18TACD2018

REDACTED

Appellant

V

REVENUE COMMISSIONERS

Respondent

DETERMINATION

Introduction

1. This is an appeal pursuant to Value Added Tax Consolidation Act 2010 (VATCA), section 119(1)(h) against a refusal by the Respondent to refund the Value Added Tax (VAT) in respect of a deduction for tax paid on the purchase of goods that was included in the return for the VAT period November/December 2008 against the Appellant's VAT liability for the earlier period July/August 2008 on the grounds that the Appellant's application for an offset was made on 22nd May 2013 and therefore outside of the four year time limit to which the claim relates as prescribed by VATCA, section 99(4).

Background

2. The Appellant carried on a business in **Redacted** before going into liquidation on 24th **Redacted**.

3. The bi-monthly VAT 3 returns for July/August 2008, September/October 2008, November/December 2008, January/February 2009, March/April 2009 and May/June 2009 taxable periods were filed by the Appellant on 22nd May 2013.

4. The VAT payable/repayable position on the basis of the returns is as follows:

	Payable	**Repayable**
July/August 2008	€34,125	
September/October 2008	€1,133	
November/December 2008		(€29,442)
January/February 2009	€1,157	
March/April 2009		(€1,235)
May/June 2009	Nil	Nil

5. The VAT payable figure of €34,125 for the taxable period July/August 2008 equates to the VAT amount on a sale of equipment by the **Redacted** to **Redacted** in August 2008. The sales invoice is dated 28th August 2008 and is shown in the sales listing for the taxable period July/August 2008 provided by the Appellant to the Respondent in correspondence of 18th October 2013.

6. The purchase invoice dated 1st October 2008 is recorded in the November/December 2008 taxable period. The payment of monies to **Bank** was made at the start of November 2008.

7. The VAT repayable figure of €29,442 for VAT taxable period November/December 2008 refers in most part to the purchase of the same equipment by the Appellant from **Bank** which included VAT of €30,450.

8. The VAT repayment claim of €29,442 for November/December 2018 VAT period was denied by the Respondent on the basis that it was outside of the four year time limit to which the claim relates as required by VATCA, section 99(4).

Legislation

9. VATCA, Chapter 1, Part 8 sets out the procedures for deducting VAT on goods and services that are used for the purpose of a taxable business. Contained within that Chapter is section 59(2) with provides *inter alia*:

> *"Subject to subsection (3), in computing the amount of tax payable by an accountable person in respect of a taxable period, that person may, in so far as the goods and services are used by him or her for the purposes of his or her taxable supplies or of any of the qualifying activities, deduct—*
>
> *(a) the tax charged to him or her during the period by other accountable persons by means of invoices, prepared in the manner prescribed by regulations, in respect of supplies of goods or services to him or her"*

10. VATCA, section 74 sets out the various rules for the time when VAT becomes due, or when a liability to VAT arises, in respect of supplies of goods and services. VATCA, section 74(1) provides that in relation to a transaction between taxable persons, the VAT becomes due on the date of issue of the invoice, or, if the invoice has not been issued at the proper time, on the date on which it should have been issued.

11. The general provision for refunds of VAT is set out in VATCA, section 99 and provides, *inter alia*:

> *(1) Subject to subsections (2) and (3), where in relation to a return lodged under Chapter 3 of Part 9 or a claim made in accordance with regulations, it is shown to the satisfaction of the Revenue Commissioners that, as respects any taxable period, the amount of tax (if any) actually paid to the Collector-General in accordance with Chapter 3 of Part 9 together with the amount of tax (if any) which qualified for deduction under Chapter 1 of Part 8 exceeds the tax (if any) which would properly be payable if no deduction were made under Chapter 1 of Part 8, the Commissioners shall refund the amount of the excess less any sums previously refunded under this subsection or repaid under Chapter 1 of Part 8 and may include in the amount refunded any interest which has been paid under section 114.*
>
> *(2) …..*
>
> *(3) …..*
>
> *(4) A claim for a refund under this Act may be made only within 4 years after the end of the taxable period to which it relates.*

12. Finance Act 2012, section 128 introduced an amendment to the Tax Consolidation Act 1997 (TCA) by the insertion of section 865B the purpose of which is to restrict, subject to a specified exception, the offset of an overpayment of tax where no repayment can be made. The definition of 'tax' is set out in subsection 1 to include VAT.

13. TCA, section 865(B)(1)(f) defines the 'relevant period' for VAT purposes as:

> *"the year of assessment or accounting period as the case may be, within which falls the taxable period in respect of which the repayment arises "*

14. TCA, section 865B(2) provides, *inter alia*, that any repayment of VAT pursuant to VATCA , section 99:

> "*shall not be set against any other amount of tax due and payable by, or from, that person*."

15. The exception is set out in the following subsections of TCA, section 865B which state:

> *(3) Where a repayment of tax cannot be made to a person in respect of a relevant period, it may be set against the amount of tax to which paragraph (a) of subsection (4) applies which is due and payable by the person in the circumstances set out in paragraph (b) of that subsection.*

(4) (a)The amount of tax to which this paragraph applies is the amount, or so much of the amount, of tax that is due and payable by the person in respect of the relevant period as does not exceed the amount of the repayment that cannot be made to the person in respect of that relevant period.

(b)The circumstances set out in this paragraph are where tax is due and payable in respect of the relevant period by virtue of an assessment that is made or amended, or any other action that is taken for the recovery of tax, at a time that is 4 years or more after the end of the relevant period."

Appellant's Submissions

17. To facilitate the sale, the liquidator purchased the equipment in the taxable period July/August 2008 for €145,000 plus VAT of €30,450. However, the invoice in respect of that purchase was not received until November 2008. In this regard, the Appellant argued that the Respondent's use of TCA, section 865B is in effect applying a sales tax regime to the sale of the equipment.

18. The Appellant argued that the failure of the Respondent to refund the overpayment of VAT in respect of the taxable periods November/December 2008 and March/April 2009 constituted an "*action that is taken for the recovery of tax"* in accordance TCA, section 865B(4)(b) and as a consequence those amounts are available for offset against the VAT liabilities arising in the taxable period July/August 2008.

19. The Appellant submitted that TCA, section 865B did not provide the authority to deny the offset of a VAT repayment arising in a VAT period against a VAT liability for another vatable period on the basis that TCA, section 865B provides that in the event of the four-year time limit for repayment of VAT, as set out in VATCA, section 99, the amount at issue cannot be set off against other tax heads not falling within the relevant period as defined.

20. It was also argued that there must be specific authority in the VATCA to deny the set off of a VAT repayment arising in a VAT period against a VAT liability for another vatable period. The Appellant argued that there is no such specific authority in VATCA which is fortified by the fact that TCA, section 865(B) which is an amendment/extension of TCA, does not apply to VAT having regard to the fundamental legal principles of statutory scheme or design. The statutory scheme or design in relation to VAT matters is contained in the VAT Acts not in an Income Tax Act/Taxes Consolidation Act 1997.

21. Furthermore, TCA, section 865(B)(3) and (4) state specifically that an offset can apply within a relevant period and therefore the four-year rule does not apply. Relevant period for VAT is defined in TCA, section 865(B)(1)(f) as:

"the year of assessment or accounting period as the case may be, within which falls the taxable period in respect of which the repayment arises "

22. As the relevant period in this case is the accounting period ended 30th June 2009, the four year time limit does not apply to set off between vatable periods in the relevant period 1 July 2008 to 30th June 2009. Therefore, the VAT credits for vatable period November/December 2008 of €30,450 and March /April 2009 of €1,235 can be set off against any of the six vatable periods falling within the accounting period ended 30th June 2009.

23. The VAT law of the European Union is also highly significant with the European Court of Justice (ECJ) acting as the ultimate arbiter in relation to VAT disputes. A clear principle emanating from the ECJ is that a domestic VAT provision should not be such as to thwart the fundamental principle in VAT, namely, that it is a tax on added value.

24. Furthermore, the issue in this appeal is the offset of VAT credits not the actual repayment of VAT. The Appellant submitted that the Respondent cannot contend that, in effect, the thwarting of the fundamental principle in VAT law is justified on the grounds of the potential danger of major unforeseen VAT liabilities for the State.

25. The Appellant argued that the position taken by the Respondent should also be seen in the context of the lack of equal rights between the Revenue and the taxpayer, namely, the Respondent claiming the right to recover VAT for a vatable period outside the 4 year time limit, while at the same time not having an obligation to offset surplus VAT credit against a VAT liability arising for vatable periods outside this 4 year time limit.

26. The differentiation approach was considered in the UK *Marks and Spencer* (C-309/06). The Appellant argued that such approach is more relevant in this appeal to the extent that the actual refund of VAT is not an issue. As such a fundamental principle in VAT law is not being implemented.

27. Furthermore, the Appellant submitted that the legislative amendment introduced by Finance Act 2012 by the insertion into the TCA of section 865B does not apply to VAT. It was argued that such an amendment does not contain what is termed a transitional period before this alleged rule came into play. The lack of such a transitional provision, on its own, raises doubts about the validity of the said provision from a VAT viewpoint having regard to the decision of the ECJ in another *Marks and Spencer* (C-62/100) case. In other words, such a transitional provision, even where the particular legislation itself is compatible with EC law, is necessary to comply with the principles of effectiveness in community law and of the protection of legitimate expectations.

27. It was asserted that the Appellant held the equipment which was either subject to a hire purchase agreement with **Bank** or more likely a finance lease agreement. In both scenarios ownership of the equipment rests with the hire purchase/leasing company for the period of the agreement. As such, the date of supply of equipment subject to a hire purchase agreement is the date the final sum due under the said agreement is paid pursuant to VATCA, section 19(1)(c). However, in a supplemental submission, the Appellant resiled from that position and acknowledged that the date of supply under a hire purchase agreement is the date of handing over of the goods.

28. At the date of liquidation, **Date**, it was asserted the Appellant had arrears under a finance agreement. The liquidator wrote to **Bank** on August 22nd 2008 seeking a settlement figure for the equipment. In August 2008, the liquidator identified, **Purchaser** as a suitable customer to acquire the equipment particularly in light of the very limited pool of customers for such equipment and the rapidly deteriorating financial outlook. The sales invoice is dated 28th August 2008 and is shown in the sales listing provided in respect of the taxable period July/August 2008 by the Appellant to the Respondent in correspondence of 18th October 2013.

29. It was asserted that the Appellant should not have been in a position to make a supply of the equipment in August 2008 "*as it would have been unable to transfer the right to dispose of it as owner until October 31 2008*", the date the agreement was settled with the hire purchase company. As a consequence, the Appellant argued that "*it would appear, if it was a HP agreement, the acquisition, technically, of the items of the equipment would have been in the VAT period September/October 2008. This, initially would appear, would also be the VAT period when it made the supply i.e. it was in a position to transfer the right of ownership.*"

30. The Appellant thereafter asserted that the liquidator acted as an undisclosed agent for the hire purchase/ lease company by entering into an agreement with **Purchaser** to sell the equipment for €162,500 plus VAT on 24th August 2008. As such, "*there are compelling reasons for concluding that for VAT purposes, there was an acquisition and a disposal, by the liquidator, of the equipment in the same VAT period July/August 2008 irrespective of whether it was the subject of a HP or finance leases*."

31. On this assumption, "*the undisclosed agency rules in VAT law states that there is a simultaneous receipt and supply of the goods for VAT purposes i.e a supply by the principal (the HP or Finance company) to the liquidator and simultaneous supply by the liquidator to the third party, (Section 19(1)(b) VATCA 2010."*

32. In the light of the above, the Appellant submitted that the importance of the application of the principle of fiscal neutrality, as highlighted by the decisions of the ECJ, in cases *PPUH Stehcemp sp. j. Florian Stefanek, Janina Stefanek, Jarosław Stefanek v Dyrektor Izby Skarbowej w Łodzi* (C-277/14) and *Lea Jorion nee Jeunehomme and Société*

*Anonyme d'Etude et de Gestion Immobilière "EGI"v Belgian State (*Joined cases 123 and 330/87)**.** As such, the Appellant submitted that the Respondent has denied a VAT credit for VAT suffered in respect of the same goods purchased and sold in the same vatable period.

33. Finally, in a further supplemental submission, the Appellant argued that as no VAT was paid to the Collector General, in the VAT period July/August 2008, the provisions of VATCA, section 99(4) do not apply.

Respondent's Submissions

34. The VAT payable of €34,125 for VAT taxable period July/August 2008 equates to the VAT on sales figure on the sale of the equipment to **Purchaser**. The VAT repayable of €29,442 for VAT taxable period November/December 2008 refers in the most part to the purchase of the same equipment by the Appellant from **Bank**.

35. The general provisions for the refund of VAT are set out in VATCA, section 99. This section provides for repayment of VAT where input credit exceeds output VAT liability. VATCA, section 99(4) states that '*A claim for a refund under the Act may be made only within 4 years after the end of the taxable period to which it relates*'. As such, a repayment of tax cannot be claimed outside of that statutorily prescribed time period.

36. The 4 year time limit in respect of the taxable period November/December 2008 expired on 31st December 2012. The claim in respect of the taxable period November/December 2008 was made by the Appellant on 22nd May 2013 and therefore falls outside the 4 year claim period. The Appellant therefore has not made a timely claim. Furthermore, the Appellant has no right to set off VAT which was statute barred by reason of VATCA, section 99(4). The right of set off does not exist in relation to a statute barred debt in accordance with *Morris, Coneys v Morris* [1922] 1 IR 81 at page 92.

37. An exception applies where tax is due and payable for a tax year or accounting period by virtue of action taken by Revenue, to assess or recover tax, at a time that is 4 years or more after the end of the year or period involved. In such case, an amount of tax which cannot be repaid because of the application of a time limit, but which relates to the same tax year or accounting period as the tax liability that the Respondent is pursuing, is available for offset against the liability.

38. The Respondent argued that the entitlement to offset VAT overpayments against liabilities, pursuant to TCA, section 865B(4)(b) only applies "*where tax is due and payable in respect of the relevant period by virtue of an assessment that is made or amended, or any other action that is taken for the recovery of tax"* and that no assessment has been made or amended and no action is being taken for the recovery of

tax. As such the refusal by the Respondent to refund the tax does not constitute an action for the recovery of tax.

39. The Respondent submitted that the Appellant's assertion that TCA, section 865B does not apply to VAT is incorrect. In this regard, Finance Act 2012, section 141(7)(h) specifically states that Part 6, which contains the amending provision section 128, provides that "*value added tax shall be construed together with the Value Added Tax Acts"*. As a result of this provision, the provisions of TCA, section 865B applies to all statutorily prescribed taxheads. It is effective from 31st March 2012 and forms part of TCA, Part 37 which relates to the administration of taxes.

40. On the plain wording of TCA, section 865B, 'tax' is defined in TCA, section 865B(1) to include VAT. The meaning of 'Acts' as it relates to TCA, section 865B includes the Value Added Tax Consolidation Act 2010 and the enactments amending or extending that Act.

41. As such TCA, section 865B(2) provides that where a repayment of 'tax' cannot be made by virtue of the operation of VATCA, section 99, that repayment cannot be set against any other amount of 'tax' due and payable by the person. As 'tax' is defined in TCA, section 865B to include VAT, it is very clear that '*No tax shall be set against any other amount of tax except as is provided for by the Acts*'.

42. Insofar as the Appellant argued that the time limit is contrary to the Sixth Council Directive 77/338/EEC of 17 May 1977 on the harmonization of the laws of Member States relating to turnover taxes – Common system of value added tax, uniform basis of assessment as amended 'the Sixth Directive', reference was made to the judgement of the ECJ in *Ecotrade SpA* C-95/07 (judgement 08/05/2008) which related in particular to a limitation period for claiming of input credit. The following extracts from that judgment were cited:

> *"44. Furthermore, the possibility of exercising the right to deduct without any temporal limit would be contrary to the principle of legal certainty, which requires the tax position of the taxable person, having regard to his rights and obligations vis-à-vis the tax authority, not to be open to challenge indefinitely.*
>
> *….*
>
> *48. With respect to the principle of effectiveness, it should be pointed out that a two year time limit, such as that at issue in the main proceedings, cannot, in itself, render the exercise of the right to deduct virtually impossible or excessively difficult since Article 18(2) of the Sixth Directive allows Member States to require that the taxable person exercise his right to deduct during the same period as that in which it arose."*

43. These same principles were again reiterated in *Alstom Power Hydro* C-427/08 (judgement 21/01/2010) which concerned a limitation period for claims for repayment of overpaid VAT. The Respondent referred to the following paragraphs in that judgement:

> *"20. As regards the question of what period is to be considered 'reasonable', it should also be pointed out that the Court has already held that a two year time limit cannot, in itself, render the exercise of the right to deduct virtually impossible or excessively difficult, since Article 18(2) of the Sixth Directive allows Member States to require that the taxable person exercise his right to deduct during the same period as that in which it arose (see Ecotrade, paragraph 48).*
>
> *21. The same finding is all the more compelling as regards a limitation period of three years, such as that applicable in the main proceedings, since that period is, in principle, such as to permit any normally attentive taxable person, validly to assert his rights derived from European Union Law."*

44. In *Alstom Power Hydro*, a 3 year time limit was in the judgement of the Court sufficient to permit a normally attentive person to assert his rights under EU law.

45. The principle of legitimate expectation applies so as to preclude a national legislative amendment which retrospectively deprives a taxable person of the rights enjoyed prior to that amendment to obtain repayment of taxes collected in breach of the Sixth Directive. The ECJ decision in *Marks & Spencer plc* C-62/00 (judgement 11/07/2002) prevents Member States from retrospectively shortening the recovery period for input VAT without providing a reasonable transitional period. In *Marks & Spencer plc*, national legislation shortened the period of reclaim from 6 years down to 3. The ECJ held that it was compatible with EU law to lay down reasonable time limits, but certain conditions must be fulfilled as:

> *(a)* it must not be intended specifically to limit the consequences of a judgement of the Court of Justice to the effect that national legislation concerning a specific tax is incompatible with EU laws, and
> *(b)* the time limit set for its application must be sufficient to ensure that the right for repayment is effective.

46. The Respondent submitted that the 4 year time limit as set out in VATCA, section 99 cannot be seen as totally depriving a taxable person of the right to recovery. In the context of settled case law, it may be said that the application of the 4 year time limitation contained within VATCA, section 99(4) has not made it impossible or

excessively difficult to make a claim. Therefore, the principles of effectiveness and protection of legitimate expectations have not been infringed in this case.

47. With regard to the Appellant's observation with regard to the lack of equal rights, the judgement in the *Marks & Spencer Plc v CRS* C-309/06 (judgement 10/04/2008) is particularly relevant to the extent that the ECJ held that the application of the unjust enrichment defence that only applied to payment traders and not repayment traders offended the Community law principles of fiscal neutrality and equal treatment. The principle of equality is one of the fundamental principles of Community Law and requires that similar situations should not be treated differently unless differentiation is objectively justified. EU law does not prevent a national legal system from disallowing the repayment of charges which have been levied but were not due where to do so would lead to unjust enrichment of the recipient, but in order to comply with EU law the principle prohibiting unjust enrichment must be implemented in accordance with the principle of equal treatment.

48. This lack of equal rights regarding the treatment of payment traders as opposed to repayment traders by the tax authority does not arise in this appeal as the facts and circumstances of the case are not similar to those of C-309/06.

49. The judgement of the ECJ in *Societe Financiere d'Investissements SPRL(SFI) and Belgian State* C-85/97 SFI [1998] is also relevant and the following passages were cited by the Respondent:

> *"47. As regards the principle of equivalence, it does not appear from the file, nor has it been argued before the Court, that the limitation period provided for in Article 19(1) of the DPR No 633/72 does not comply with that principle.*
>
> *48. With respect to the principle of effectiveness, it should be pointed out that a two-year time-limit, such as that at issue in the main proceedings, cannot, in itself, render the exercise of the right to deduct virtually impossible or excessively difficult, since Article 18(2) of the Sixth Directive allows Member States to require that the taxable person exercise his right to deduct during the same period as that in which it arose.*
>
> *49. It is also appropriate to examine whether that conclusion is not invalidated by the fact that, under the national legislation, the tax authority has a longer period in which to demand recovery of the VAT due than that accorded to taxable persons to claim deduction of VAT.*
>
> *50. In that regard, it should be pointed out that the tax authority does not have the information necessary to determine the amount of the tax chargeable and the deductions to be made until it receives the taxable person's tax return. In*

the case of an inaccurate return, or where it turns out to be incomplete, it is therefore only from that time that the authorities can reassess the tax return and, where necessary, recover unpaid tax (see, to that effect, Case C-85/97 SFI [1998] ECR I-7447, paragraph 32).

51. Thus the position of the tax authority cannot be compared with that of a taxable person (SFI, paragraph 32). As the Court has already held, the fact that a limitation period begins to run as regards the tax authority at a date subsequent to the date from which the limitation period applicable to the right of a taxable person begins to run is not such to infringe the principle of equality (see, to that effect, SFI, paragraph 33)."

50. The time limit for the Respondent to raise an estimate or assessment of tax is contained VATCA, section 113. The estimate or assessment may be made not later than 4 years after the end of the taxable period to which the estimate or assessment relates. This 4 year time limit was provided for by Section 129 Finance Act 2003 and applies for the making of estimates and assessments for underpayment of VAT for taxable periods after 1st May 2003.

51. However, in a case in which any fraud or neglect has been committed by or on behalf of any person in connection with or in relation to tax, the estimate or assessment may be made at any time for any period for which, by reason of fraud or neglect, tax would be lost to the exchequer.

52. It is also highly relevant that a corresponding 4 year time limit is placed on the Respondent with regard to making of estimates or assessments and therefore the same obligations and requirements are imposed on all parties.

53. The Respondent asserted that the Appellant, in a supplemental submission incorrectly argued that, "*The date of supply, for VAT purposes, of equipment subject to a HP agreement is the date the final sum is paid*" and cites VATCA section 19(1)(c). On the contrary, that provision categorically states the actual handing over of the goods is a supply of goods under VATCA, section 19(1)(c) even though ownership of the goods will not transfer to the purchaser until the terms of the contract have been fulfilled.

54. Furthermore VATCA, section 20(1) provides that the transfer of goods by a finance company to the purchaser on completion of a hire purchase agreement is not a supply of goods.

55. Therefore, the date of supply of the equipment by **Bank** to the Appellant would in all likelihood predate 2008 and would be the date the hire purchase agreement was entered into and not the date that the Appellant settled the hire purchase agreement.

56. In addressing the Appellant's conclusion that "*the liquidator acted as an undisclosed agent for the HP/Finance lease company*", the Respondent pointed out that there has been no indication in the correspondence furnished by the Appellant that the liquidator was acting on the instruction of or on account of **Bank**. Furthermore, there is no reference to any commission element payable to the liquidator together with the fact that the undisclosed agency rules in VAT law are not supported by the sales and purchase invoices which are dated 28th August 2008 and 1st October 2008 respectively.

57. Furthermore, VATCA section 22(3) deals with sales of an accountable person's assets by liquidators who might dispose of goods forming part of the assets of an accountable person in the course of a winding up of a company. Under this provision, the accountable person's assets that are being disposed of by the liquidator are deemed to be supplied by the accountable person in the course and furtherance of his/her business.

58. Therefore, the Respondent cannot agree with the Appellant's conclusion that the liquidator acted as an undisclosed agent in the sale of the equipment from **Bank** to **Purchaser**.

Analysis

59. A claim for a refund, pursuant to VATCA, section 99(4) can only be made "*within 4 years after the end of the taxable period to which it relates*". The taxable period as defined by VATCA, section 2 is the "*period of 2 months beginning on 1st January, 1st March, 1st May, 1st July, 1st September or 1st November*". The Appellant's VAT overpayment arose in the 2 month taxable period that began on 1st November 2008 and ended on 31st December 2008. As a consequence, the claim for a refund should have been made before 31st December 2012.

60. The Appellant's claim for the refund was made on 22nd May 2013 and therefore outside of the statutory limit of 4 years from the taxable period to which it relates. As such the claim for a refund must be denied.

61. Furthermore, the entitlement to offset VAT overpayments against liabilities, pursuant to TCA, section 865B(4)(b) only applies "*where tax is due and payable in respect of the relevant period by virtue of an assessment that is made or amended, or any other action that is taken for the recovery of tax".* The Respondent confirmed that no assessment has been made or amended and no action is being taken for the recovery of tax.

62. In this appeal, it was the failure of the Appellant to make a timely claim as opposed to an action taken by the Respondent to make or amend an assessment or to recover tax outside of the statutorily prescribed time limit of 4 years that would have entitled the Appellant to the offset.

63. Contrary to the Appellant's submission, an action requires a process of doing something to achieve an aim. As such, the refusal by the Respondent to refund the tax does not constitute an action for the recovery of tax. In this regard, the entitlement to offset VAT repayments against an earlier VAT liability in the relevant period does not arise.

Ancillary Issues

64. Notwithstanding the Appellant's failure to make a claim for a refund within the prescribed 4 year time limit to which the claim relates, the Appellant raised alternative arguments which require consideration.

65. The Appellant argued that the position taken by the Respondent should be considered in context of the lack of equal rights between the Respondent and the taxpayer, namely in context of the Respondent's right to recover VAT for a vatable period outside the 4 year time limit, while at the same time not having an entitlement to offset surplus VAT credit against the liability arising for vatable periods outside this 4-year time limit.

66. In this context, *Alstom Power Hydro v Valsts ieņēmumu dienests* (C-472/08), considered such an issue and concerned a taxpayer who sought a refund of sums which it considered it had overpaid in respect of VAT. The Latvian revenue authority refused to make the refund on the basis that the taxpayer had exceeded the three-year time limit provided for under Latvian law for applying for a VAT refund. The matter was referred by the domestic appellate court to the ECJ on whether art 18(4) of the Sixth Directive precluded legislation of a member state that laid down a limitation period of three years in which to make an application for a refund for excess VAT paid to the revenue authority of that state. In confirming the settled law, the Court said at paragraph 17 that:

> *"in the absence of Community rules on the refund of national charges levied though not due, it is for the domestic legal system of each member state, in particular, to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from Community law, provided that such rules are not less favourable than those governing similar domestic actions (principle of equivalence) and that they do not render virtually impossible or excessively difficult the exercise of rights conferred by Community law (principle of effectiveness) (see, inter alia, Aprile Srl (in liquidation) v Amministrazione delle Finanze dello Stato (No 2) (Case C-228/96) [2000] 1 WLR 126,*

[1998] ECR I-7141, para 18, and Marks & Spencer plc v Customs and Excise Comrs (Case C-62/00) [2002] STC 1036, [2003] QB 866, para 34)."

67. In holding that a 3 year period was sufficient to enable a normally attentive taxable person validly to assert rights derived from European Union law, the Court ruled at paragraph 22:

> *"the answer to the question referred must be that art 18(4) of the Sixth Directive is to be interpreted as not precluding legislation of a member state, such as that at issue in the main proceedings, which lays down a limitation period of three years in which to make an application for the refund of excess VAT collected by, though not due to, the tax authority of that member state."*

68. Therefore, in context of equal rights, VATCA, section 113 provides a corresponding period of 4 years for the Respondent to raise an assessment or estimate other than cases involving fraud or neglect. As such, the Appellant's assertion that VATCA, section 99(4) is unlawfully weighted against taxpayers in relation to time periods is unfounded.

69. In a case in of fraud or neglect, an estimate or assessment may be made at any time. The legitimacy of such entitlement was confirmed in *Societe Financiere d'Investissements SPRL(SFI) and Belgian State* C-85/97 SFI [1998] at paragraph 51:

> "*As the Court has already held, the fact that a limitation period begins to run as regards the tax authority at a date subsequent to the date from which the limitation period applicable to the right of a taxable person begins to run is not such to infringe the principle of equality (see, to that effect, SFI, paragraph 33)."*

70. The Appellant was unable to confirm how the equipment sold to **Purchaser** was financed. If under a hire purchase agreement, the Appellant asserted that the date of supply for VAT purposes was the date of final payment to the hire purchaser company. However, in a supplemental submission, the Appellant acknowledged that the date of supply, pursuant to VATCA, section 19(1)(c), is the date of "*handing over of the goods*".

71. In the alternative, the Appellant argued that if the equipment was financed by way of lease agreement, ownership of the asset would have only vested in the Appellant with effect from 1st October 2008. The Appellant in a supplemental submission furnished the accounts for the year ended 30th June 2007 asserting that 85% of its assets constituted leased assets. However, in the absence of specific evidence confirming the nature of financing, I am unable to satisfy myself that the equipment sold to **Purchaser** was acquired as a result of the termination of the lease.

72. The Appellant claimed, contrary to the evidence, that the beneficial interest in the equipment did not vest in the liquidator in August 2008 and therefore there was no entitlement to dispose of the equipment to **Purchaser** until October 2008. As such the

sale and purchase of the equipment arose in the same taxable period September/October 2008 and therefore the principle of fiscal neutrality must apply.

73. In highlighting a different factual scenario, Appellant proceeded to argue that it "*is reasonable to conclude*" that the liquidator was an undisclosed agent for the hire purchase or leasing company and the VAT arising on the purchase and the sale would have occurred in the July/August taxable period therefore the principle of fiscal neutrality also applies. The Appellant proceeded to cite *PPUH Stehcemp sp. j. Florian Stefanek, Janina Stefanek, Jarosław Stefanek v Dyrektor Izby Skarbowej w Łodzi* (C-277/14) and *Lea Jorion nee Jeunehomme and Société Anonyme d'Etude et de Gestion Immobilière "EGI"v Belgian State (*Joined cases 123 and 330/87).

74. In considering the principle of fiscal neutrality, recourse can be made to *Compass Contract Services Limited v Commissioners for Her Majesty's Revenue and Customs* (C-38/16) where the ECJ confirmed at paragraph 21:

> *"it should be recalled that, according to settled case-law, the principle of fiscal neutrality precludes in particular treating similar goods or supplies of services, which are thus in competition with each other, differently for VAT purposes (judgments of 3 May 2001, Commission v France, C-481/98, EU:C:2001:237, paragraph 22, and of 10 November 2011, The Rank Group, C-259/10 and C-260/10, EU:C:2011:719, paragraph 32)."*

75. However, the *PPUH* and *Lea Jorion* cases concerned the entitlement to claim an input credit on purchases resulting from a VAT fraud and the denial of a VAT deduction in respect of invoices which contained numerous irregularities respectively and not the denial of a refund by a Revenue authority. The principle of fiscal neutrality, contrary to the Appellant's submissions, were not contained in either of the 2 cited judgements. In this regard, the Appellant cannot rely on that principle.

76. The Appellant's final argument raised in the supplemental submission claims that as no VAT was paid to the Collector General in the VAT period July/August 2008, the provisions of VATCA, section 99(4) do not apply. This argument is without foundation as the refund pursuant to VATCA, section 99 is based on any amounts paid to the Collector General "*together with the amount of tax (if any) which qualified for deduction under Chapter 1 of Part 8 exceeds the tax (if any) which would properly be payable if no deduction were made under Chapter 1 of Part 8".* (Emphasises added).

Conclusion

77. After due consideration of the evidence and the submissions of parties, I have determined that the Appellant is not entitled to the refund of VAT in respect of the VAT period November/December 2008 on the grounds that the claim for the refund was made outside of the statutorily prescribed time limit of 4 years from the taxable period to which it relates.

78. The period of 4 years to claim the refund does not contravene the law of the European Union and is sufficiently long enough to permit a normally attentive person to make an application for a refund.

79. Furthermore, the entitlement to offset VAT overpayments against liabilities, pursuant to TCA, section 865B(4) does not arise as no assessment has been made or amended and the Respondent is taking no action for the recovery of tax.

80. This appeal is therefore determined in accordance with TCA, section 949AL.

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Appeal Commissioner
5th September 2018

The Tax Appeals Commission has been requested to state and sign a case for the opinion of the High Court in respect of this determination, pursuant to the provisions of Chapter 6 of Part 40A of the Taxes Consolidation Act 1997 as amended.