TC03578

Appeal number: TC/2012/05560

VAT – preliminary issue – whether EU law required a claim to enforce a directly-effective right under the Sixth VAT Directive to be made within a reasonable period –Revenue and Customs Commissioners v British Telecommunications plc [2014] EWCA Civ 433 – resolution of issue following issue of judgment of Court of Appeal

FIRST-TIER TRIBUNAL
TAX CHAMBER

IVECO LTD **Appellant**

- and -

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS **Respondents**

TRIBUNAL: JUDGE ROGER BERNER

Sitting in chambers at 45 Bedford Square, London WC1 on 9 May 2014

DECISION on PRELIMINARY ISSUE

1. This is the final part of my decision on the preliminary issue in this case, namely whether the claim of the Appellant, Iveco Limited ("Iveco"), to recover VAT arising from payments of certain rebates that occurred in the period 1 January 1978 to 31 December 1989 is subject to the statutory time limit prescribed by s 80(4) of the Value Added Tax Act 1994 ("VATA"), or is otherwise time-barred.

2. For the reasons set out in my decision released on 6 December 2013; [2013] UKFTT 763 (TC), I decided that s 80 VATA did not apply to Iveco's claim in respect of its directly-effective right under article 11C(1) of the Sixth VAT Directive to reduce the taxable amount of certain of its supplies, and that in consequence the time limit in s 80(4) did not apply to that claim. I also found that Iveco could make an adjustment under regulation 38 of the Value Added Tax Regulations 1995 to give effect to its directly-effective right.

3. That left open one aspect of the preliminary issue. In addition to arguing that Iveco's claim was precluded by the domestic time limit, HMRC had also submitted that, as a matter of EU law, a directly-effective right under the Sixth VAT Directive (which was the applicable Directive at the relevant time) had to be exercised within a reasonable time after the relevant price reduction leading to an overpayment. A similar argument had not found favour with the Upper Tribunal in *GMAC UK v Revenue and Customs Commissioners*; *British Telecommunications plc v Revenue and Customs Commissioners* [2012] STC 2349, but at the time of the hearing before me that decision was the subject of an appeal to the Court of Appeal. The issue was therefore left to one side, to be addressed only to the extent that it remained relevant following my decision on the other aspects of the preliminary issue.

4. My decision did, of course, did not resolve matters in favour of HMRC, so that their argument on the existence of an EU time limit remains to be determined. The judgment of the Court of Appeal has now been delivered in *Revenue and Customs Commissioners v British Telecommunications plc* [2014] EWCA Civ 433, and I am now in a position therefore to finalise my decision on the preliminary issue.

5. Neither party has made any submissions on the reasoning of the Court of Appeal. I can accordingly deal with this matter quite shortly.

6. The position adopted by HMRC, as summarised in the skeleton argument of Ms Mitrophanous prepared for the original hearing, is that under the principles of EU law, in particular the principle of legal certainty, there is an obligation to act within a reasonable time in all cases except where the legislature has expressly excluded or expressly laid down a specific time limit. HMRC relies on *Allen v Commission* (Case T-433/10P, 14 December 2011) in the General Court (Appeal Chamber), and a more recent case, *Arango Jaramillo and Others v European Investment Bank (EIB)* (Case C-334/12) [2013] 2 CMLR 49, in the Court of Justice. They also cite *Alstom Power Hydro v Valsts ienemumu dienests* (Case C-472/08) [2010] STC 777. On this basis it

is submitted that Iveco did not make its claim within a reasonable time, and is therefore barred from claiming.

7. The Upper Tribunal in *BT* rejected an argument put in the same way. It too had found that, in the circumstances of that case (which related to bad debt relief), there was no domestic time limit. It reasoned, at [225] – [226], that the question whether a time limit in respect of the exercise of a right derived from the Directive should be applied was a matter for the member states; if a member state chose not to do so, then the member state could not seek to impose a time limit by reference to EU law. *Allen* did not lead to the conclusion that, where it has been found that there is no domestic time limit, some overriding EU time limit comes into play. *Allen* was a case concerning a free-standing claim for damages as a result of an alleged breach of EU legislation. In those circumstances it was understandable that considerations of legal certainty required claims to be brought within a usual time. The same considerations did not apply to rights under a Directive. Whilst member states might, in the interests of legal certainty, impose time limits on claims, such time limits are not an absolute requirement in order to provide that certainty (see [232]).

8. The Court of Appeal agreed with the Upper Tribunal. Having referred to the arguments for HMRC, including reliance on the same authorities as are put forward in this case, Rimer LJ (with whom Kitchen and Christopher Clarke LJJ agreed) set out his own reasons quite shortly (at [89]);

> "HMRC now argues, however, that any such claims must in fact have been subject to undefined limitation periods, of necessarily uncertain length; and that such a consequence is required by reference to EU law principles that claims must be brought within a reasonable time. The error in that proposition is that whilst BT would be directly enforcing its EU law rights, it would be doing so under the umbrella of domestic machinery that subjected it to no such limits; and the application or otherwise of limitation periods to the bringing of claims is a matter for the domestic law of the member state where the claim is brought. HMRC can, in my view, point to nothing in such domestic law that can justify its assertion that the direct enforcement by BT of its EU law rights under the provisions of sections 12 [of the Finance Act 1978] and 22 [of the VATA 1983] (as appropriately moulded) would have been subject to a condition that such claims must be brought within a reasonable time. In particular, if the domestic legislation had properly implemented article 11C(1) but had expressly provided that refund claims could be brought without limit of time, that might have been unusual, but it would not have been unlawful (compare the observations of Lord Scott of Foscote in *Fleming's* case, at [2008] UKHL 2; [2008] 1WLR 195, at [20]). I can see no reason why the implied unlimited time for the bringing of BT's directly effective claims under the section 22 machinery is not equally lawful."

9. The Court of Appeal judgment is binding on me. It is entirely apt to the circumstances of Iveco's claim in respect of its own directly-effective right to apply article 11C(1) where, as I have found, there is no domestic time limit.

10. Accordingly, in respect of that one outstanding issue, I conclude 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.

Application for permission to appeal

11. This document, in combination with my earlier decision, contains full findings of fact and reasons for the decision on the preliminary issue. As I indicated at the conclusion of my earlier decision, because that decision had not determined the preliminary issue in all its respects, time for applying for permission to appeal had not then started to run. The time for applying for permission to appeal will therefore commence in respect of both this decision and the earlier decision from the date of release of this decision.

12. Any party dissatisfied with this decision or my earlier decision has a right to apply for permission to appeal against either or both pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

ROGER BERNER
TRIBUNAL JUDGE

RELEASE DATE: 13 May 2014