



[2015] UKUT 0004 (TCC)

Directions following preliminary ruling from Court of Justice – review of earlier decision in light of subsequent Court of Appeal authority

Appeal number: FTC/52/2010

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

THE COMMISSIONERS FOR HER MAJESTY’S REVENUE AND CUSTOMS
Appellants

- and-

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

Respondent

Tribunal: Mr Justice Warren, Chamber President

Judge Charles Hellier

Ruling on papers

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DECISION

1. This decision is supplemental to our Decision released on 3 August 2012 and is to be read with it.

Further Developments

2. Following the reference to the Court of Justice by us, GMAC succeeds on the Windfall Issue. Subject to what follows, HMRC's appeal is therefore unsuccessful.
3. Since the release of our Decision, there has been appeal to the Court of Appeal by HMRC in relation to the preliminary issues which we decided in the BT appeal. Our decision was upheld save in relation to one aspect. The Court of Appeal held that we were wrong, in relation to Preliminary Issue 2, to hold that BT's claim was not time barred in respect of supplies made during the period 1 October 1978 to 31 March 1989. BT has been refused permission to appeal by the Supreme Court. HMRC's position is that the decision of the Court of Appeal in BT applies in the case of GMAC so that HMRC's appeal should succeed in relation to such supplies. GMAC's position is that it is not possible to "read across" the decision in BT to the very different facts of GMAC's case; the correct answer is, as the Court of Appeal recognised, heavily fact dependent, and on the facts, GMAC's appeal even in relation to the earlier period is not time-barred. We will refer to this issue as "the BT Issue".

Procedural difficulty

4. There is a procedural difficulty which we now mention. It is unclear whether the conclusions which we reached in the Decision gave rise, so far as concerns the appeal in the GMAC case, to appealable decisions for the purposes of section 13 Tribunals Courts and Enforcement Act 2007. If those conclusions did give rise to appealable decisions, then we do not consider that we can now modify them other than in the context of a review following an application by HMRC for permission to appeal pursuant to Rules 45 and 46 of the Upper Tribunal Rules. In contrast, if those conclusions did not give rise to appealable decisions, we consider that it must be open to us to modify our conclusions to reflect what we see as the correct answer to the BT Issue.
5. In order to decide how best to proceed, we invited the parties to provide us with written submissions on the impact of the decision of the Court of Appeal in BT, in other words to set out their cases on the BT Issue. Our thinking was that, if we had thought it clear from those submissions that GMAC was correct on the BT Issue, we would simply affirm the conclusions in the Decision: HMRC would then be able to seek permission to appeal on any issue, including the BT Issue, which they considered was a possible ground of appeal. If, on the other hand, we had thought it clear from those submissions that HMRC were correct, we would nonetheless affirm the Decision, but would indicate that, were

HMRC to seek permission to appeal, we would be likely to review (in favour of HMRC) our conclusions to reflect the decision of the Court of Appeal in BT.

6. Unfortunately for us, the answer is not at all clear either way from the written submissions which we have received. What we propose to do, therefore, is to affirm our conclusions in the Decision in all respects. We consider that, procedurally, this is a sensible and fair course. It is a course which avoids the need to decide whether the Decision gave rise to any appealable decision so far as concerns the GMAC appeal. It will not necessarily result in HMRC having to be the appellant in relation to the BT Issue: HMRC are able to apply for permission to appeal, in the context of which application we will need to consider whether to review our conclusions, in accordance with the Rules, to reflect the Court of Appeal decision in BT and if we do so it may be GMAC which has to appeal the BT Issue.

Approach to application for permission to appeal

7. It might be helpful if we were to indicate our likely approach to an application for permission to appeal. At this stage we, of course, do not know what if any grounds of appeal HMRC might seek to raise. Having said that, it is, we think, likely to be uncontroversial that HMRC faces obvious difficulties in seeking to challenge our decision on the Windfall Issue, which simply reflects the ruling of the Court of Justice. There are obvious difficulties too in relation to the Insolvency Condition and the Time Limit Issue (other than the BT Issue) where the Court of Appeal has upheld our decision as between BT and HMRC. It is only in relation to the Property Condition that no higher court has yet said anything.
8. How we should deal with the BT Issue depends on the points of law in respect of which HMRC apply for permission to appeal and on the result of such an application. If the BT Issue is the only aspect of our decision in respect of which HMRC seek permission to appeal, it may be that we should deal with the BT Issue on its merits. Although, as indicated above, we have had written submissions about this, to deal with the issue properly will, we think, be likely to require a further oral hearing although a further round of written submissions may be sufficient. From what we have seen so far, it is at least possible that the matter will need to be remitted to the FTT for it to make further findings of fact although we appreciate that GMAC's position is that this is not necessary in the light of HMRC's alleged concessions in earlier litigation and because of a *res judicata* arising from earlier litigation. Alternatively, if any area of further dispute on the facts is limited, we may be able to resolve that dispute ourselves. Given that Judge Wallace has now retired, that might be the preferable course.
9. However, if HMRC seek permission to appeal on other aspects of the Decision, and if we were to give permission, there is a great deal to be said in favour of allowing the BT Issue to be dealt with by the Court of Appeal at the same time. If the Court of Appeal takes the view that the matter needs to be remitted to the FTT (or perhaps to the Upper Tribunal), then so be it. But if it accepts GMAC's arguments that further evidence is not necessary, then it will be in as good a position as we are to decide the BT Issue. To allow the BT Issue to proceed in tandem with other issues on appeal will avoid any further delay occasioned by the need to reconvene a hearing before us and by the time for us to give a

further written decision; and it will eliminate the possibility that we might decide to remit the matter to the FTT when the Court of Appeal could take a different view about the need to do so. We are conscious of the many years which have passed since GMAC first sought to obtain a decision in its favour and consider that we should adopt a course which achieves a final decision sooner rather than later so far as we can properly do so in accordance with case management principles.

Conclusions

10. We affirm our Decision released on 3 August 2012 in its entirety (and so that the BT Issue is decided in favour of GMAC). We resolve the Windfall Issue in favour of GMAC in accordance with the ruling of the Court of Justice. Accordingly, HMRC's appeal to us is dismissed.
11. If and insofar as is necessary, we extend HMRC's time for serving on the Tribunal any application for permission to appeal to close of business on 2 February 2015.

Mr Justice Warren, Chamber President

Judge Charles Hellier, Upper Tribunal Judge

Release date: 5 January 2015