[2016] UKUT 0263 (TCC)

Appeal number UT/2014/0037

VALUE ADDED TAX – whether section 80 VAT Act 1994 applies to claim to enforce directly effective right under article 11C(1) Sixth Directive to reduce taxable amounts to reflect rebates paid in periods before it was implemented in UK legislation – if so, whether claim made within time limit in section 80(4) – whether regulation 38 VAT Regulations 1995 can be adapted or moulded to allow adjustment to reflect reduction in taxable amounts at any time – whether FTT has jurisdiction to determine claim - appeal allowed

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

THE COMMISSIONERS FOR
HER MAJESTY'S REVENUE AND CUSTOMS

Appellants

- and –

IVECO LIMITED

Respondent

Tribunal: The Hon Mr Justice Warren
Judge Greg Sinfield

Sitting in public at The Royal Courts of Justice, Rolls Building, Fetter Lane, London EC4 on 25 and 26 November 2015

Eleni Mitrophanous, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Appellants

Andrew Hitchmough QC and Barbara Belgrano, counsel, instructed by PricewaterhouseCoopers Legal LLP, for the Respondents

DECISION

Background

1. This is another case about time limits for the recovery of overpaid VAT. The Respondent ('**Iveco**') is the representative member of a VAT group that includes companies engaged in the distribution and sale of commercial vehicles. Iveco charged and accounted for VAT on its sales of the vehicles. Between 1 January 1978 and 31 December 1989 ('**the claim period'**), Iveco paid rebates to purchasers of the vehicles. Article 11C(1) of the Sixth VAT Directive ("**article 11C(1)**"), which was in force throughout the claim period, provided that where the price of a supply is reduced after the supply has taken place, the value of the supply must be reduced accordingly under conditions laid down by the Member State. Article 11C(1) was not implemented in UK domestic law until 1 January 1990 when regulation 7 of the VAT (Accounting and Records) Regulations 1989 ('**the 1989 Regulations**') came into force. Regulation 7 of the 1989 Regulations was subsequently replaced by regulation 38 of the Value Added Tax Regulations 1995 ('**the 1995 Regulations'**) which was in identical terms. References to regulation 38 of the 1995 Regulations below should be taken to include regulation 7 of the 1989 Regulations. It is common ground that article 11C(1) had direct effect, that is to say that Iveco could rely on it to reduce the value of its supplies notwithstanding the absence of implementing legislation before 1 January 1990. It is also common ground that, as drafted, regulation 38 of the 1995 Regulations only allowed adjustments in relation to rebates paid after 1 January 1990.

2. Section 24 of the Finance Act 1989 ('**FA 1989**') also came into force on 1 January 1990. Section 24 provided that persons who had overpaid VAT could claim a repayment subject to a time limit of six years from the date of overpayment or, in the case of mistake, six years from the date on which the claimant discovered, or with reasonable diligence could have discovered, the mistake. Section 24 FA 1989 became section 80 of the Value Added Tax Act 1994 ('**VATA**') on consolidation which, when it was enacted, contained the same time limit. The time limit was reduced to three years from the date of payment, with no extension for a mistake based claim, by section 47(1) of the Finance Act 1997 with effect from 18 July 1996. In 2008, following the decision of the House of Lords in *Fleming (trading as Bodycraft) v HMRC* [2008] STC 324, HMRC accepted that the three-year cap could not operate retrospectively but only from the date on which it had been authorised by Parliament, that is to say 4 December 1996. A new transitional period was introduced by section 121 Finance Act 2008, with effect from 19 March 2008, which provided that the three year time limit did not apply to claims for amounts overpaid in VAT accounting periods that ended before 4 December 1996 provided that the claim was made before 1 April 2009 ('**the *Fleming* window'**). With effect from 1 April 2009, the three year time limit in section 80(4) was extended to four years. Section 24 FA 1989 is set out at [10] below and section 80 (as it stood at the time of the claim by Iveco mentioned in the next paragraph below) is set out in [11] below. References to section 80 include, save where the context otherwise requires, references to section 24 FA 1989 and references to EU law are to be read as including Community law. We will use the acronym CJEU for the court now called the Court of Justice, previously known as the European Court of Justice or ECJ.

3. In a letter dated 9 November 2011, Iveco submitted a claim to the Appellants ('**HMRC**') for a repayment of £78,680,107, subsequently reduced to £73,361,865, VAT charged on vehicles sold to reflect the rebates given during the claim period. In a letter dated 23 January 2012 and upheld on review on 19 April 2012, HMRC, without

accepting the basis of the claim or its quantum which remain disputed, rejected the claim on the ground that it was made too late, being outside the four year time limit in section 80(4).

4. Iveco appealed to the First-tier Tribunal ('FTT'). The FTT directed that the question of whether Iveco's claim was subject to the statutory time limit prescribed by section 80(4) or otherwise time-barred should be determined as a preliminary issue.

FTT's decisions

5. The FTT dealt with the preliminary issue in two decisions. In a decision released on 6 December 2013, [2013] UKFTT 763 (TC), ('**the First Decision'**), Judge Berner decided that Iveco's claim was not subject to the time limit in section 80(4) VATA or otherwise time-barred, subject to the issue of whether Iveco's EU law right had expired. Judge Berner summarised his conclusions on three points considered at the preliminary hearing at [65] of the First Decision:

> "(1) Section 80 VATA does not apply to Iveco's claim of 9 November 2011. Accordingly, the time limit for the making of such a claim contained in s 80(4) does not apply.
>
> (2) Regulation 38 of the 1995 Regulations is to be construed, in the circumstances of Iveco's claim, without regard to regulation 38(5) [which provides that the appropriate entry must be made in the VAT account for the period in which the reduction is given effect in the person's business accounts]. Accordingly, Iveco may make an adjustment under regulation 38 to give effect to its directly-effective right under EU law in respect of any reduction to be made pursuant to article 11C(1) of the Sixth Directive consequent upon the making of bonus payments in the period 1 January 1978 to 31 December 1989.
>
> (3) This tribunal has jurisdiction to determine this preliminary application."

6. The remaining issue of whether Iveco's EU law right had expired was deferred pending the release of the judgment of the Court of Appeal in *HMRC v British Telecommunications plc* [2014] EWCA Civ 433 ('***BT***'). On 13 May 2014, Judge Berner issued the second part of the decision, [2014] UKFTT 451 (TC), ('**the Second Decision**'). Having set out the relevant passage of the Court of Appeal's judgment in *BT*, which he noted was binding on him, Judge Berner concluded, at [10], that "there is no requirement under EU law that Iveco's claim be brought within a reasonable period after the assumed price reduction that led to the overpayment of VAT."

Grounds of appeal

7. HMRC now appeal, with the permission of the FTT, against the First and Second Decisions on four grounds that challenge all of the conclusions reached by Judge Berner. HMRC's grounds of appeal against the Decisions are that the FTT erred as follows:

(1) in holding that

(a) section 80 does not apply to Iveco's claim; and

(b) if section 80 applied, a section 80 claim was made within the applicable time limit;

(2) in seeking to interpret regulation 38 in such a way as to give effect to any reduction pursuant to article 11C(1);

(3) in concluding that it had jurisdiction to determine the preliminary issue; and

(4) in holding that there is no requirement under EU law that Iveco's claim be brought within a reasonable period after the assumed price reduction.

8. On the joint application of the parties, we have deferred consideration of whether EU law required Iveco to bring its claim within a reasonable period (Ground 4) pending the decision of the Court of Appeal in *GMAC UK plc v HMRC*, which is due to be heard on 28-30 June 2016, as that may determine the issue.

Legislation

9. From 1 January 1978, article 11C(1) of the Sixth VAT Directive provided:

> "In the case of cancellation, refusal or total or partial non-payment, or where the price is reduced after the supply takes place, the taxable amount shall be reduced accordingly under conditions which shall be determined by the Member States.
>
> However, in the case of total or partial non-payment, the Member States may derogate from this rule."

10. Section 24 FA 1989 provided:

> "Recovery of overpaid VAT
>
> 24.(1) Where a person has paid an amount to the Commissioners by way of value added tax which was not tax due to them, they shall be liable to repay the amount to him.
>
> (2) The Commissioners shall only be liable to repay an amount under this section on a claim being made for the purpose.
>
> ……
>
> (4) No amount may be claimed under this section after the expiry of 6 years from the date on which it was paid, except where subsection (5) below applies.
>
> (5) Where an amount has been paid to the Commissioners by reason of a mistake, a claim for the repayment of the amount under this section may be made at any time before the expiry of 6 years from the date on which the claimant discovered the mistake or could with reasonable diligence have discovered it.
>
> (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.
>
> (7) Except as provided by this section, the Commissioners shall not be liable to repay an amount paid to them by way of value added tax by virtue of the fact that it was not tax due to them.
>
> (8) The preceding provisions of this section apply to an amount paid before, as well as to an amount paid after, the day on which this section

comes into force, except where the Commissioners have received a claim for repayment of the amount before that day.

……'

11. Section 80(1) VATA, as originally enacted, reflected section 24(1) and (8). Section 80, as it stood at the time of Iveco's claim, provided:

"Credit for, or repayment of, overstated or overpaid VAT

80(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.

…

(1B) Where a person has for a prescribed accounting period (whenever ended) paid to the Commissioners an amount by way of VAT that was not VAT due to them, otherwise than as a result of

(a) an amount that was not output tax due being brought into account as output tax, or

(b) an amount of input tax allowable under section 26 not being brought into account,

the Commissioners shall be liable to repay to that person the amount so paid.

(2) The Commissioners shall only be liable to credit or repay an amount under this section on a claim being made for the purpose.

…

(4) The Commissioners shall not be liable on a claim under this section—

(a) to credit an amount to a person under subsection (1) or (1A) above, or

(b) to repay an amount to a person under subsection (1B) above,

if the claim is made more than 4 years after the relevant date.

(4ZA) The relevant date is -

(a) in the case of a claim by virtue of subsection (1) above, the end of the prescribed accounting period mentioned in that subsection, unless paragraph (b) below applies;

(b) in the case of a claim by virtue of subsection (1) above in respect of an erroneous voluntary disclosure, the end of the prescribed accounting period in which the disclosure was made;

(c) in the case of a claim by virtue of subsection (1A) above in respect of an assessment issued on the basis of an erroneous voluntary disclosure, the end of the prescribed accounting period in which the disclosure was made;

(d) in the case of a claim by virtue of subsection (1A) above in any other case, the end of the prescribed accounting period in which the assessment was made;

(e) in the case of a claim by virtue of subsection (1B) above, the date on which the payment was made.

In the case of a person who has ceased to be registered under this Act, any reference in paragraphs (b) to (d) above to a prescribed accounting period includes a reference to a period that would have been a prescribed accounting period had the person continued to be registered under this Act.

(7) Except as provided by this section, the Commissioners shall not be liable to credit or repay any amount accounted for or paid to them by way of VAT that was not VAT due to them."

12. Section 121 FA 2008 provides as follows:

"121 **Old VAT claims: extended time limits**

(1) The requirement in section 80(4) of VATA 1994 that a claim under that section be made within 3 years of the relevant date does not apply to a claim in respect of an amount brought into account, or paid, for a prescribed accounting period ending before 4 December 1996 if the claim is made before 1 April 2009."

13. Regulation 38 of the Value Added Tax Regulations 1995 provides as follows:

"(1) This regulation applies where

(a) there is an increase in consideration for a supply, or

(b) there is a decrease in consideration for a supply,

which includes an amount of VAT and the increase or decrease occurs after the end of the prescribed accounting period in which the original supply took place.

...

(2) Where this regulation applies, both the taxable person who makes the supply and a taxable person who receives the supply shall adjust their respective VAT accounts in accordance with the provisions of this regulation.

(3) ... the maker of the supply shall

(a) in the case of an increase in consideration, make a positive entry; or

(b) in the case of a decrease in consideration, make a negative entry,

for the relevant amount of VAT in the VAT payable portion of his VAT account.

(5) Every entry required by this regulation shall … be made in that part of the VAT account which relates to the prescribed accounting period in which the increase or decrease is given effect in the business accounts of the relevant taxable person."

14. Regulation 32 (from 1 June 2007 to present) provides as follows:

"(1) Every taxable person shall keep and maintain, in accordance with this regulation, an account to be known as the VAT account.

(2) The VAT account shall be divided into separate parts relating to the prescribed accounting periods of the taxable person and each such part

> shall be further divided into 2 portions to be known as 'the VAT payable portion' and 'the VAT allowable portion'.
>
> (3) The VAT payable portion for each prescribed accounting period shall comprise
>
> (a) a total of the output tax due from the taxable person for that period,
>
> …
>
> (c) every correction or adjustment to the VAT payable portion which is required or allowed by regulation 34, 35, 38 or 38A, and
>
> (d) every adjustment to the amount of VAT payable by the taxable person for that period which is required, or allowed, by or under any Regulations made under the Act.
>
> (4) The VAT allowable portion for each prescribed period shall comprise
>
> …
>
> (c) every correction or adjustment to the VAT allowable portion which is required or allowed by regulation … 38 …"

15. We also mention section 5 Limitation Act 1980 which provides that an action founded on simple contract shall not be brought after the expiration of six years from the date on which the cause of action accrued. It is generally accepted that this is the time limit which applies to restitutionary claims also.

The operation of section 80 and Regulation 38

16. We think that it is helpful, at this stage, to say something about the operation of section 80 and regulation 38. It may not be immediately apparent why we should be spending time on this in what will, in any case, be an overlong decision. We hope that the reasons will become apparent later.

17. Both sides consider that Regulation 38 applies only to an increase or decrease in consideration taking place once the Regulation was in force. It has no direct application (subject to a possible *Marleasing* construction) to the reductions in price made by Iveco in the claims period. Judge Berner considered this to be the correct approach (see [38] of the Decision) and so do we for the reasons which he gave.

18. So far as concerns section 80, it is clear, of course, that a subsequent reduction in price in a later accounting period in respect of a supply does not have the effect that VAT was overpaid, or excess output tax was accounted for, in relation to the original price in the prescribed accounting period which is referred to in section 80. The supplier's accounts for the prescribed accounting period, if they are correct, will include output tax on the full price. Both sides, as we understand their positions, consider that the subsequent reduction in price in a later accounting period does not result in there being an overpayment of VAT or an over-accounting of output tax in the earlier period. We proceed on the same basis although we should not be taken as deciding that it is correct.

19. We also think that it is helpful to give a brief explanation of how this legislation works in an ordinary case where all the relevant events take place after the end of the *Fleming* window. Take a simple example where a trader (T) sells a car to a purchaser (P) for £10,000 plus VAT of £2,000. Two years later, and thus in a later accounting

period, the original price is reduced by £1,000 to £9,000 and T pays P £1,000 plus the relevant proportion of the VAT, £200.

20. In these circumstances, T ought to apply Regulation 38, the provisions of which appear to be mandatory. T should adjust his VAT account by making a negative entry for the relevant amount of VAT (£200) in the VAT payable portion of his VAT account: see Regulation 38(3)(b). The entry is to be made, under Regulation 38(5) in that part of the VAT account which relates to the prescribed accounting period in which the decrease is given effect in T's business accounts. If T would otherwise have to account to HMRC for more than £200 of VAT, then the amount otherwise owing to HMRC will be reduced by £200. If T would otherwise account for less than £200 of VAT or no VAT then that will give rise to a negative balance in the VAT payable part resulting in a payment to T by HMRC.

21. If T fails to implement Regulation 38, that is not an end of T's claim to credit or repayment of £200. The result of failing to implement regulation 38 is that, in the case where the amount otherwise due exceeds £200, T has paid too much VAT in the prescribed period just mentioned. It is accepted by both HMRC and Iveco that section 80 is applicable. In other words, the reduction in VAT which T could have achieved by using regulation 38 remains VAT which was not due to HMRC so that T can make a claim under section 80 to recover it. We consider that that is a correct and purposive approach to the legislation.

22. There has been some suggestion, based on the decision in *Masterlease Ltd v HMRC* [2010] UKFTT 339 (TC), that it is section 80(1) rather than section 80(1B) which applies in such a case. However the point does not appear to have been argued (since nothing turned on it). In any case, we are not bound by that decision. In our judgment, a claim under the current version of section 80, following the failure by a taxpayer to utilise regulation 38, would fall within section 80(1B) and not section 80(1). In the example we have given, T should have included a negative entry in the relevant account. Not having done so, too much VAT has been paid; but this was not because an incorrect amount of output tax had been included in the accounts, but because a negative entry had not been made to the VAT payable portion of the account. We consider there has, in the example, been no over-accounting for output tax at any stage but only a failure to include a negative entry and thus reduce the VAT payable. Regulation 38 is, after all, there to implement article 11C(1). Absent regulation 38, section 80 would not, by itself, give rise to any over-accounting of output tax or overpayment of VAT. It is only by reliance on regulation 38 that T can show any claim at all, and that is a claim to overpaid VAT not a claim based on an over-accounting of output tax.

23. If the amount of VAT for which T accounts to HMRC is less than £200, say £50, T will have paid £150 by way of VAT, which ought, in principle, to be repaid. It is not, however, entirely apparent to us how section 80 provides T with an immediate claim for the difference, £150, between the £50 paid and the £200 which ought in principle to be repaid. Although T paid the whole of the £200 when the original supply was made, when he did so it was VAT due for the relevant accounting period. T will not have paid that £150 in the later accounting period when regulation 38 should have been implemented so that section 80(1B) would not appear to apply. It is not clear that recourse could be had to section 80(1) (or the old section 24 Finance Act 1989 while that was in force) whether in that later accounting period or any subsequent accounting period. One solution is that T could carry forward the £150 to the next accounting

period and reduce his VAT payable in relation to that period. This would not, however, provide a repayment trader with a solution. If there is no remedy for T in such a situation, he may still be able to assert directly effective rights through the mechanism of section 80 but that would depend on establishing that regulation 38 did not provide a fully effective vindication of his article 11C(1) rights. We do not need to resolve this particular difficulty for the purposes of the present appeal.

Introduction to discussion and summary of opposing views

24. The preliminary issue before the FTT was whether Iveco's claim made on 9 November 2011 for repayment of £73,361,865 VAT relating to 'bonus payments' paid to its customers between 1 January 1978 and 31 December 1989 was subject to the time limit in section 80(4) VATA or any other applicable time limit. We approach this issue by considering the nature of Iveco's claim and when the right to make it arose as that determines the applicable limitation period.

25. It is important to note that the word "claim" has been used in different senses by the parties in the course of their submissions. It has been used in the sense of Iveco making a claim to assert its directly effective rights as a matter of EU law; it has been used in the sense of making a claim for the purposes of section 80; and it has been used simply in the sense of demanding the repayment of VAT, which repayment is due as a result of the reduction of the taxable amount envisaged by article 11C(1). It will usually be clear in which sense the word is being used in this decision. The point which we wish to make at this stage is that because there may not be a claim in one sense, for instance a claim for the purposes of section 80, it does not mean that there is not a claim for another purpose, for instance a claim to assert directly effective rights.

26. As we have said, the United Kingdom did not transpose article 11C(1) into domestic legislation until 1 January 1990 when regulation 7 of the 1989 Regulations came into force. It was common ground that, before that date and during the whole of the claim period, article 11C(1) had direct effect and Iveco could rely on it. Mr Hitchmough (who appeared for Iveco) submitted that, while it was common ground that article 11C(1) had direct effect, it said nothing about how and when the taxable amount should be reduced.

27. In summary, Iveco's position is that, unless and until it made its claim to assert its directly effective rights, there could be no relevant "claim" for the purposes of section 24 FA 1989 or section 80 VATA. The time limits in section 80 would not, in those circumstances present Iveco with a problem. This is because, although Iveco could, it accepts, have asserted its directly effective rights during the *Fleming* window (or, on its case, at any other time), it did not in fact do so. The fact that it did not do so means that there was no time before it made its claim in November 2011 at which Iveco had brought into account as output tax an amount that was not output tax due (as required by section 80(1)) and no occasion when it had paid an amount of VAT that was not due (as required by section 80(1B)). It was only after Iveco made its claim in November 2011 that there was a reduction in the taxable amount and a right to recover VAT. It was only after that date that Iveco can be said to have paid any VAT which was not due. Time did not start to run under section 80(4) until that claim was made.

28. In summary, HMRC's position is that there is no need for Iveco to have asserted its directly effective rights before it can be said that there was output tax accounted for which was not output tax due or that there was VAT overpaid. Much of Iveco's claim was time-barred before the *Fleming* window opened (for reasons we will explain). But

to the extent that Iveco's right to repayment of VAT was not already time-barred, it could have asserted its rights to repayment at least during the *Fleming* window and, in some cases, before that. That represented a total vindication of Iveco's directly effective rights under EU law. Since Iveco did not avail itself of the opportunity to make a claim within that window, it is now too late for it to do so.

29. It can be seen that a central issue in the dispute is the question when Iveco's directly effective rights first gave rise to a relevant overpayment of VAT. Was it when the original price was reduced and payment made by Iveco or was it when the claim to a VAT refund was made?

The First Decision

30. It is convenient next to consider the First Decision since this will explain what the dispute is really about and identify some, at least, of the arguments. We have already mentioned Judge Berner's own summary of his conclusions at [5] above.

31. At [1] to [15], Judge Berner sets out the background and the statutory provisions. At [16] to [35] appears a section headed "Commentary on the parties' submissions". Judge Berner commences his real discussion at [36] under the heading "Is Iveco's claim barred by s 80(4)". His approach (see [36]) was to say that Iveco's claim would be barred by section 80(4) unless either (a) the claim was not within section 80 at all or (b) the claim was within section 80 but the overpayment was made at such a time as would enable a timely section 80 claim to be made. The second of those was one of timing, namely whether there was an overpayment at the time when the price reduction took effect. The first was whether the direct effect of article 11C(1) gave rise to either the bringing into account in any accounting period of an amount by way of output tax that was not output tax due (section 80(1)) or the payment of an amount by way of VAT which was not VAT due (section 80(1B)).

32. In [37] he correctly states, as already recorded, that regulation 38 did not, as a matter of domestic law, give Iveco a right to make an adjustment in respect of pre-1990 price reductions. In [38] and [39], he addresses the direct effect of article 11C(1), concluding in [40] that Iveco did not at any time prior to its claim bring into account as output tax any amount which was not due as output tax and did not pay any VAT which was not due, so that section 80 did not apply to the claim. We quote [38] and [39] in full:

> "38. Although the effect of article 11C(1) is that a price reduction after the time of the supply results in a reduction in the taxable amount, in the absence of implementation of that article so as to give it effect under domestic law, the most the Directive can give rise to is a directly effective right in favour of the taxable person. The effect of article 11C(1) is mandatory, but only in the sense that such an effect must be provided for by member States, which may be subject to conditions, and to enable the taxable person to claim to give that article direct effect. Unless or until the taxable person exercises that right, there is no basis for saying that the VAT accounted for by the taxable person was not 'due', which is the state of affairs required by section 80. Until Iveco exercised its right, its VAT account could include only those items prescribed by regulation 32 of the VAT regulations; those items could not, in Iveco's case, have included any regulation 7 or regulation 38 adjustment.

> 39. Even if it were possible for HMRC to rely on the Directive itself in this respect, I do not consider that article 11C(1) could operate, independently of domestic legislation implementing it, so as to have the consequence that Iveco would have overpaid output tax in the accounting period in which the bonus payments were made. Article 11C(1) provides only for a reduction in the taxable amount; it says nothing of the consequences, in terms of the amount of output tax for which the taxable person must account, of that reduction. Those consequences can only flow from the domestic legislation that gives effect to the reduction of the taxable amount in those circumstances. In any event, an argument on the part of HMRC that relies on the effect of the Directive in the absence of domestic implementation appears to me, as it did to the VAT Tribunal in GMAC, to be bound to fail. Such an argument is not, as Ms Mitrophanous sought to argue, merely one of construction."

33. Although stating that this conclusion was not based on the decision of the Court of Appeal in *University of Sussex v Customs and Excise Commissioners* [2004] STC 1 relating to input tax or the decision of the Upper Tribunal in *GMAC UK plc v HMRC; British Telecommunications plc v HMRC* [2012] STC 2349 ("***GMAC/BT***") relating to bad debt relief, he saw those cases as consistent with his conclusion. He acknowledged that the rights in those cases were different from the right to rely on a directly effective provision in the Sixth VAT Directive that reduces the value of a supply after it has been made but stated that they shared certain characteristics.

34. As he explained in [42]:

> "First, the mere existence of such a directly-effective right does not give rise to a reduction in the output tax that is due – that will be output tax calculated by reference to supplies other than the original supply – nor in the amount of VAT payable after all relevant reductions have been made. The amount of output tax, or otherwise of VAT, payable is a function of a taxable person's return for a relevant accounting period, and the VAT account prescribed by regulation 32 of the 1995 Regulations. Absent appropriate implementation of article 11C(1) in the UK, there was no domestic mechanism that could operate to reduce the amount of output tax or VAT due. That was the case both before 1 January 1990, and equally so after that date, when although a mechanism for adjustment was introduced that could operate for future prescribed accounting periods, it could not do so for cases where the price reduction had taken effect before 1990. Secondly, it requires the taxable person to exercise a right or make a claim; it does not follow simply as a result of the nature of a supply, such as whether it is standard-rated or exempt as in *Marks and Spencer* or *Birmingham Hippodrome Trust*."

35. The last sentence is a reference to the argument that Iveco could have made a claim under EU law before Article 11C(1) was implemented. In *Birmingham Hippodrome Theatre Trust Ltd v HMRC* [2014] EWCA Civ 684 and [2013] STC 1079, the Upper Tribunal held in [126]-[127] that the VATA must be construed in accordance with the Sixth VAT Directive and if the Directive was mistakenly construed to require VAT to be chargeable (when, correctly construed, it was not) then that was a mistake about the amount payable under the VATA. In the Court of Appeal, Lewison LJ, at [37] – [40], appeared to adopt the same approach. Judge Berner distinguished *Birmingham Hippodrome* on the ground that it was concerned with whether a supply was taxable or exempt whereas the issue in this case was how to give effect to a

reduction in the value of a supply when there was no domestic provision. We accept that *Birmingham Hippodrome* was concerned with a different issue and does not determine the issue in this appeal.

36. And so, in [44], Judge Berner concluded that, until it made its claim in November 2011, Iveco "could not as a matter of either domestic or EU law have made any overpayments of output tax or otherwise of VAT". Section 80 VATA did not apply to Iveco's claim.

37. It is to be noted that Judge Berner does not, in [44], say anything one way or the other about the position once Iveco's claim in November 2011 had been made. Instead, he goes on, in the next section of the Decision, starting at [45] under the heading "Giving effect to Iveco's claim", to consider how effect could be given to Iveco's directly effective rights under article 11C(1). In [46] he states that, applying normal domestic canons of construction, it would not be possible for the reasons already given to interpret either section 80 or regulation 38 so as to provide an appropriate remedy. He then goes on to consider the *Marleasing* principle, referring to the decisions of Henderson J in *Prudential Assurance Co Ltd v HMRC* [2013] EWHC 3249, of Sir Andrew Morritt C in *Vodafone 2 v Revenue and Customs Commissioners* [2009] EWCA Civ 446 and of the Court of Appeal in *Wilkinson v Fitzgerald* [2012] EWCA Civ 1166, citing passages from that last case and from *Prudential*. We do not need to restate these well-established principles. He concluded that the appropriate moulding would be to construe regulation 38 as if regulation 38(5) were omitted, so that Iveco would have, in effect, an unlimited time within which to utilise regulation 38.

Discussion

38. Although, as we have said, a central issue is when Iveco's directly effective rights first gave rise to a relevant overpayment of VAT (the choice being between when the original price was reduced and when the claim to a VAT refund was made in November 2011) we wish first to establish what the consequences of each choice would be.

The consequences of the parties' respective positions

A. Consequences of Iveco's position

39. Iveco's original position, as recorded in [8] of the Decision, was that section 80 did not apply at all because there was no amount of output tax not due that had been accounted for. But that position was modified in that Mr Hitchmough was disposed to accept that a claim could be made under section 80(1B). We understand Mr Hitchmough now to say to us that, as a result of making the claim in November 2011, Iveco could indeed rely, without any moulding of any of the statutory provisions, on section 80(1B). The result of the claim in November 2011 was to assert the direct effect of article 11C(1) and thus entitle Iveco to say that there had been a reduction in the taxable amount which would have to be given effect under domestic law. As we understand it, he accepts that section 80(1B) is a sufficient vindication of Iveco's directly enforceable rights. And since the taxable amount was not reduced until the date of the claim, time did not start to run until then at the very earliest. A protective, in-time, claim under section 80 was made in October 2015 so that there is, on his submission, no question of Iveco's claim to repayment under section 80 being out of time.

40. Mr Hitchmough puts the point in slightly different language. He says that "…if Iveco overpaid VAT as a result of it writing to HMRC in November 2011, it follows that section 80 provides it with an effective means of enforcing its directly effective rights. Nothing more is required: there is no need for any moulding or adaptation of the legislation". We read this as something of a shorthand. Iveco did not, on any view, overpay VAT as a result of writing to HRMC since it did not pay, let alone overpay, VAT at all as a result of writing. What arguably happened, and is Iveco's case, is that the result of writing was that the direct effect of article 11C(1) was asserted with the result that Iveco was then entitled to rely on domestic legislation to give effect to the reduction in the taxable amount and consequential entitlement to a reduction in the VAT attributable to the original transactions. It is in that sense that the claim resulted in an overpayment.

41. Nonetheless, Mr Hitchmough suggests that an alternative route to providing Iveco with an EU-complaint means of enforcing its directly effective rights is to mould regulation 38 in precisely the way in which Judge Berner did. If Iveco then makes use of the moulded regulation 38 by adjusting its accounts in future years, there is no need to rely on section 80. We do not agree with that approach. If it is right that section 80 provides a remedy which is EU-compliant, without any moulding, then it is not open to Iveco to assert, or to the court to adopt, an alternative remedy which does require such moulding. We will, in any case, be addressing the moulding of regulation 38 in preference to moulding section 80 and/or regulation 32 later in this decision. We would add that, if section 80(1B), or indeed section 80(1), is capable of applying in the way for which Mr Hitchmough contends, then the same approach ought also to provide an answer to the difficulties which we have identified at [22] above.

42. It is not, in any case, clear to us that it is section 80(1B), rather than section 80(1), on which Iveco can rely. The position is different from that which obtains when the reduction in price occurs on or after 1 January 1990. Section 80(1B) applies in the case of a price reduction on or after that date: and it does so because the overpayment of tax is to be found in the failure to utilise regulation 38 and thus an inability to make the correct entry in the regulation 32 accounts. In the case of a price reduction before 1 January 1990, there is no scope for the application of regulation 38 (unmoulded) at all. For the case to fall within section 80 (unmoulded) there must either be (i) an occasion when Iveco accounts for VAT and in doing so has brought into account output tax which was not output tax due or (ii) an occasion not falling within (i) where Iveco has paid an amount by way of VAT which was not VAT due. Article 11C(1) does not provide that, in the case of a price reduction, the VAT shall be reduced, although that, is of course, the end result of article 11C(1). What it actually directs is that the taxable amount shall be reduced.

43. In our view, a reduction in the taxable amount is more appropriately reflected in a reduction in the output tax than in a reduction in the VAT due, albeit that the former will lead to the latter. Once Iveco had made its claim in November 2011, its appropriate course was in subsequent accounts to reflect the reduction in the taxable amount in a reduction of the output tax due box of the account under regulation 32(3)(a) (output tax due for the period). This contrasts with the position where there is a failure to implement regulation 38 where the reduction in price occurs on or after 1 January 1990: in that case, the overpayment of VAT arises as a result of a failure to include an item under regulation 32(3)(c) (various adjustments, including under regulation 38). Accordingly, we do not agree with Mr Hitchmough that Iveco's claim would be under section 80(1B): we consider that it would be under section 80(1).

44. We have some doubt, however, that either of section 80(1) or (1B) can apply without some sort of moulding in accordance with *Marleasing* principles. For reasons which we will come to, we do not consider that Judge Berner was correct, if moulding is needed at all, to mould regulation 38. Rather, a moulding of the statutory provisions should be effected to give effect to the requirement under article 11C(1) to reduce the taxable amount rather than to reduce the VAT (albeit that the former leads to the latter). It seems to us that the most straightforward way of achieving this is for regulation 32(3)(a) to reflect the reduction in the taxable amount by a reduction in the output tax box rather than by making what, in our view, is a significant change to regulation 38. The failure to include this reduction does not mean that the resulting reduction of VAT which should have then taken place becomes irrecoverable. Just as the failure to effect a reduction in the VAT due pursuant to regulation 38 leaves the section 80 claim in place, so too the failure to include the reduction in output tax in the relevant box leaves such a claim in place.

45. The result of applying Iveco's approach, is that it is able to achieve repayment of VAT under section 80(1) of an amount equal to the reduction in VAT arising under article 11C(1) as a result of the reduction in the price. Further, Iveco would not appear to face any time-limit issues.

B. Consequences of HMRC's position

46. If HMRC are correct in their contentions, the position is very different. Their position is that the mandatory nature of article 11C(1) means that a reduction in the taxable amount took place, in the absence of any domestic implementation of that article, when the price was reduced. It follows that, when VAT was accounted for without taking that reduction in the taxable amount into account, there was an overpayment of VAT for the purposes of section 24 Finance Act 1989; and this is so even though the relevant overpayment was made before the section came into force. Accordingly, Iveco had a claim for the overpaid amount.

47. If HMRC's approach is correct, then, were it not for the time limit in section 24(4), this would have satisfied Iveco's directly effective rights without any need to invoke those rights by a separate claim. However, for claims arising other than comparatively close to the beginning of 1990, this would not, in our view, have provided Iveco with an EU-compliant remedy since it would not have satisfied the principle of effectiveness. The time-limit would, accordingly, have been disapplied so that, without more, Iveco's directly effective rights would have continued to be enforceable without limit of time unless and until the UK introduced provisions which did comply with EU/Community law. Such provisions were introduced by section 121 which disapplied the time limit for claims made during the *Fleming* window. We consider that this gave to Iveco a sufficient opportunity to make a claim under section 80. Having failed to do so, its remedies under section 80 are now time-barred.

48. It can be seen, therefore, that the critical issue, at least as presented by the parties, turns on the question when the reduction in price resulted in a reduction in the taxable amount for the purposes of applying section 80.

A claim in restitution?

49. All of the above is subject, however, to HMRC's case that Iveco's claims in relation to reductions in price more than 6 years before 1 January 1990 are time barred.

The basis of this assertion is that, until the relevant statutory provisions came into force on 1 January 1990, the only way in which Iveco could enforce its directly effective rights was by a common law action in restitution. The ordinary six year time limit applies to such claims. Such a claim which was time-barred prior to 1 January 1990 would not be revived by the introduction of the new provisions designed to give effect to article 11C(1). Iveco say that this is entirely wrong. First, a restitutionary claim only arises if it seeks to enforce its directly effective rights; until it does so, time does not begin to run for limitation purposes. Secondly, it is said that a restitutionary claim would not have provided the effective remedy which EU/Community law required. We will deal with this issue later in this decision, after we have dealt with the claims which would not be time-barred in any event, that is to say cases where the price reduction took place on or after 1 January 1984.

When was there a reduction in the taxable amount for the purposes of domestic law? When should Iveco have made its claim?

50. Having set out the results of the competing contentions, and flagged the argument based on the common law remedy of restitution, we turn to the central point on which the parties took issue, namely, when did the reduction in the taxable amount take place.

51. On its face, article 11C(1) is mandatory in its effect. The tribunal in *General Motors Acceptance Corporation (UK) plc v HMRC* [2007] VTD 19989 ("***GMAC***) at [76] said as much. Further, Judge Berner also agreed at [38] of the First Decision that the effect of article 11C(1) is mandatory, but only in the sense that such an effect must be provided for by member states, and to enable the taxable person to claim to give that article direct effect. Accordingly, he considered that unless and until the taxable person exercises that right, there is no basis for saying that the VAT accounted for by the taxable person was not "due" which is the state of affairs required by section 80. Although Judge Berner did not in this passage refer to a reduction in that taxable amount, we consider that <u>if</u> it is the case that the reduction in the taxable amount takes place without the need for the taxpayer to invoke its directly effective rights, then contrary to what Judge Berner said, there is every reason for saying that the VAT accounted for was not "due".

52. In saying what he did, Judge Berner clearly had in mind the decision in *Marshall v. Southampton and South West Hampshire AHA* (Case 152/84) [1986] ECR 723 (***Marshall***) (at [48]) to which he referred at [18] of the First Decision. Mr Hitchmough relies on it and describes its effect as follows: that, although an individual can rely upon directly effective provisions of a directive against the state, a member state cannot rely upon its own failure to implement the terms of a directive as against the individual, Iveco's case being that it did not rely upon its directly effective right to reduce the taxable amount until it wrote to HMRC on 9 November 2011. It is worth recording what the CJEU actually said:

> "With regard to the argument that a directive may not be relied upon against an individual, it must be emphasized that according to Article 189 of the EEC Treaty the binding nature of a directive, which constitutes the basis for the possibility of relying on the directive before a national court, exists only in relation to each Member State to which it is addressed. It follows that a directive may not of itself impose obligations on an individual and that a provision of a directive may not be relied upon as such against such a person. ….."

53. Mr Hitchmough relies on what Judge Berner said in [39] of the First Decision that, "even if it were possible for HMRC to rely on the Directive itself", this still did not "have the consequence that Iveco would have overpaid output tax in the accounting periods in which the bonus payments were made", as HMRC had contended. This was because article 11C(1) itself was silent as to timing. Timing was an issue that was, in principle, left to the discretion of the Member State when it implemented that article. Mr Hitchmough draws attention to the fact that regulation 38(5) provides that effect shall be given to a price reduction for VAT purposes in the period in which it is recognised by a trader in its business accounts (which will not necessarily be the period in which it has been paid). Accordingly, he submits that, absent implementation by the Member State (as here), timing would depend upon the exercise by the trader of their directly effective rights.

54. He relies also, as he did in the FTT, on the decision of VAT and Duties Tribunal in *GMAC*. HMRC had argued that

> "... the reduction in the taxable amount under article 11C.1 is mandatory, rather than merely giving the taxable person a right. Regulation 38 … used similar obligatory language. It is implicit in article 11C.1 that the reduction in the taxable amount is when the price is reduced rather than at a time of choice. Since the Appellant did not make the adjustment at the time when the price was reduced, it overpaid VAT for the periods when the adjustments should have been made and section 80 applies".

55. That was rejected by the tribunal at [77] of their decision. Judge Berner deals with this at [19] – [22], setting out [76] and [77] of the decision of the tribunal. We set out [77] again:

> "Mr Cordara [counsel for GMAC] further contended that there was no overpayment in respect of reduction in price taking effect before 1 January 1990 the date on which regulation 7 of The Value Added Tax (Accounting and Records) Regulations 1989, the predecessor of regulation 38, took effect. It was common ground that the original returns based on the contractual VAT price were correct and before 1990 there was no statutory mechanism in domestic law for adjustment. The failure of the UK to implement the mandatory requirement of Article 11C.1 before 1990 had the effect that the Appellant could rely on the direct effect of Article 11C.1 from 1 January 1978 when the Sixth Directive took effect whereas Customs could not. Consequently the Appellant did not overpay VAT as a result of not making adjustments before 1990 and section 80 does not apply to those adjustments."

56. By "those adjustments" we think the tribunal must be referring to adjustments which it would have been entitled to effect had it exercised it directly effective rights. In that paragraph, the tribunal was considering the position under domestic law. It was certainly not stating that GMAC did not have any claim for repayment of overpaid VAT before the implementation of article 11C(1). Indeed, it had a directly effective right which it could have asserted for just that purpose.

57. Mr Hitchmough has also placed some reliance on what Judge Hellier and I said in *GMAC/BT* at [184]. In that part of our decision starting at [182], we were dealing with the position in case we were wrong in our primary conclusion concerning section 22 Value Added Tax Act 1983. We said this at [184]:

> "184. Once it had become apparent that the taxable amount should be reduced pursuant to Article 11C(1), it would be open to the taxpayer to claim appropriate relief. If, as Mr Cordara submits, section 22 does not apply, there is no domestic provision which indicates how or when the relief is to be given. But it is obvious, we think, that the onus is on the taxpayer to make a claim; in the absence of a claim, HMRC would have no way of knowing that a bad debt had arisen. It follows, unless and until a claim is indicated, that it cannot be said that any relief is to be afforded and that it cannot be said that any amount has been brought into account as output tax that was not output tax due. Accordingly, section 80 does not, in our judgment, in terms apply to GMAC's claims."

58. HMRC, like Iveco, run the same argument that they ran before Judge Berner. In particular, they say in answer to Iveco's contention that time did not start to run for any purpose until the claim was made in November 2011 that (i) this is contrary to the mandatory provisions of article 11C(1) which provides for a reduction in the taxable amount when the price is reduced (ii) as there was a reduction and therefore an over-accounting or overpayment in terms of EU law at the time of the rebate, there was a similar over-accounting or overpayment under section 80 and (iii) Iveco's position makes a nonsense of time limits by allowing a taxpayer to choose when time starts to run without restriction.

59. Ms Mitrophanous contends that there is no support for Iveco's position to be found in *GMAC/BT*. However one reads [184] of the decision, she submits that it cannot be understood to mean that Judge Hellier and I held that time started to run only when BT wrote to HMRC. As she notes from [236] of our decision, BT wrote to HMRC on 30 March 2009 and yet we held that even if it did have a section 80 claim, it was time-barred. If [184] is interpreted as supporting Iveco's position on the 'when issue', it was *obiter* as section 80 was held not to apply to bad debt relief and we (this tribunal) are now invited to disagree with it.

60. Dealing with that last point first, we do not consider that *GMAC/BT* is of assistance in the present case. We have to say that [183] to [185] are not as coherent as they might be, especially when read with what was said about BT's appeal in [242] to [244] in relation to Issue 3. Thus we said in [182] that if we were wrong in our main conclusion, then GMAC would have paid more output VAT than was due. That would have been because that would have been the result of article 11C(1). We then noted that section 80(2) only obliged HMRC to make a repayment if a claim was made <u>for that purpose</u>. We decided that the only letter of claim was not a claim made under section 80. Our conclusion in [183] was that it was thus too late to rely on section 121 adding that "Whether there are any bad debts remaining which can be made the subject of a claim within the section 80(4) time limit, we do not know". It was clearly implicit in that that, if a claim were then to be made, it would be subject to the four year time limit under section 80 which we must have thought would run from the date when the bad debt was established.

61. Indeed, in [184], we noted that, once it had become apparent that the taxable amount should be reduced pursuant to article 11C(1), it would be open to the taxpayer to claim appropriate relief. We were clearly there referring to a reduction as a matter of EU/Community law. There was, however, as we again noted, no domestic provision which indicated how or when the relief was to be given. It was in that context that we said, in [184], that it was obvious that the onus is on the taxpayer to make a claim since, in the absence of a claim, HMRC would have no way of knowing that a bad debt had

arisen. That is not strictly correct, since a taxpayer could simply inform HMRC that a bad debt had arisen: but the likelihood is that this would be done in the context of a claim for relief. It is no doubt correct that relief was not to be afforded until a claim was made, but in saying that we did not have in mind the central distinction which the present claim highlights (and which we have drawn attention to in [25] above) between a claim to invoke a directly effective right and the claim for repayment under section 80. It was no doubt correct to say that a claim for relief is not to be afforded (in the sense of being obtained) in the absence of a claim for relief. But it does not follow from that that it cannot be said that any amount has been brought into account as output tax that was not output tax due. We said what we did in the context of a claim for bad debt relief and, although the logic of what we said may appear to apply also to a claim where there has been a reduction in price, we did not have that in mind either. For my part, I would have expressed myself differently if I had had in mind the arguments now presented.

62. A further lack of overall coherence can be seen in what we said in relation to Issue 3. We there expressed the view that claims under section 80, if they were to be made, would be time-barred. And yet if we followed what Mr Hitchmough contends we said in [186], the answer ought to be that BT could make a claim to assert its directly enforceable rights which it had not previously made with the result that no time-limit should apply.

63. We (this tribunal) are not bound by what was said in *GMAC/BT* about section 80: what we said was *obiter*. In the light of our discussion above, we gain no assistance from what was said and propose to deal with the present case paying little regard to it.

64. Ms Mitrophanous does not, of course, accept that the principle demonstrated in *Marshall* leads to the result for which Mr Hitchmough contends. The facts of *Marshall* and other cases demonstrating that the provisions of a directive do not have direct effect against an individual are remote in the extreme from the present case. Care must be taken in applying the principle in a way which might not have been intended. Moreover, the way in which the principle is expressed must be remembered. We have set out [75] of the Judgment out at [51] above. The critical part is that "a directive may not of itself impose obligations on an individual and that a provision of a directive may not be relied upon as such against such a person. …..". The point to emphasise is that this approach applies principally to avoid burdens being cast on individuals (whether enforceable by governments or other individuals) which have not been imposed by domestic legislation implementing the directive.

65. However, the present case, it seems to us, is not an attempt by HMRC to use article 11C(1) to impose a burden on Iveco or to rely on it as against Iveco. The position is, we consider, quite the reverse. The result, on HMRC's approach, would be to give immediate effect to Iveco's directly effective rights and would not be the imposition of burdens imposed by the Sixth Directive.

66. Quite apart from that general consideration, it is a principle of statutory construction that domestic legislation should, if possible, be construed in a way which gives effect to the provisions of a directive which it is intended to implement. There is no doubt that one purpose of the amendments made by the statutory changes coming into force on 1 January 1990 was to give effect to article 11C(1) among other matters. Regulation 7 of the 1989 Regulations dealt exclusively with that article and although section 24 was not exclusively concerned with that article, it was apposite to deal with cases where regulation 7 was not complied with. If as a matter of construction, section

80 can be interpreted, without doing undue violence to the language, so as to give effect to the directly effective rights of a taxpayer under article 11C(1) in relation to matters occurring before 1 January 1990, and in particular, reductions in taxable amounts taking place before that date, then it should be so interpreted. We do not consider that there is any difficulty in interpreting section 80 in that way.

67. In relation to the original wording (that is to say of section 24(1) FA 1989 and the original form of section 80(1)), we see no difficulty. The overpaid reduction in the taxable amount under article 11C(1) gives rise to a reduction in VAT from a purely EU/Community law perspective just as much as a reduction in the VAT from a domestic perspective on or after 1 January 1990. We give an example. T sells a car in 1988 for £10,000 plus VAT (say at 10% for the sake of simplicity) giving a total price of £11,000). A price reduction of £1,000 plus VAT of £100 occurs in 1989. For the accounting period in which the reduction in the taxable amount takes place, T accounts for VAT (ignoring the VAT consequences of the price reduction) of £5,000. In making a payment of £5,000, T has paid £100 too much VAT if account is to be taken of article 11C(1). We see no difficulty in construing section 24 as providing T with the right to reclaim that amount in relation to that accounting period. Section 24(1) is to be read in this way:

> "Where a person [T] has paid an amount [£100] to the Commissioners by way of value added tax [T has paid £5,000 'by way of value added tax' which included the £100] which was not tax due [the £100 was VAT not properly due after applying article 11C(1)] to them, they shall be liable to repay the amount [£100] to him."

68. In this example, T would have had 6 years from the date of the reduction in the taxable amount in which to make a claim under section 24. That would clearly have been a complete vindication of T's rights under article 11C(1).

69. The analysis is similar once the new sections 80(1) and 80(1B) were introduced. If we are right in thinking that it is section 80(1) rather than section 80(1B) which applies, then T will have brought into account as output tax an amount that was not output tax due; or, if section 80(1B) applies, T will, as before, have paid an amount of VAT which was not due.

70. However, if the reduction in the taxable amount had occurred some years in the past, say in 1980, the relevant time limits provided for prior to the coming into effect of section 121 would already have expired. It would be necessary to disapply the time-limits under section 24 and section 80 (in both its forms) in order to provide T with an effective remedy. The domestic court would not substitute its own view of a reasonable time-limit so that, apparently, T would have an unlimited time in which to make a claim unless and until further legislation was introduced providing for a new time limit which was compliant with EU/Community law. This is precisely what the UK government did in enacting section 121 FA 2008. During the *Fleming* window, T would have been able to make claims under section 80 in relation to reductions in the taxable amount for the whole of the claim period.

71. There are two possible objections to this approach which we should address. The first is that it is simply not possible to reach this result as a matter of construction of section 80. If that objection is well-founded, that is not an end of the matter. We consider whether a construction, applying the muscular *Marleasing* approach, of section 80 would produce precisely the same result. For reasons which we come to later, we

consider that Judge Berner was wrong to mould regulation 38 rather than section 80. Under the *Marleasing* approach, the first step is to identify available domestic mechanisms as possible and appropriate mechanisms for giving effect to directly effective rights. Once such a mechanism has been identified, the domestic provisions are to be moulded in such a way as to give effect to those rights. If there is more than one mechanism identified, then the most suitable and appropriate must be selected. In the present case, section 80 (or possibly regulation 38) is to be moulded (assuming that any moulding is needed at all) so as to provide taxpayers (not just Iveco) with a means of enforcing their directly effective rights. The moulding does not, in our view, arise only once a person actually seeks to invoke their directly enforceable rights. We reject this first objection.

72. The second objection is one of the points raised by Mr Hitchmough, namely that article 11C(1) does not provide for the time at which the reduction in the taxable amount takes place. It is left to Member States to determine the conditions for that reduction. However, notwithstanding the apparent uncertainty to which that gives rise, it is nonetheless clearly the case that article 11C(1) is sufficiently clear, unconditional and precise for it to give rise to directly effective rights. We consider that, unless and until domestic legislation provides otherwise, article 11C(1) gives rise to a reduction in the taxable amount when the reduction in price takes place. We reject this objection also.

73. Our conclusion, therefore, is that Iveco should have made its claims by the end of the *Fleming* window at the very latest. It did not do so. It is now too late to do so.

Application of the *Marleasing* approach

74. We have mentioned, in our analysis above, the possibility of moulding section 80 to reflect Iveco's directly effective rights. Judge Berner took a different approach, considering that the appropriate moulding would be to regulation 38. We disagree with him. He perceived regulation 38 as being the provision intended to give effect domestically to article 11C(1) and accordingly turned, in [45], to consider that first. He concluded that, since that was the intention behind regulation 38, it would not go against the grain of the legislation to give effect to it for cases that are excluded only by reason of the failure of the UK to introduce the domestic legislation in a timely manner. He therefore moulded regulation 38 by striking out regulation 38(5), or as he put it by construing regulation 38 without regard to regulation 38(5).

75. In fact, to achieve the objective of providing Iveco with a machinery for giving effect to its directly effective rights, the moulding to regulation 38 has to go beyond that which Judge Berner identifies. Since, viewed purely domestically, regulation 38 is concerned only with cases where a reduction in consideration for a supply occurs on or after 1 January 1990, it does not catch cases where the reduction took place before then. In fact, the actual reductions in consideration in the present case took place before that date, in some cases long before. The moulding required to give Iveco a remedy therefore includes, in addition, the extension of regulation 38 to reductions in consideration taking place before 1 January 1990. There can be no doubt that the actual reductions in price occurred when the bonus payments were made or when they became due. Regulation 38 is concerned with a reduction in the consideration for the supply; the actual reductions took place before 1 January 1990 and do not fall within the (unmoulded) regulation 38.

76. We disagree with Judge Berner that the moulding of regulation 38 which he identified (with the additional moulding we have just mentioned) does not go against the grain (as to which see Lord Nicholls in *Ghaidan v Godin-Mendoza* [2004] 2 AC 557 at [33] and Dyson LJ in *HMRC v EB Central Services Ltd* [2008] STC 2209 at [81]). It is an essential feature of regulation 38 that the relevant reduction in consideration marches hand in hand with the accounting period in which the reduction is reflected in the taxpayer's business accounts. The structure of regulation 38 includes its own inherent time limit: there is no scope for late implementation of regulation 38. In an ordinary case of a supply made on or after 1 January 1990, recourse is had to section 80 when regulation 38 is not invoked. If section 80 and regulation 38 are read together, as they must be in our view, it goes against the grain to allow a taxpayer such as Iveco to use regulation 38 at any time in the future, however distant. Instead, it is section 80 which should be moulded.

77. If that is putting the matter too high, then we consider that it would be more appropriate to mould section 80 rather than regulation 38. The factors which we have identified in the preceding paragraph leading us to conclude that it would go against the grain to mould regulation 38 are precisely the factors which make it more appropriate to mould section 80 rather than regulation 38.

Claim in restitution

78. If we are wrong in our conclusions so far, it is necessary to consider whether any of Iveco's claims to enforce its directly effective rights were time-barred before 1 January 1990. If they were, then the question arises whether those rights could nonetheless be asserted through the mechanism of section 80 and regulation 38.

79. Prior to 1 January 1990, there was no domestic legislation which reflected article 11C(1). There was nothing in the legislation which could have been moulded in accordance with *Marleasing* principles to give effect to Iveco's directly effective rights. Nonetheless, if Iveco had sought before 1 January 1990 to enforce those rights in the English court, there is no doubt that the court would have had to find a way to give effect to those rights. Although article 11C(1) envisages member states laying down their own domestic procedures and time limits for the reduction of the taxable amount where (among other matters) the price is reduced after the supply takes place, the article is nonetheless seen as sufficiently precise and certain for it to be given direct effect. It follows that, where there is a reduction in the price, a taxpayer can assert the direct effect of article 11C(1) to reflect the requirement that the taxable amount should be reduced.

80. In these circumstances, there can be no doubt that the court would order the repayment of a sum equal to the difference between the VAT actually paid and the VAT which would have been paid on a sale at the reduced price. It would have been the duty of the court to give effect to Iveco's rights and, if there was no remedy available as a matter of domestic law, the court would have to invent one. The court would not have been able simply to rewrite the VAT legislation which existed prior to 1990 to provide a remedy (in contrast with a possible moulding of the legislation coming into force on 1 January 1990).

81. It might be thought that a remedy in restitution would have been the most obvious way to give effect to Iveco's directly effective rights. Mr Hitchmough submits, however, that a claim in restitution at common law would have faced very great

difficulties and would have been an excessively difficult means of enforcing Iveco's directly enforceable rights. He adds, perfectly correctly, that domestic procedural rules concerning actions for safeguarding rights under EU/Community law must not render the exercise of those rights virtually impossible or excessively difficult – the principle of effectiveness.

82. Iveco's position may have shifted. It appeared to accept that there would have been a claim in restitution in [28] of its skeleton argument before us. And certain things that Mr Hitchmough said in his oral submission have left us with the impression that that was his position at the hearing. Following a request for further written submissions from us, he now puts his position this way namely "that the only potential means available to Iveco to enforce its directly enforceable rights under the directive would have been through a common law restitutionary claim". It does not follow, he submits, that the possibility of such a claim provided a means for Iveco to enforce its directly effective rights that was compliant with EU law. Indeed, he submits that the common law has never provided Iveco with a means of enforcing its directly effective rights which is compatible with EU law.

83. Before we come to that submission, we wish to record that Ms Mitrophanous submits that this represents a change of position on the part of Iveco and that we should not allow Iveco to change its position in this way. However, we consider that we should address Mr Hitchmough's arguments. First, it is not entirely clear that Mr Hitchmough did accept unequivocally that there would have been an effective remedy in restitution before 1990. Secondly, the points which he raises are pure matters of law; HMRC are not prejudiced by any disadvantage in terms of the evidence which they would wish to adduce.

84. The reason why Mr Hitchmough suggests that a claim in restitution would have faced difficulties is because, to put the matter briefly, the law was unclear about the availability of the remedy in the case of a self-assessed tax such as VAT (with the position becoming clear only as late as the decision of the Supreme Court in *FII* [2012] STC 1362). Further, it was only after the decision in *Deutsche Morgan Grenfell* [2007] STC 1 that a claim in restitution could lie in respect of a mistake of law.

85. He may well be right that the claim would have faced difficulties although we confess to having difficulty in seeing why the claim would be based on a mistake of law. The claim would be to recover VAT which was not due. The only mistake would have been that Iveco did not appreciate that it had a remedy. Even if it thought that there would be difficulties in asserting a conventional restitution claim, it should have appreciated that it had some sort of claim since article 11C(1) was of direct effect.

86. But all of that is beside the point, as we see it. What is clear is that article 11C(1) was of direct effect and that, had Iveco sought to enforce its directly enforceable rights, the court would have had to provide a remedy. Even if such a claim would have gone beyond a conventional claim for restitution according to established principle, the claim would have looked very like a claim in restitution and the remedy would have been fashioned in a similar way to a remedy in restitution. In effect, the court would have given effect to the right to receive payment as a claim in restitution. If and to the extent that this would have represented an extension of the established law of restitution, it would have been a principled and justified extension. For present purposes, the important consequence is that the same limitation period would apply as applies in

relation to any other claim in restitution, that is to say 6 years from the accrual of the cause of action by analogy with contractual claims under section 5 Limitation Act 1980.

87. There is nothing, in our view, in the point that a restutionary claim does not provide Iveco with an effective remedy. It is precisely when there is no effective remedy (in particular, no statutory implementation of the relevant directive) that a person can enforce their directly effective rights. It is illogical to suggest that the remedy given where there is no other effective means of enforcement is itself non-compliant with the principle of effectiveness. If that were so, then the court would be granting a remedy in vindication of directly effective rights which remedy was itself inadequate as breaching the principle of effectiveness. The point here is that whatever remedy Iveco could have obtained from the court, it would have vindicated its directly effective rights. If that remedy would not have been restitution strictly so called, it would have been sufficiently close to it to be treated, for limitation purposes, in the same way as restitution.

88. Mr Hitchmough suggests, if we understand his submissions correctly, that no time limit would have applied to the invocation of Iveco's directly enforceable rights even if those rights would have been given effect by a remedy in restitution. As with his case in relation to section 80, he says that there is no claim to which any domestic limitation period would apply (in restitution if that is the appropriate remedy) until a claim is made to enforce the directly effective rights. We reject that submission. Iveco had the right to enforce its directly effective rights as soon as the relevant price reduction had taken place. It thus had the right to require HMRC to repay overpaid VAT as a result of the reduction in the taxable amount. Its cause of action against HMRC arose when its right to assert its directly enforceable rights arose; it would not arise only once it had actually asserted that right.

89. In some of the authorities, the Court appears to have acknowledged that a claim in restitution would lie. Mr Hitchmough could no doubt say that the cases did not address the difficulties which he submits would have faced a restitutionary claim. There was no suggestion, however that time would not start to run until a claim was actually made to enforce a directly effective right. We refer, for instance, to *HMRC v British Telecommunications plc* [2014] EWCA Civ 433, [2014] S.T.C. 1926 ("***BT***") at [86], where Rimer LJ said this:

> "86. As regards supplies made during the first, nine-month, period during which there was no bad debt relief domestic legislation in place, BT was, as I would hold, entitled nevertheless to enforce domestically its directly effective rights under article 11C(1) of the Directive. There was some discussion in argument as to the nature of the claim that it could have made and I cannot see how it could have been otherwise than of an English common law restitutionary nature, in respect of which there would be a domestic limitation period of six years. I did not understand either side to suggest anything different."

90. Although Rimer LJ was here addressing bad debt relief, we see no material difference for present purposes (*ie* the juridical basis under which a person's directly enforceable rights to repayment of VAT are recognised) between bad debt relief and a reduction in the taxable amount following a reduction in price.

91. At [118] of his judgment, Rimer LJ addressed the period from 1 January 1978 to 30 September 1978 (the relevant statutory provisions coming into force on 1 October

1978). He did so in the context of [116] and [117] where he considered how the Upper Tribunal had dealt with that period. They had dealt separately with (i) cases where the supply pre-dated 1 October 1978 but the bad debt post-dated it and (ii) cases of bad debts arising before 1 October 1978 on supplies made before that period. At [118], Rimer LJ stated:

> "Given my overall conclusion in respect of the main part of BT's claims, namely, that part relating to supplies made during the period 1 October 1978 to 31 March 1989, I regard it as unnecessary to deal separately with these two types of case. Either they are blighted by the same problem as relates to the main claim; or else the only right that BT ever had to claim relief in respect of these bad debts was a common law restitutionary claim, which is long since statute barred."

92. What Rimer LJ said in [118] was really directed not at the position prior to 1 October 1978 but at whether a claim under the bad debt provisions could be brought after that date, that is to say once the provisions had come into force. Clearly he contemplated in [118] that if the statutory provisions could not be relied on, there would be a restitutionary claim (albeit that it was time-barred).

93. These passages demonstrate clearly that the commencement of the running of time was not postponed to the time when the directly effective right was first asserted. Moreover, they indicate that Rimer LJ at least considered that a claim in restitution would lie.

94. In *CCE v Fine Art Development plc* [1989] STC 85, both the Court of Appeal and the House of Lords referred to a remedy in restitution without adverse comment, albeit it was acknowledged that there **might** be a defence to such a claim namely that the overpayment was made as a mistake of law and could not be claimed. Again, this case suggests that a restitutionary claim would lie and provides no support for the view that time does not start to run until a claim is made to assert a directly effective right.

95. In our view, all of Iveco's claims based on price reductions occurring before the beginning of January 1984 (six years before section 24 FA came into force) were time barred by 1 January 1990. In our view, section 24 and regulation 7 of the 1989 did not have the effect of reviving such claims. This is so even if Mr Hitchmough's case that no overpayment of VAT or over-accounting of output tax occurred until a claim was actually made is correct so far as concerns claims which were not time barred by 1 January 1990. Iveco's restitutionary claim (or however the claim is to be described) is to recover the amount of the overpaid VAT resulting from a reduction in the taxable amount. That overpaid VAT ceased to be due for repayment as the result of the expiry of the limitation period. In applying section 80, the payment of VAT by Iveco after it made its claim in November 2011, or after it made its section 80 claim in October 2015, will not have included any element of VAT which was not VAT due or resulted in Iveco accounting for any output tax which was not output tax due. Accordingly, there is no amount recoverable under section 80.

Did the FTT have jurisdiction to determine the preliminary issue?

96. It is common ground that, if Iveco can make a claim under section 80 VATA, the FTT has jurisdiction. Section 83(1)(t) VATA provides that an appeal lies to the FTT with respect to a claim for the crediting or repayment of an amount under section 80. It is also common ground that, if Iveco only had a claim in restitution then the FTT does

not have jurisdiction in relation to such claims. That, however, does not deprive us of jurisdiction to consider a claim in restitution if its existence, and its subsequently becoming time-barred, have an impact on the claim which would otherwise exist under section 80.

97. The issue for the FTT in the light of its decision that regulation 38 provided a remedy for Iveco was whether the FTT had jurisdiction in relation to a claim under that regulation. Judge Berner concluded, in [59], that the FTT also had jurisdiction in relation to regulation 38 adjustments under section 83(1)(b) VATA. Section 83(1)(b) provides that an appeal lies with respect to the VAT chargeable on the supply of any goods and services. Judge Berner reasoned that section 83(1)(b) was wide enough to include appeals in relation to regulation 38 because that concerned the chargeability of a taxable person to VAT under domestic or EU law.

98. Ms Mitrophanous submitted that the FTT neither has nor needs to have any jurisdiction relating to any Regulation 38 adjustments. She observed, correctly, that there is no express jurisdiction relating to any regulation 38 adjustments in section 83 VATA. Ms Mitrophanous contended that the FTT did not require any jurisdiction in relation to Regulation 38 which is why it is not mentioned in section 83. She submitted that there was no need for the FTT to have jurisdiction in relation to such adjustments because they were intended to be the means by which a taxable person could make adjustments to reflect changes in price without recourse to HMRC. If the adjustment mechanism in regulation 38 is not used or is contested by HMRC then the taxable person can make a claim under section 80 if there is an overpayment or HMRC can assess any underpayment. The FTT has jurisdiction in such cases.

99. Ms Mitrophanous also submitted that section 83(1)(b) could not be read as providing jurisdiction in relation to regulation 38 adjustments. She argued that "VAT chargeable on the supply of any goods and services" related to questions such as what rate of tax applied to a supply or whether it was exempt. There is no dispute about the amount of VAT chargeable on the supplies made by Iveco. It is the amount of the consideration paid by the customer less the rebate paid by Iveco. She also contended that section 84(3) which requires an appellant to pay the disputed VAT before an appeal can proceed in certain cases, including those under 83(1)(b), shows that regulation 38 disputes do not fall within section 83(1)(b) because the requirement to pay can have no bearing in relation to adjustments for a reduction of VAT.

100. Mr Hitchmough submitted that Judge Berner was correct to conclude that the FTT had jurisdiction for the reasons he gave. Mr Hitchmough said that support for this approach was also found in the decision of the VAT Tribunal in *GMAC* which concluded that section 83(1)(b) applied to adjustments under regulation 38 because the effect of the price reduction is to reduce the value of the supply on which VAT is charged.

101. We consider that the FTT has jurisdiction under section 83(1)(b) VATA to determine whether an adjustment may be made under regulation 38 and, if so, what adjustment should be made. We agree with the comments of the VAT Tribunal in *GMAC*. If HMRC refuses to accept an adjustment under regulation 38 then it follows that there is a dispute about the value of the supply and that is directly related to the VAT chargeable on the supply. We do not consider that it can be right that, in such circumstances, the taxable person must make a separate claim under section 80 in order to pursue an appeal although such a claim could be made.

102. However, on our view of the law, it is section 80 which applies, and not a moulded regulation 38. We consider that all the matters with which we have dealt fall within the jurisdiction of the FTT (and, on appeal, of the Upper Tribunal).

Disposition

103. HMRC's appeal is allowed. Section 80 applies on the basis that the reduction in the taxable amount and the consequent overpayment of VAT arose on the occasion of each price reduction. If that is wrong, all of Iveco's claims in relation to price reductions occurring before 1 January 1984 were time-barred prior to 1 January 1990. Section 80 does not apply in relation to such claims and does not revive them.

The Hon Mr Justice Warren

Greg Sinfield
Judge of the Upper Tribunal

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