significantly understated. They therefore submitted the 2009 claims to "make good" the perceived shortfall in the 2003 claims arising from the defects in the previously published Italian tables.

11. One entirely separate issue arose, which was dealt with specifically in the Section 85 Agreement, as follows. At the time of that agreement, there was ongoing litigation elsewhere on a technical point concerning the availability of *Italian Republic* repayments in respect of VAT accounting periods in which the trader had been a repayment trader. HMRC maintained that it was not required to repay output VAT over-accounted for in respect of those VAT accounting periods. The issue was specifically addressed in the Section 85 Agreement, making clear that if the litigation went in favour of the taxpayer, the amounts in respect of those accounting periods would be paid as well as the agreed amounts for the remainder of the VAT accounting periods. This is the "claim under Regulation 29 of the Value Added Tax Regulations" referred to in the Section 85 Agreement. No issue in relation to that claim arose in these proceedings.

**THE FTT DECISION**

12. After its brief introduction, the FTT set out the relevant legislation and then its detailed findings of fact.

13. At [17] of the Decision, the FTT made the following statement about the issues before it:

> The parties are agreed that there are essentially three issues which I need to resolve. Firstly, whether the 2009 claims say something new when compared to the 2003 claims and are thus permissible second claims within the meaning set out in *John Wilkins*. Secondly whether the claims to overpaid VAT which were settled by the Section 85 agreement include the 2009 claims. Thirdly whether the bringing of the 2009 claims and appealing against HMRC's decision not to allow them is abusive at common law.

14. The FTT decided the first of these three issues in favour of the Companies and HMRC do not seek to appeal that aspect of the Decision.

15. The FTT decided (and the parties agree) that the other two issues are interlinked. It reached the view that the 2009 claims had been settled by the Section 85 Agreement, which led it inexorably to the conclusion that those claims (and the related appeals to the Tribunal) were abusive at common law because they represented an attempt to re-litigate the matters that had been settled by the Section 85 Agreement. As such, it struck out the appeals (but also, somewhat confusingly, purported to dismiss them). It also expressed the view that the underlying issues were *res judicata*, meaning that the Companies should not be allowed to re-litigate them, whilst recording that HMRC had not asked the FTT to strike out the appeals on that basis.

16. The FTT's reasons for finding in favour of HMRC on the question of whether the 2009 claims were settled by the Section 85 Agreement are set out at [31] of the Decision. In summary, its reasoning was as follows:

> (1) The 2003 claims included amounts and an indication of the method of calculation (including the numbers of cars involved). As such, they were valid claims pursuant to section 80 VATA and Regulation 37 of the VAT Regulations 1995. The appeals which were brought against HMRC's decision to reject the claims in part were settled by the Section 85 Agreement following meetings, exchanges of information and discussions on the original claims which had led up to HMRC's decision to reject them in part. That process had involved consideration of a great deal of detail, and ultimately arrived at "a deal" to settle the claims.
>
> (2) It was not an express condition of the deal that the Italian tables were accurate, in whole or in part, indeed it was understood on both sides that the tables were "an estimation", in order to enable traders to make claims in the absence of detailed records.

(3) As far as HMRC were concerned, the deal they had struck was to settle "all *Marks & Spencer* claims" (i.e. the historic claims whose validity was only confirmed as a result of the *Marks & Spencer* litigation).

(4) The 2003 claims related to a specific number of demonstrator vehicles for specific VAT periods, and they had been the subject of some detailed negotiation.

(5) A reasonable person having all the background knowledge which would have been available to the parties would have understood the word "claim" in the Section 85 Agreement to be used "in a commercial sense, in the context, of course, that the 2003 claims were claims under section 80 and the decisions against which the appellant appealed related to those claims." That reasonable person looking at the Section 85 Agreement now "would have understood it to mean all the Italian margin claims which related to the vehicles for the periods" and would not have thought it was limited to "only those claims which had been brought on the basis of the methodology set out in the 2003 claims."

(6) Neither side probably gave any thought to what might happen if the Italian tables turned out to be wrong.

(7) Whilst it might have been open to HMRC to enter into a collateral agreement to deal with possible future claims (but they did not do so), equally it would have been open to the Companies or their advisors to challenge the accuracy of the Italian tables at the time, and accordingly to have included some reservation in the Section 85 Agreement to address the possibility of their inaccuracy, but they did not do so. In the absence of this, there was nothing to suggest that either side contemplated that the Companies might be permitted a "second bite at the cherry" if a better method of calculation could be shown than that based on the Italian tables.

(8) The draft agreement was amended at the request of the adviser to the Companies to accommodate one particular (unrelated) uncertain point, clearly demonstrating that it was a carefully considered and negotiated document; however no attempt was made to amend it to reflect the possibility that the Italian tables might be unreliable.

(9) As a matter of "contractual interpretation", therefore, the FTT considered that "the Section 85 Agreement settled all Italian margin claims, i.e. claims to overpayment of VAT on the sale of demonstrator vehicles, for the vehicles identified in the 2003 claim and for the periods identified in that claim." Accordingly, since the vehicles and periods were identical in the 2009 claims, they were covered by the Section 85 Agreement.

(10) With the wisdom of hindsight, the Companies had, through their "imprudence", made a "bad bargain". It was not the role of the Tribunal to "rewrite that contract to protect the appellants from that imprudence."

**THE GROUNDS OF APPEAL**

17. For present purposes, the only relevant ground of appeal for which permission was granted by the FTT was the following:

> The First-tier Tribunal ('FTT') erred in law in concluding that the agreement under Section 85 Value Added Tax Act 1994 ('VATA') entered into with the Respondents ('HMRC') at the end of March 2006 ('the Section 85 Agreement') was a full and final settlement for all Italian margin claims in respect of the vehicles ('Vehicles') and for the periods ('Periods') set out in the claims commenced in 2003 by the Appellant.
>
> In particular the FTT, for the reasons explained below, erred in law and, in particular, without prejudice to the generality of this ground, the FTT wrongly

> interpreted "the Appellants' claim for overpaid VAT" in the context of the Section 85 Agreement as meaning not only the claims that were being made by the Appellant but also any further claims that could have been made by the Appellant, either by amending its extant claims, or by subsequently making new claims, in so far as they related to those Vehicles for those Periods.

18. We do not set out the "reasons explained below" which were submitted by the Companies to support their above assertion of an error of law by the FTT, as those reasons were effectively developed in full by Mr Mantle in the course of his submissions as set out below.

**THE LEGISLATION**

19. Section 80 VATA, so far as relevant, provided as follows at the relevant time:

> **80 Credit for, or repayment of, overstated or overpaid VAT.**
>
> (1) Where a person –
>
> (a) has accounted to the Commissioners for VAT for a prescribed accounting period (whenever ended), and
>
> (b) in doing so, has brought into account as output tax an amount that was not output tax due,
>
> the Commissioners shall be liable to credit the person with that amount.
>
> …
>
> (2) The Commissioners shall only be liable to credit or repay an amount under this section on a claim being made for the purpose.
>
> …
>
> (6) A claim under this section shall be made in such form and manner and shall be supported by such documentary evidence as the Commissioners prescribe by regulations; and regulations under this subsection may make different provision for different cases.

20. Regulation 37 of the VAT Regulations 1995 provided as follows at the relevant time:

> **37 Claims for credit for, or repayment of, overstated or overpaid VAT**
>
> Any claim under section 80 of the Act shall be made in writing to the Commissioners and shall, by reference to such documentary evidence as in possession of the claimant, state the amount of the claim and the method by which that amount was calculated.

21. Section 85 VATA, so far as relevant, provided as follows at the relevant time:

> **85 Settling appeals by agreement.**
>
> (1) Subject to the provisions of this section, where a person gives notice of appeal under section 83 and, before the appeal is determined by a tribunal, the Commissioners and the appellant come to an agreement (whether in writing or otherwise) under the terms of which the decision under appeal is to be treated –
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> (a) as upheld without variation, or
>
> (b) as varied in a particular manner, or
>
> (c) as discharged or cancelled,
>
> The like consequences shall ensue for all purposes as would have ensued if, at the time when the agreement was come to, a tribunal had determined the appeal in accordance with the terms of the agreement (including any terms as to costs).

> (2) Subsection (1) above shall not apply where, within 30 days from the date when the agreement was come to, the appellant gives notice in writing to the Commissioners that he desires to repudiate or resile from the agreement.

**THE ARGUMENTS**

## For the Companies

22. Mr Mantle argued, in outline, as follows.

23. The key question was whether, on a correct interpretation of the Section 85 Agreement, its effect was to settle the 2009 claims or, to put it another way, whether the Section 85 Agreement was a full and final settlement of all Italian margin claims in respect of the vehicles and for the periods covered by the 2003 claims.

24. He submitted that the question gave rise to a straightforward exercise of contractual interpretation of the Section 85 Agreement, and the FTT had made six errors of law in addressing it.

25. First, he argued that the word "claim" in the Section 85 Agreement had a natural and ordinary meaning, referring to the 2003 claims, as amended up to the time of the Section 85 Agreement. He argued that the FTT had not appreciated that "claim" had a natural and ordinary meaning, nor had it established what it was. Alternatively, if the Decision could be read as implying the FTT had found such a meaning, it had not attached proper significance to it, and in particular it had not followed the guidance given by the Supreme Court in *Arnold v Britton* [2015] AC 1619, [2015] UKSC 36, particularly paragraphs [15] to [20].

26. Second, he argued that the FTT had failed to have regard to the relevant legal background (especially the scheme of section 80 VATA), and the impact that a proper understanding of that background would have had upon any reasonable person seeking to identify the intentions of the parties to the Section 85 Agreement when interpreting it in accordance with the guidance in *Arnold*; in particular, it had failed to take into account the difference between the 2003 claims and the 2009 claims, the latter now being accepted as being, in principle, second and permissible claims with "something new to say" under the unchallenged authority of *Hayward Gill v CCE* [1988] VATDT15634 (subsequently acknowledged, without disapproval, by the Court of Appeal in *John Wilkins (Motor Engineers) Ltd v HMRC* [2010] EWCA Civ 923, [2010] STC 2418).

27. Third, he argued that the FTT had incorrectly taken the view that certain elements of the pre-contract correspondence supported the argument that the Section 85 Agreement was intended to settle all potential Italian Republic claims for the vehicles and periods under discussion.

28. Fourth, he argued that the FTT had failed to take account of HMRC's particular status as a tax collecting agency charged with collecting the correct amount of tax (rather than a normal commercial party) and in seeking to establish whether the 2009 claims were compromised by the Section 85 Agreement it had failed to recognise and take account of the opposing interests of the two parties.

29. Fifth, on a fair reading of the Decision, the FTT appeared to have reached the view that the burden lay on the Companies to reserve the right to make further claims if they wanted to preserve that right, rather than the view that the burden lay on HMRC to preclude any such further claims. He argued this was an error of law, given the legal background.

30. Sixth, the FTT had wrongly placed reliance on the insertion into the Section 85 Agreement of specific reference to a potential section 29 claim, seemingly considering this to support the argument that as no reference was included to the possibility of additional claims

if the Italian tables turned out to be wrong, such potential claims were implicitly included in the "claim" being settled as part of the Section 85 Agreement.

31. Taking these points in turn, Mr Mantle developed his submissions as follows.

***1 - The natural and ordinary meaning of "claim"***

32. He argued that the case law required a "single process of interpretation" of any agreement which combined the five factors identified by Lord Neuberger (giving the majority decision of the Court) in *Arnold* at [15]:

> When interpreting a written contract, the court is concerned to identify the intention of the parties by reference to "what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean", to quote Lord Hoffmann in *Chartbrook Ltd v Persimmon Homes Ltd* [2009] AC 1101, para 14. And it does so by focussing on the meaning of the relevant words, in this case clause 3(2) of each of the 25 leases, in their documentary, factual and commercial context. That meaning has to be assessed in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the lease, (iii) the overall purpose of the clause and the lease, (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions.

33. The FTT had, he acknowledged, correctly directed itself to take account of the five factors set out above (the sixth listed factor being a matter to be disregarded, rather than taken account of). However, it had not then gone on to consider, as a first step, the "natural and ordinary meaning" of the word "claim" in the Section 85 Agreement. It was inherent in Lord Neuberger's subsequent consideration of the matters set out above that it should have done so, as could be seen from his comments at [17] and [18] in particular:

> 17 First, the reliance placed in some cases on commercial common sense and surrounding circumstances… should not be invoked to undervalue the importance of the language of the provision which is to be construed. The exercise of interpreting a provision involves identifying what the parties meant through the eyes of a reasonable reader, and, save perhaps in a very unusual case, that meaning is most obviously to be gleaned from the language of the provision…
>
> 18 Secondly, when it comes to considering the centrally relevant words to be interpreted, I accept that the less clear they are, or, to put it another way, the worse their drafting, the more ready the court can properly be to depart from their natural meaning. That is simply the obverse of the sensible proposition that the clearer the natural meaning the more difficult it is to justify departing from it.

34. The FTT had not grappled at all with the issue of the clarity of the language used in the Section 85 Agreement, in spite of that being the first key issue. It had failed to address the point, instead simply jumping to a final conclusion as to its meaning as being "all Italian margin claims in respect of the vehicles for the periods set out in the 2003 claims".

35. In doing so, it acknowledged at 31(5) of the Decision that "the 2003 claims were claims under section 80 and the decisions against which the appellant appealed related to those claims", which appeared to imply it accepted that this was the "natural and ordinary meaning" of "claim" in the Section 85 Agreement, which then left one asking how it had reached the opposite conclusion as to its actual meaning in the context of that agreement.

36. In his submission, the natural and ordinary meaning of the word "claim" in the Section 85 Agreement was to refer to the claim that had actually been made by each Appellant and subsequently varied by partial agreement with HMRC. He referred to Regulation 37 of the VAT Regulations 1995, which provides that "any claim under section 80 of the Act shall be made in writing to the Commissioners and shall, by reference to such documentary evidence as is in the possession of the claimant, state the amount of the claim and the method by which that amount was calculated." It was a matter of fact that the claims were based on a specific methodology accepted by HMRC, and he argued that the methodology (in particular the use of the Italian tables current at the time) should be regarded as an inherent part of each claim, such that the use of a different methodology (in particular, amended Italian tables) should properly be regarded as an entirely different claim, even though it related to the same vehicles and the same VAT accounting periods.

***2 – Failure to have proper regard to the legal background***

37. Mr Mantle argued that when considering the "background knowledge which would have been available to the parties", as referred to by Lord Neuberger in the passage from *Arnold* quoted at [32] above, the legal background was clearly part of that picture.

38. As the parties would (or should) have been aware, it was established by the date of the Section 85 Agreement that it was permissible for a taxpayer to bring a second or subsequent claim for repayment of overpaid VAT which arose in relation to the same supplies made in the same period(s) as a previous claim, unless it was simply a repeat claim "with nothing new to say". Furthermore, the subsequent acceptance by HMRC of different methods which they would accept for the calculation of a claim was sufficient to provide a legitimate basis for a valid second or subsequent claim. This was made clear by the VAT and Duties Tribunal in *Hayward Gill*, which was effectively endorsed by the Court of Appeal in *John Wilkins*.

39. After examining these authorities, the FTT reached the view that the 2009 claims did "say something new", and were therefore valid claims, subject only to the question of whether they were settled by the Section 85 Agreement.

40. Having reached that view, the FTT had failed, in Mr Mantle's submission, to take account of it properly or at all in construing the Section 85 Agreement. In short, having decided that the possibility of a further valid claim existed, the failure of the Section 85 Agreement to address the matter should have led the FTT inexorably to the conclusion that it was not intended to affect the validity of any such further claim or, at the very least, to explain why it had not reached that conclusion.

***3 – Inappropriate use of pre-contract correspondence***

41. Mr Mantle argued that at various points in the FTT's analysis, it had placed considerable emphasis on the pre-contract correspondence between the parties. It was well settled (see *Chartbrook v Persimmon Homes Ltd* [2009] UKHL 38 per Lord Hoffmann at [41] – [42]) that pre-contract negotiations are generally inadmissible "for the purpose of drawing inferences about what the contract meant". They might be admissible for other reasons, such as "to establish that a fact which may be relevant as background was known to the parties, or to support a claim for rectification or estoppel", but that was not the case here. In his submission, the FTT had failed to observe this requirement, by referring to various aspects of the pre-contract correspondence in support of the view that the "claims" intended to be settled by the Section 85 Agreement included any potential future claims arising in relation to the same vehicles and the same periods.

42. Then in doing so, it had missed the point that the correspondence leading up to the Section 85 Agreement focused on particular features of the 2003 claims (i.e. the claims as originally made and as adjusted over time), never addressing the accuracy of the Italian tables. The

various points referred to by the FTT in the pre-contract correspondence, even if it were legitimate to refer to them, did not give rise to any suggestion that what was being agreed to be settled was not just the 2003 claims but also any potential further claims that might be raised under the *Hayward Gill* principle.

***4 – Applying "commercial common sense"***

43. Mr Mantle submitted that the FTT had approached the process of interpretation incorrectly by failing to take into account that HMRC were not acting as a party to a normal arm's length commercial negotiation, they were acting as a tax authority which had a primary function of ascertaining and repaying the correct amount of tax due under the claims advanced by the Companies – the 2003 claims. From this erroneous starting point, the FTT had reached the conclusion at [31(5)] that "the parties simply wanted to conclude a deal on the best possible terms for each of them", and that "a reasonable person looking at that agreement now, would have understood it to mean all the Italian margin claims which related to the vehicles for the periods." This last statement appeared to conflict with the immediately preceding observation that "when they used the word claim in the Section 85 Agreement, they did so in a commercial sense, in the context, of course, that the 2003 claims were claims under section 80 and the decisions against which the appellant appealed related to those claims."

44. Furthermore, he pointed to Lord Hoffmann's comment in *Arnold* at [17] that "reliance… on commercial common sense and surrounding circumstances… should not be invoked to undervalue the importance of the language of the provision which is to be construed. The exercise of interpreting a provision involves identifying what the parties meant through the eyes of a reasonable reader, and, save perhaps in a very unusual case, that meaning is most obviously to be gleaned from the language of the provision. Unlike commercial common sense and the surrounding circumstances, the parties have control over the language they use in a contract."

***5 – Imposing the burden on the Appellants of displacing an adverse interpretation***

45. Mr Mantle argued that at [32 (8) and (9)] of its decision, the FTT referred to the fact that the Appellants could have sought to include a provision in the Section 85 Agreement expressly reserving the right to bring further claims, if admissible, under the *Hayward Gill* approach, and failed to do so. It appeared to consider that the absence of any such provision (or attempt to include it) added weight to the wider interpretation of "claim" contended for by HMRC. But there was no basis for this, as it effectively assumed what it sought to prove, namely that the word "claim" in the context of the Section 85 Agreement had the wider meaning contended for by HMRC. On that basis, if the word "claim" had the narrower meaning contended for by the Appellants, the absence of any provision seeking to widen it to encompass any subsequent claims in respect of the same vehicles and periods (or attempt by HMRC to include such a provision) could just as easily be interpreted as supporting the Appellants' case. This showed clearly that this particular aspect of the FTT's reasoning was entirely circular, contributing to the overall error of law in its interpretation of the Section 85 Agreement.

***6 – Inclusion of express provision concerning Regulation 29 claim***

46. Mr Mantle argued that the FTT made a further error of law in referring (at [31(8) and (9)] of the Decision) to the "Regulation 29" provision inserted into the Section 85 Agreement at the instance of the Companies as showing that the parties had specifically addressed a particular type of potential future claim, supporting the interpretation that a failure to include a similar reservation in respect of any other potential future claims meant that such claims were intended to be covered by that agreement. The Regulation 29 issue was an entirely separate technical point on the 2003 claims as they stood at the time, and had no relevance to the question of whether future potential claims were intended to be covered by the Section 85 Agreement.

47. Finally, Mr Mantle made two further points:

(1) He argued that the FTT had elided the concept of a claim with that of a cause of action, which lay below some of the errors he argued had been made. In essence, as mentioned by Roth J in *Reed Employment Ltd v HMRC* [2013] UKUT 109 (TCC) at [37], "a claim in the ordinary sense as used in s 80 VATA does not mean a cause of action". He was seeking to contrast the "cause of action" in the present case (i.e. the overpayment of VAT by the Companies during the relevant period) with the "claim" which had been settled (i.e. the 2003 claim that had actually been made). This had led the FTT at [35] of the Decision to say that "the cause of action in the appeals against the decisions not to admit the 2009 claims is identical to that in relation to the decisions not to accept the 2003 claims", and whilst that statement was made in the context of the FTT's discussion of abuse and res judicata, it had in his submission clearly also coloured the FTT's approach at [31] of the Decision in deciding that the 2003 claims and the 2009 claims were merely separate manifestations of the same underlying claims.

(2) He referred to *John Wilkins*, where the Court of Appeal endorsed the approach followed in *Hayward Gill* in finding that a change of the basis accepted by HMRC for calculating repayment claims was a sufficiently new fact to allow a second claim to be submitted to recover the difference, albeit arising out of exactly the same supplies during the same periods. The natural conclusion of this was that if the 2003 claims had not been settled on the basis of the Section 85 Agreement but had instead proceeded to adjudication by the Tribunal, there would have been nothing to prevent the Companies from raising new claims, once the revised Italian tables became available, to recover the shortfall in the previous claims. In a situation where the statutory effect of the Section 85 Agreement was to give rise to a deemed determination of the appeal by the Tribunal in accordance with the terms of the agreement, it would be odd if an additional consequence of reaching the agreement was to preclude a future claim which could have been validly brought if there had been no agreement, merely an adjudication by the Tribunal.

**For HMRC**

48. Mr Puzey argued, in outline, as follows. There was a superficial attraction to the argument that the 2009 claims must be new claims, not covered by the Section 85 Agreement, because they were for new amounts. The Companies had not explained what the features of the 2009 claims were that defined them as "new", so they had taken the simple route of arguing that because the 2009 claims were for additional amounts, they must be new claims, distinct from the 2003 claims. But this focus on the numbers was misleading as it did take into account what was actually being claimed for, in both the 2003 and 2009 claims. It was common ground that each claim was in respect of the same specific supplies of specific vehicles in specific periods. The Companies' heavy reliance on *John Wilkins* was unjustified because there was no s.85 agreement in that case, therefore it did not consider the effects of that section. The Court of Appeal did not get to the bottom of what was meant by "something new to say" and the case was decided before all the other cases which considered the meaning of "claim". Also, it appeared never to have been followed on any case involving repeat claims under section 80 VATA.

49. Mr Puzey went on to argue that the FTT's approach of interpreting the word "claim" as a simple common law contractual matter perhaps did not pay enough attention to the VAT law background, however the effect of the Section 85 Agreement was clear – it was to decide all the matters that would have been decided by the VAT Tribunal if it had adjudicated on the case (which Mr Puzey, following what the FTT had said at [31(5)] of the Decision, characterised as "all the Italian margin claims which related to the vehicles for the periods"). In doing so, the

tribunal could have determined for itself how much VAT was overpaid; it was not bound by the Italian tables or the methodology used by either side. It would have been open to the tribunal (or either side) to use different methodology (as had happened in *HMRC v General Motors (UK) Limited* [2015] UKUT 605 (TCC)), including different margin figures from those contained in the Italian tables – anyone could have carried out at that time the analysis which was later carried out which showed the unreliability of those tables. This was clearly inconsistent with any suggestion that the "claim" which subject to the deemed determination under section 85 VATA was confined to the basis upon which it had been calculated.

50. As to the FTT's unchallenged acceptance that the 2009 claims had "something new to say", Mr Puzey argued this left unanswered the question of whether they amounted to new claims or simply an amendment to the original claims. To consider that question required reference to the authorities, in particular *Reed Employment Limited v HMRC* [2013] UKUT 109 (TCC), *HMRC v Vodafone Group Services Limited* [2016] UKUT 89 (TCC) (especially at [47] and [51]) and *Wheels Common Investment Fund Trustees and others v HMRC* [2017] UKFTT 830 (TC). In his submission, by reference to these authorities, the 2009 claims were simply an attempt to amend the 2003 claims; since the 2003 claims had been settled, it was not open to the Companies to attempt to resuscitate them by arguing that the 2009 claims were entirely new.

**DISCUSSION**

## Introduction

51. It is common ground that the Companies made their initial claims on 26 June 2003. At that stage, the *Italian Republic* element of the claims totalled approximately £900,000. Initially, HMRC rejected them entirely as invalid, but (following appeals to the VAT Tribunal against that rejection and the provision of further evidence by the Companies) they accepted them as valid in January 2005, but disagreed with the amounts claimed.

52. As a result of further information supplied, on 22 June 2005 HMRC provided their own recalculation of the claims, totalling some £577,000.

53. The Companies then appealed again to the Tribunal on 19 July 2005, on the grounds that higher amounts claimed by them in a letter dated 3 June 2005 should be paid (the shortfall being identified in the notices of appeal as approximately £284,000 in total).

54. There followed further contact between the parties, ultimately resulting in agreement on a total amount (in respect of the *Italian Republic* claims) of just over £1 million, which was included in the Section 85 Agreement.

55. The effect of that agreement, under section 85 VATA, was to vary HMRC's initial decision of 22 June 2005 by setting a final agreed amount for the claims; accordingly, "the like consequences shall ensue for all purposes as would have ensued if, at the time when the agreement was come to, a tribunal had determined the appeal in accordance with the terms of the agreement".

56. If the VAT Tribunal had determined the appeals in March 2006 "in accordance with the terms of the agreement", it is clear that it would have decided the amount to be paid (in the amount agreed between the parties); but the question around which this appeal revolves is whether:

> (1) such an adjudication would have amounted to a comprehensive and final determination of the overpaid amounts in respect of the relevant vehicles for the relevant periods (as HMRC assert), or

(2) the adjudication would have left open the possibility of further claims, other than claims with "nothing new to say", in respect of the same vehicles and the same periods (as the Companies assert).

57. This question must be answered by deciding the correct meaning and effect of the Section 85 Agreement.

**Consideration of the grounds of appeal**

58. It is true that the FTT directed itself at [26] by reference to the statements made by Lord Neuberger in *Arnold*, however when it came to give the reasons for its decision, at [31] of the Decision, it is difficult to see how it followed its own direction. At [31(1) to (3)] it recounted some of the history leading up to the settlement, then at [31(4)] it drew the following conclusions from that history:

(1) The Companies (through their representatives) were prepared to "do a deal".

(2) It was never a condition of the deal that the Italian tables were accurate, indeed both sides knew that they were simply an estimation in order to enable traders without adequate records to bring a claim.

(3) So far as HMRC were concerned, the deal they had struck was payment of a sum of money in settlement of all *Marks & Spencer* claims.

(4) The 2003 claims related to a certain number of demonstrator vehicles for certain VAT periods.

(5) There was discussion and subsequent alteration to the Companies' position on one particular aspect of the quantification of the claim (the "1.85 times uplift for Jaguars and Daimlers").

59. Then at [31(5)] it expressed the conclusion that:

> To my mind a reasonable person having all the background knowledge which would have been available to the parties would have understood the word "claim" in the Section 85 agreement not to bear the highly technical and deconstructed meaning which has been suggested to me by both Mr Puzey and Mr Mantle. At the time at which this deal was struck the evidence shows that the parties simply wanted to conclude a deal on the best possible terms for each of them… when they used the word claim in the Section 85 agreement, they did so in a commercial sense, in the context, of course, that the 2003 claims were claims under section 80 and the decisions against which the appellant appealed related to those claims. It was inevitable therefore that a "claim" was identified as being settled by Section 85. But the reasonable person looking at that agreement now, would have understood it to mean all the Italian margin claims which related to the vehicles for the periods. The reasonable person with the background knowledge would not have thought that it was limited to only those claims which had been brought on the basis of the methodology set out in the 2003 claims.

60. It then added some additional observations:

(1) Neither side probably gave any thought to what might happen if the Italian tables turned out to be wrong. The evidence of the Companies' representative that she would have advised the Companies not to sign the agreement if she had known the Italian tables were incorrect was to be disregarded as irrelevant ([31(6)]).

(2) There was no challenge to the Section 85 Agreement based on mistake or misrepresentation. Many of the factors subsequently used to update the Italian tables already existed at the time of the 2003 claims, they simply had not been properly analysed

and understood. This could have been done at the time, which would have enabled the Companies to deal with matters on a provisional basis pending "correction" of the Italian tables – which they had not done. This indicated that it was not in the parties' contemplation at the time that a "second bite at the cherry" might be permitted. HMRC's understanding was that the settlement was for "all aspects of the appellants' claims" and their draft of the Section 85 Agreement was based on that understanding. ([31(7)]).

(3) The draft Section 85 Agreement was a "negotiated document", to which detailed changes were made at the instance of the Companies' representative. They did not suggest any amendment, or collateral agreement, to deal with further claims. ([31(8) & (9)]).

(4) The FTT did not consider relevant HMRC's argument that the Companies' case on the extent of the Section 85 Agreement was inconsistent with their submissions about "second or successive claims with nothing new to say", even though it could see the point.

61. It is therefore somewhat difficult to discern precisely how the FTT has gone about complying with its own direction at [26], and how it has arrived at the conclusion that it has.

62. As such, we consider that there are errors of law in the Decision.

63. In the circumstances, we consider that we should set aside and remake the Decision, applying our own analysis on the basis of the facts found by the FTT.

**Analysis**

64. The Companies' argument proceeds on the basis that, properly construed, the "terms of the agreement" (and therefore the tribunal's deemed determination under section 85 VATA) should be regarded as permitting further claims, in respect of the same underlying subject matter, which had "something new to say[2]" – as their 2009 claims did.

65. This then leads on to an examination, on general principles of interpretation, of the meaning of the phrase "the Appellants' claim for overpaid VAT" in the Section 85 Agreement. Should this phrase be interpreted as meaning that the agreement between the parties (and consequently the deemed determination of the Tribunal) only extended to the claim as formulated up to that time (or, as Mr Mantle put it, did not go "beyond the parameters of the 2003 claims as actually originally made or as actually amended", and did not cover "section 80 claims which, although accrued, had not been made")? Or should it be interpreted as meaning that the Section 85 Agreement (and therefore the deemed determination of the Tribunal) extended to cover the whole of any overpayment which had arisen in respect of the relevant supplies of vehicles by the Companies over the relevant period?

66. We adopt the approach set out in *Arnold* at [15] to [23] in considering this question, bearing in mind that the context is an agreement entered into to settle an appeal under a statutory provision.

67. We therefore ask ourselves "what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean", and we do so by focussing on the meaning of the words "the Appellants' claim for overpaid VAT" in their documentary, factual and commercial context, in the light of the six elements identified by Lord Neuberger in *Arnold* at [15(i) to (vi)].

[2] This phrase is used simply as shorthand to denote the opposite of claims having "nothing new to say", the phrase actually considered in the authorities.

68. First (considering element [15(i)] from *Arnold*), as to the "natural and ordinary meaning" of the phrase "in settlement of the Appellants' claim for overpaid VAT" in the Section 85 Agreement (when considered purely on the basis of the wording of the Section 85 Agreement itself), we regard it as referring to the fact that the Appellants had made a claim for overpaid VAT under section 80 VATA, HMRC had rejected that claim by letter dated 21 July 2005, the Appellants had appealed against that decision to the Tribunal, and the settlement was intended to settle the quantum of that claim and the appeal. The phrase makes no mention of any particular basis of the claim, nor does it even refer specifically to the nature of the claim, the periods in respect of which it was made or the vehicles with which it was concerned, still less does it refer to any particular method of calculation. The use of the singular word "claim" (when in fact there were four separate detailed "claims") connotes reference to a single umbrella concept of "claim", rather than to the specific individual claims made by the Companies. In the light of this, we consider the natural and ordinary meaning of the phrase as it stands refers to that wider concept of "claim". This militates somewhat against the suggestion that "claim" should be interpreted as referring to the specific details of the claim by each of the Companies, including its method of calculation.

69. Turning to element [15(ii)] of *Arnold*, the only other part of the Section 85 Agreement which either side argued might cast light on the meaning of the key phrase was the specific provision in relation to the "Regulation 29 claim". We do not consider this to be of any assistance at all. The most that could be said of the provision is that it showed the agreement to have been a thoughtfully negotiated document, but that does not provide any assistance in interpreting the key phrase in it.

70. As to element [15(iii)] of *Arnold*, the overall purpose of the key phrase and the Section 85 Agreement as a whole was clearly to settle the dispute between the parties as they understood it at the time. But that does not really assist in deciding the extent to which the settlement was intended to be final or to leave room for a potential future claim based on a different method of calculation which the parties did not foresee at the time.

71. As to element [15(iv)] of *Arnold*, the facts and circumstances known or assumed by the parties at the time clearly included all the background correspondence leading up to the agreement, which shows that the claim arose in respect of certain estimated numbers of different types of vehicles, supplied during specific VAT accounting periods. It also shows how the claim had been initially calculated, subsequently negotiated and then finalised, including by reference to the Italian tables in circulation at the time. We consider that in deciding on the natural and ordinary meaning of the phrase "the Appellants' claim for overpaid VAT", this background material demonstrates that the claims themselves evolved over the period from June 2003 to March 2006. Whether the claim of each of the Companies is viewed individually or they are viewed together as a composite "claim", we consider it to have been the same "claim" over that period, and Mr Mantle did not argue otherwise. The common element throughout the period remained the fact that relief was being sought for all the overpayments made by the Companies in respect of their demonstrator vehicles in respect of the specific identified accounting periods. The method of arriving at the amounts of those overpayments (both in agreeing the numbers of vehicles involved and, in some cases, the applicable margins) changed over the period of negotiation, but the core objective of the claim remained the same, i.e. to recover a quantified amount of VAT that had been overpaid. The fact that one particular element of the negotiations throughout was reliance by both parties on the Italian tables as they stood at the time does not in our view mean that the phrase "the Appellants' claim for overpaid VAT" should be limited to claims which were formulated on the basis of those tables, because those tables were simply a part of the method that was used to calculate the amounts of the claims. Further, as discussed below at [79], in the context of a

Section 85 Agreement (where the appeal concerns quantum) the amounts set out in the Agreement are deemed to be, or have the effect of, a determination by a Tribunal of the correct amount of overpaid VAT. We consider this also militates against limiting the meaning of the phrase "the Appellants' claim for overpaid VAT" to claims formulated on the basis of those tables.

72. Still addressing element [15(iv)] of *Arnold*, whilst Mr Mantle made much of the fact that as a matter of law when the Section 85 Agreement was signed, second or subsequent claims under section 80 VATA were permissible unless they had "nothing new to say" (based on *Hayward Gill*), there was no finding by the FTT that anyone at the Companies, their advisers or HMRC were aware of that fact, nor was there any reference to it in the witness statement or contemporaneous documents before the FTT. It might be argued that because knowledge of the *Hayward Gill* principle was "available" to the parties, such knowledge should be imputed to them (whether they actually had it or not) for the purposes of identifying their intention by reference to the overall objective identified at the start of [15] of *Arnold:* "what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean" *[emphasis added]*; but even if this is correct (which we doubt), given the limitations of the *Hayward Gill* principle referred to from [76] below, we do not consider it adds any great weight to Mr Mantle's argument.

73. As to element [15(v)] of *Arnold*, attempting to apply "commercial common sense" to the Section 85 Agreement is fraught with difficulties. First, we are mindful of Lord Neuberger's injunction in *Arnold* at [17] that reliance on commercial common sense and surrounding circumstances "should not be invoked to undervalue the importance of the language of the provision which is to be construed. The exercise of interpreting a provision involves identifying what the parties meant through the eyes of a reasonable reader, and, save perhaps in a very unusual case, that meaning is most obviously to be gleaned from the language of the provision." Second, there is no objective "commercial common sense" which underpins the interpretation contended for by either party: for each party, the interpretation they now contend for would make perfect commercial common sense. This takes the matter no further forward.

74. In relation to Mr Mantle's argument that "commercial common sense" should be qualified by reference to HMRC's particular status as a tax collecting agency charged with collection the correct amount of tax, we consider that does not affect matters either. The legislation sets out a statutory basis for the settlement of appeals and it we consider it unlikely Parliament would have intended that an agreement under the statutory scheme should be interpreted to allow an appellant simply to ignore the agreement if it subsequently discovers new facts which, if known to it earlier, would have enabled it to reach a more advantageous settlement; such a suggestion would be inconsistent with the whole concept of final settlement of appeals by agreement. See also [76] to [79] below.

75. Finally (element [15(vi)] of *Arnold*), it is clear that the subjective evidence of either party's intentions is to be disregarded; however, in a situation where both sides candidly accept that the eventuality which actually took place was not in the contemplation of either of them at the time, this is of limited relevance in any event.

76. Turning now in more detail to the *Hayward Gill* argument of Mr Mantle, quite apart from the fact (identified above) that there does not appear to be any evidence the Companies were aware at the time the Section 85 Agreement was signed of the possibility of second or subsequent claims, we do not in any event consider that *Hayward Gill* and the apparent endorsement of it in *John Wilkins* bear the weight that Mr Mantle seeks to place on them. In *Hayward Gill*, the taxpayer had simply made a claim for refund of an overpayment, based on

HMRC's published guidance as to the basis upon which it was prepared to accept such claims. HMRC had then simply paid it. There had been no agreement and no appeal to the Tribunal. Subsequently, HMRC had published guidance permitting a more advantageous basis for such claims, and the taxpayer submitted a further claim for the difference. HMRC argued that the second claim should be rejected by analogy to the principle of *res judicata*. The Tribunal rejected the argument, but in doing so said this:

> There has been no adjudication on the claim by an independent authority separate from the Commissioners and the Appellant. Any decision of the Commissioners in relation to a refusal to make a repayment is subject to an appeal to the tribunal and it is the tribunal's decision to which the principles of res judicata would be applicable, not the decision of the Commissioners, whether their original decision to reject the claim or a decision of the Commissioners on review. At that stage there is no question of the respective claims of the parties being adjudicated upon by anyone.

77. In relation to the argument that there had been an agreement which should be regarded as compromising the appellant's claim in full, it said this:

> There is no question of any negotiations having taken place between the parties in which either can properly be said to have compromised or settled for a particular sum a claim or contention by way of any legally binding agreement.

78. In other words, the Tribunal's decision in *Hayward Gill* to allow the second claim was specific to a situation in which there had been no agreement, no appeal to the Tribunal and no determination (actual or deemed) by the Tribunal, and it seems to us that there are clear indications in the decision that it may well have decided the matter differently if there had been an agreement, appeal and/or determination (actual or deemed) by the Tribunal. This point did not arise for consideration in *John Wilkins*, accordingly there is nothing in that decision which in our view casts any further light on the matter.

79. Section 85 provides that all the like consequences shall ensue for all purposes as would have ensued if, at the time when the agreement was come to, a tribunal had determined the appeal in accordance with the terms of the agreement. Following on from our observations above, we consider what would have happened if there had been no settlement and the 2003 claims had been determined by the Tribunal. In that case, the quantum of the claims (which was the only issue remaining outstanding) would have been determined by the Tribunal, probably using the Italian tables current at the time – though, as Mr Puzey pointed out, the Tribunal need not have done so (he gave *HMRC v General Motors UK Limited* [2015] UKUT 605 (TCC) as an example of a situation in which the FTT had used its own method to reach a result, not accepting one advanced by the parties, and the Upper Tribunal had endorsed that approach). The Tribunal would have had to form a view about the number of vehicles involved in each VAT accounting period, and the amount of overpayment attributable to each one. It would have had to do this on the basis of the best evidence available to it at the time, and after it had issued its decision (no appeal against such a decision having been made), any later attempt to re-open the matter on the basis that subsequent evidence showed there were better approximations than those which the Tribunal had adopted would, we consider, inevitably have been met by an argument that the matter was *res judicata*. To accept Mr Mantle's argument, we would have to be satisfied either that this analysis is wrong, or that a Tribunal would have been willing and able to issue a determination which (despite having determined the amount of VAT that had been overpaid) explicitly allowed for the parties to make further claims (presumably either for further payments or for repayment of excessive payments) after the

event unless those claims had "nothing new to say". We reject any such suggestion as completely implausible.

80. Whilst we would agree with Mr Puzey that the case law on what constitutes a "new claim" as opposed to an amendment to a pre-existing claim has some relevance (though that case law is mostly concerned with the question of identifying whether a supposed amendment to an existing claim is in fact a new claim and therefore out of time), it does not appear that the arguments as advanced before us (or the authorities relied on) were put to the FTT. Further HMRC did not appeal against the FTT's finding at [24] that the claims were permissible second claims under section 80. Whether or not we agree with the Tribunal's conclusion, just because the 2009 claims had something new to say does not in our view mean that they must be regarded as entirely valid new claims outside the scope of the Section 85 Agreement, as Mr Mantle appeared to be arguing.

81. Nor do we accept Mr Mantle's argument that the very fact of a different method of calculation meant that the 2009 claims must be regarded as distinct claims as a result of Regulation 37 of the VAT Regulations. That regulation is in our view an administrative provision which simply requires that, to be validly made, a claim needs to include a statement of the amount claimed and the method of calculation so that HMRC are in a position to understand and respond to the claim properly. If Mr Mantle's argument were correct, every slight change in the method of calculation during the course of negotiation of a claim would technically result in a new claim, with all the risks highlighted in the case law of the supposedly new claim falling foul of statutory time limits.

82. For the above reasons, we consider it is clear that a reasonable person, having all the background knowledge which would have been available to the parties at the time of signature of the Section 85 Agreement, would have understood the phrase "the Appellants' claim for overpaid VAT" in the Section 85 Agreement to have the meaning contended for by HMRC, namely as extending to all overpayments pursuant to the *Italian Republic* case in relation to the vehicles supplied by the Companies during the relevant periods.

83. Neither party disputed that if we reached this conclusion, then it would automatically follow that the appeals against HMRC's refusal of the 2009 claims ought to be dismissed as an abuse of process. We agree.

84. It follows that we agree with the FTT that the Section 85 Agreement precludes the Companies from making any further valid *Italian* Republic claims in respect of the periods covered by it, that the attempt to do so in the 2009 claims was invalid and therefore their appeals against HMRC's refusal of those claims amounts to an abuse of process.

**CONCLUSION AND SUMMARY**

85. We consider there to have been errors in the FTT's Decision and therefore set it aside – see [61] and [62] above.

86. In remaking the decision, we have reached the same conclusion as the FTT but for the different reasons which we have given – see [82] to [84] above.

87. The appeal is therefore DISMISSED.

**JUDGE PHYLLIS RAMSHAW**
**JUDGE KEVIN POOLE**

**Release date: 13 October 2023**

## APPENDIX

### FULL TEXT OF THE SECTION 85 AGREEMENT

VAT and Duties Tribunals — Tribunal centre: LONDON

Reference: LON/05/0761
LON/05/0762
LON/05/0821
LON/05/0825

**DOVE GROUP PLC AND INVICTA MOTORS LTD**

Appellants

**COMMISSIONERS OF H.M. REVENUE AND CUSTOMS**

Respondents

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**AGREEMENT UNDER SECTION 85 VALUE ADDED TAX ACT 1994**

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The Appellants and Respondents **HEREBY AGREE** that the Appellants' appeal against the Commissioners' decision notified in their letter issued on 21 July 2005 refusing part of the appellant's claim (as amended) under section 80 of the Value Added Tax Act 1994 shall be settled upon the following terms:-

The Respondents will pay the sum of £1,423,510.58 (one million, four hundred and twenty three thousand, five hundred and ten pounds and 58p) in settlement of the Appellants' claim for overpaid VAT. In addition, the Commissioners will pay statutory interest under section 78 of the Value Added Tax Act 1994, with the exception of that part of the claim where it has been agreed there was no error on the part of the Commissioners. The amounts already paid by the Commissioners in relation to the Appellants' claim will form part of the above mentioned sums. The Commissioners also agree to pay £38,813.27 of the claim which relates to a claim under Regulation 29 of the Value Added Tax Regulations 1995, SI 1995/2518 in the event that ongoing litigation in another case is not resolved in the Commissioners' favour.

Each party will bear their own costs in the appeal.

Each appellant hereby acknowledges that if he does not within 30 days of the date hereof give notice in writing to the Commissioners that he desires to repudiate or resile from this agreement, this agreement shall be legally binding as if the matter had been decided by a Tribunal.

| | | |
|---|---|---|
| Name S J D Taylor<br>(On behalf of the appellants) | Signature: [*Signed*]<br>Secretary | Date 23.3.2006 |
| Name J H Ridings<br>(On behalf of HM Revenue & Customs) | Signature: [*Signed*]<br>Higher officer | Date 29/3/06 |