

Case No: CO/322/2004

Neutral Citation Number: [2004] EWHC 2515 (Admin)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Before :

THE HONOURABLE MR JUSTICE LIGHTMAN

THE QUEEN
(on the application of UK TRADECORP
LIMITED)

Claimant

-
- and -

THE COMMISSIONERS OF CUSTOMS
AND EXCISE

Defendants

Mr Jolyon Maugham instructed by Michael Welch & Co for the Claimant

Mr Rupert Anderson QC, Mr Hugh McKay & Ms Nicola Shaw instructed by The Solicitor for Customs and Excise

Judgment date: 10 November 2004

Mr Justice Lightman:

INTRODUCTION

1. This application for judicial review is made by UK Tradecorp Limited (“the Claimant”) with the permission of Moses J granted on the 29th April 2004. It relates to the investigation by the Commissioners of Customs and Excise (“the Commissioners”) into the Claimant’s twelve monthly VAT returns during 2003 in which the Claimant claimed repayment of input tax. For each of the monthly returns for 2003 the Claimant claimed repayment of input tax. The total amount of input tax reclaimed was £2,569,072. Apart from the claim for £246,698 for the period of June 2003 which has been rejected and is the subject of an appeal to the VAT and Duties Tribunal (“the Tribunal”), the Commissioners have repaid all the Claimant’s repayment claims for 2003.
2. Initially on this application the Claimant sought declarations that the period taken by the Commissioners to reach decisions on the Claimant’s claims to recover input tax in respect of seven months in 2003, (namely January to March and June to September 2003) and the manner in which the Commissioners conducted the investigation breached the principles of the European Sixth VAT Directive (“the Sixth Directive”). No complaint was made in respect of the other five months, namely April and May and October to December 2003. Repayment claims in respect of those five months were processed by the Commissioners either without enquiry or, if following an enquiry, before the expiration of thirty days from the making of the claim. The Claimant accepted (or at least did not challenge) that those five repayment claims were dealt with reasonably and proportionately by the Commissioners. No claim was made for any relief other than declarations, and in particular no claim was made for interest or any damages or compensation.
3. At the hearing Mr Jolyon Maugham, counsel for the Claimant, and Mr Rupert Anderson QC, counsel for the Commissioners, both afforded me the greatest assistance for which I am grateful.
4. In the course of the hearing the Claimant sensibly and properly dropped its claim that the Commissioners had committed any breach of the principles of the Sixth Directive. The determination of the claim to the declarations of breach would have required of the court a lengthy and intense scrutiny of the underlying facts relating to each month. A somewhat similar, though not identical, exercise is shortly to be undertaken by the Value Added Tax Tribunal (“the Tribunal”) on the appeals by the Claimant from decisions of the Commissioners refusing to pay repayment supplements. It was plain, most particularly in the context where the only relief claimed was declarations in general terms, that this exercise served no useful purpose and required an inappropriate and extravagant expenditure of time by the Administrative Court. In its place the Claimant sought declarations to the following effect:
 - i) that in verifying the Claimant’s claims for input tax for the periods in the calendar year 2003 the Commissioners were under a duty to act proportionately; and
 - ii) that the Commissioners’ failure to pay interest at LIBOR in respect of the period between (a) accrual of the Claimant’s right to input tax (i.e. the date of submission of its claims); and (b) actual payment of that input tax breaches the Commissioners’ duty to act proportionately.

In view of the fact that claims by the Claimant for repayment of input tax would continue to be made to the Commissioners in the future, the nature of the Claimant's business and low profit margins on goods which it purchases and sells which make its ability to trade dependent on expeditious repayments, the Claimant also asked the court to provide guidance as to the law in respect of the areas where the breaches had been alleged. Moses J made plain in his judgment giving permission the desirability of the provision of such guidance both to the Claimant and traders generally.

5. I should make four initial observations on the matters raised before me: (1) the claim to the first declaration, namely that the Commissioners were under a duty to act proportionately, is plainly merely a preliminary to the second declaration sought, for the duty to act proportionately is both well established in law and accepted by the Commissioners; (2) the claim to the second declaration is in substance a claim to two separate declarations, namely that the Claimant's right to input tax arises on the date of submission of its claim to deduction and payment of input tax and that the Commissioners are liable to pay interest on the sum in question from that date to the date of payment; (3) both of these claims raise questions of far-reaching importance, and on the issue of interest on which there is little (if any) guidance beyond that which can be extracted from the Opinion of the Advocate General and the Judgment of the European Court in Garage Molenheide [1998] STC 126 ("Molenheide"); and (4) as regards the request for guidance, in the course of the hearing it became apparent how difficult it is to give any but the most general guidance and how limited is the scope for such guidance, because the Claimant is not a representative trader and because the real issues between the Claimant and the Commissioners lie, not so much in the general principles to be applied, but in their application to a broad range of factual situations which call for the exercise of judgment by the Commissioners. I shall, however, in the course of this judgment try to give the requested guidance so far as it is practicable to do so.

FACTS

6. The Claimant is a repayment trader which at different times during 2003 traded in a peculiar mixture of high value readily movable zero rated goods, and in particular software CDs, pearl necklaces, diamond jewellery, mobile phones and "Platinum XXX" Cards which (as Mr Anderson delicately explained) are cards which afford "low value" access to pornographic web sites. Such goods are often used as the ostensible subject matter of artificial transactions carried out by missing traders involved in "Missing Trade Inter-Community Fraud" ("MTIC"). MTIC frauds gave rise to loss of revenue to the Commissioners in the year to March 2003 of between £1.6 and £2.6 billion. All the Claimant's transactions began with a missing trader and all had features calling for an investigation, e.g. valuations which post-dated export, diamonds bought from a retail florist, counterfeit compact discs and low value suspect XXX cards. In a word, on their face the transactions were "dodgy". In these circumstances it is common ground that all the Claimant's transactions required the Commissioners, in pursuance of their duty to the general body of taxpayers, thoroughly to investigate the Claimant's claims and seek verification that they were genuine and well founded. The investigations were thorough and complex and frequently required information from third parties and overseas authorities from whom the response time was lengthy and beyond the control of the Commissioners. The Claimant itself delayed the investigation by (in certain instances) failing to provide information requested as necessary to advance the investigation.

7. The chronology of key dates is as follows:

Period	Goods dealt in	Amount	Exported to	Date of Claim	Date of Payment
Jan	Software CDs	309,119	Dubai	31 Jan 2003	14 May 2003
Feb	Software CDs/ Pearl Necklaces	115,075	Ukraine/ Dubai	3 March 2003	16 June 2003, 29 March 2004
Mar	Diamond Jewellery/ Pearl Necklaces	332,349	Dubai, Russia/ Spain	3 April 2003	15 July 2003
April	Mobile Phones	136,204	Holland	12 May 2003	17, 26 June 2003
May	Mobile Phones	123,510	Holland	30 May 2003	2 July 2003
June	3 x Mobile Phones	378,047	Holland, Austria	7 July 2003	2 April 2004
July	XXX cards	292,360	Denmark	6 Aug 2003	14 April 2004
Aug	XXX cards/ Diamonds	365,120	Denmark/ Dubai	4 Sep 2003	14 April 2004
Sep	Diamonds	514,888	Dubai	13 Oct 2003	15 April 2004
Oct	Jewels/ Mobile Phones	1,073	Dubai/ UK	13 Nov 2003	23 January 2004
Nov	Mobile Phones	842	UK	24 Dec 2003	6 February 2004
Dec	No trading	501	No trading	12 Jan 2004	6 February 2004

8. The issues on which the Claimant originally sought declarations, notwithstanding the repayments had already been made, were how the Commissioners ought to have dealt with the claims for repayment of input tax made by the Claimant. In particular the Claimant sought declarations that:

- i) the Commissioners failed to discharge the burden upon them of showing that the measures they took in dealing with its claims for input tax in the periods 01/03-03/03 and 06/03-09/03 were, whilst enabling them effectively to attain the objective of protection of the exchequer, the least detrimental to the Claimant's fundamental right under the Sixth Directive to deduct input tax;
- ii) the Commissioners acted disproportionately in failing to make, in respect of the periods 02/03, 03/03 and 06/03, the following part payments of the following amounts respectively:

Period 02/03, part payment of £69,785, on 14 May 2003
 Period 03/03, part payment of £214,812.50 on 7 May 2003
 Period 06/03, part payment of £129,360 on 8 September 2003

- iii) the Commissioners failure timeously to give adequate reasons:
 - (a) in respect of the period 01/03 contravened their duty to give reasons in that they never notified the Claimant that the reason for their delay was that

they were taking legal advice as to whether their belief that the software CDs were produced in breach of copyright obviated the need for them to meet the Claimant's claim for input tax;

- (b) in respect of the period 02/03 contravened their duty to give reasons in that the Commissioners never notified the Claimant that one of the bases upon which they denied the claim for input tax was that they were concerned that the valuation document had been obtained after the date of export of the pearl necklaces;
 - iv) the Commissioners erred in law in proceeding, in respect of the periods 08/03 and 09/03, on the basis that a failure on the part of the Claimant to answer the questions put to it in their letter of 31 October 2003 obviated the need for the Commissioners to continue their investigations into the transactions the subject of those questions;
 - v) the Commissioners' failed to exercise their powers of care and management of the VAT system pursuant to Schedule 11 para 1 Value Added Tax Act 1994 ("the VATA") to pay interest at the High Court judgment rate in respect of the period between (1) accrual of the Claimant's right to repayment of input tax (i.e. on the date of submission of the claim for input tax as set out in the Grounds) and (2) actual payment of that input tax, breaches the Sixth Directive; and
 - vi) alternatively to (v), the Commissioners' failure to pay interest in respect of the period specified in (v) above breaches the Sixth Directive.
9. As I have already said, in lieu of declarations to this effect the Claimant merely seeks the declarations set out in paragraph 4 above and guidance as to the duties of the Commissioners in the above respects.

THE LEGISLATIVE FRAMEWORK

10. The VATA and regulations made thereunder implement the provisions of the Sixth Directive. The provisions of the Sixth Directive are directly effective. The relevant articles of the Sixth Directive provide as follows.

"Article 2. The following shall be subject to value added tax:

1. the supply of goods... effected for consideration within the territory of the country by a taxable person acting as such...

Article 4. 1. 'Taxable person' shall mean any person who independently carries out in any place any economic activity specified in paragraph 2, whatever the purpose or results of that activity.

2. The economic activities referred to in paragraph 1 shall comprise all activities of... traders...

Article 10.

1.

(a) 'Chargeable event' shall mean the occurrence by virtue of which the legal conditions necessary for tax to become chargeable are fulfilled.

(b) The tax becomes 'chargeable' when the tax authority becomes entitled under the law at a given moment to claim the tax from the person liable to pay, notwithstanding that the time of payment may be deferred.

2. The chargeable event shall occur and the tax shall become chargeable when the goods are delivered or the services are performed.

Article 17. Origin and scope of the right to deduct

1. The right to deduct shall arise at the time when the deductible tax becomes chargeable.

2. In so far as the goods and services are used for the purposes of his taxable transactions, the taxable person shall be entitled to deduct from the tax which he is liable to pay:

(a) value added tax due or paid within the territory of the country in respect of goods or services supplied or to be supplied to him by another taxable person...

Article 18. Rules governing the exercise of the right to deduct

1. To exercise his right of deduction, a taxable person must:

(a) in respect of deductions pursuant to Article 17(2)(a), hold an invoice drawn up in accordance with Article 22(3)...

2. The taxable person shall effect the deduction by subtracting from the total amount of value added tax due for a given tax period the total amount of the tax in respect of which, during the same period, the right to deduct has arisen and can be exercised under the provisions of paragraph 1.

3. Member States shall determine the conditions and procedures whereby a taxable person may be authorised to make a deduction which he has not made in accordance with the provisions of paragraphs 1 and 2.

4. Where for a given tax period the amount of authorised deductions exceeds the amount of tax due, the Member States may either make a refund or carry the excess forward to the following period according to conditions which they shall determine.

However, Member States may refuse to refund or carry forward if the amount of the excess is insignificant.

Article 20. Adjustments of deductions.

1. The initial deduction shall be adjusted according to the procedures laid down by the Member States, in particular:

(a) where the deduction was higher or lower than that to which the taxable person was entitled; ...

Article 21. Persons liable for payment of tax.

1. Under the internal system the following shall be liable to pay value added tax—

...(d) any person who mentions the value added tax on an invoice.

Article 22.8. Member States may impose other obligations which they deem necessary for the correct collection of the tax and for the prevention of evasion, subject to the requirement of equal treatment for domestic transactions and transactions carried out between Member States by taxable persons and provide that such obligations do not, in trade between Member States, give rise to formalities connected with the crossing of frontiers.

Article 27.1. The Council, acting unanimously on a proposal from the Commission, may authorise any Member State to introduce special measures for derogation from the provisions of this Directive, in order to simplify the procedure for charging the tax or to prevent certain types of tax evasion or avoidance.”

JURISDICTION

11. Questions have been raised before me on the matter of the respective jurisdictions of the High Court and the Tribunal. The general principle must be that the Tribunal's jurisdiction is limited to that conferred on it by statute and that issues outwith that jurisdiction must fall to be determined by the High Court.
12. Subject only to the supervisory jurisdiction in judicial review proceedings of the Administrative Court exercisable to ensure that the Tribunal acts lawfully, (see R v. CCE ex parte Strangewood [1987] STC 502 “Strangewood”), there are three issues in respect of which the Tribunal has exclusive jurisdiction: see Glaxo Group Limited v. IRC [1995] STC 1075 at 1080-1084 affirmed [1996] STC 191 (“Glaxo”).
13. The first issue is in respect of disputed claims to repayment of input tax and accordingly is in respect of the one claim by the Claimant rejected by the Commissioners. Pursuant to section 83(c) of the VATA the taxpayer has a right of appeal to the Tribunal from the adverse decision of the Commissioners and indeed the Claimant has an appeal pending before the Tribunal. The appellate jurisdiction conferred on the Tribunal is an exclusive jurisdiction to determine the disputed claims to repayment. Subject to two qualifications the Administrative Court does not have and should not assume jurisdiction to carry out a review of such a disputed claim: see The Queen (oao Bond House Systems Limited) v. CCE [2002] EWHC 2134. The first qualification is that judicial review may be apposite when the challenge to the

decision of the Commissioners is made on grounds that cannot be entertained by the Tribunal, e.g. unfairness in the exercise of a power (see In re Preston [1985] AC 835) or unfair treatment of the taxpayer by the Commissioners (see CCE v. National Westminster Bank [2003] STC 1072). The second qualification is that in exercise of its supervisory jurisdiction the Administrative Court may be required to carry out a limited review e.g. in order to determine whether the Commissioners' decision not to make an interim payment is proportionate and lawful. There can be no dispute that, if and when the claim on acceptance or establishment crystallises into an entitlement, the court will have both jurisdiction and a duty to provide effective judicial protection of that entitlement and to preserve the balance between the rights of the Claimant in respect of that entitlement and the general obligations of the Commissioners: see the Opinion of Advocate General Fennelly at paragraph 46 and Judgment of the Court at paragraph 55 in Molenheide.

14. The second issue is in respect of a claim for a repayment supplement under the provisions of section 79 of the VATA and Regulations 198 and 199 of the Value Added Tax Regulations 1995. The provision for such a supplement is a "spur to efficiency": per Auld J in CCE v. Rowland [1992] STC 647 at 655 g-h. The thrust of this section is to the effect that, where a written instruction that the claim be repaid is not issued within the specified thirty day period, whatever the period of the delay thereafter, the amount due by way of repayment or refund shall be increased by the addition of a supplement equal to 5% of that amount. Section 79(3) and the regulations however go on to provide that in computing the thirty day period there should be left out of account periods referable (inter alia) to the raising and answering of any reasonable inquiry relating to the requisite return or claim and the correction by the Commissioners of any errors or omissions in that return or claim. Section 79(4) provides that, in determining whether any period is referable to the raising or answering of such an enquiry, there shall be taken to be so referable any period which (a) begins with the date on which the Commissioners first consider it necessary to make such an inquiry and (b) ends with the date on which the Commissioners satisfy themselves that they have received a complete answer to the inquiry or determine not to make the inquiry or pursue it further. Section 79(4) further provides that for this purpose it is immaterial whether any inquiry is in fact made or whether it is or might have been made of the person or body making the requisite return or claim or of an authorised person or of some other person. The resolution of a disputed claim to repayment supplement (and accordingly any issue as to whether any time and, if so, what should be left out of account) lies within the exclusive jurisdiction of the Tribunal. It should be noted that the Tribunal has only limited jurisdiction to examine and determine the reasonableness of the investigation by the Commissioners, for under the provisions of section 79(4) once a reasonable inquiry has started the means adopted by the Commissioners in carrying it out cannot be questioned before the Tribunal: see paragraph 29 of the Decision of the Tribunal in Purple International Ltd v. CCE. The Claimant is currently appealing to the Tribunal against refusal by the Commissioners to pay repayment supplements in respect of the months January to June and September 2003. The appeal will be heard after the conclusion of these proceedings. The Commissioners have paid the repayment supplement in respect of the months of July and August 2003.
15. The third issue is in respect of a claim to interest in certain specified cases. The VATA makes express provision for the recovery of interest in two circumstances. Section 78 of the VATA provides for the mandatory payment of interest set at a statutory rate (presently 3%) in cases of official error; and section 84(8) of the VATA

confers on the Tribunal a discretionary power to award interest at a rate determined by the Tribunal in the event that a decision has been made not to repay a claim and that decision is later admitted or held to be wrong. The Tribunal has awarded the Claimant interest in respect of part of its claim for February 2003. This part of the Claimant's claim in respect of that month was initially rejected and then finally accepted. No other decision of the Commissioners has yet been admitted or held to be wrong and no right to interest under either of these sections has arisen or been claimed.

16. The Claimant in the course of the hearing before me raised for the first time a new contention that the Commissioners have power to pay interest under paragraph 1(1) of Schedule 11 of the VATA whenever there is any delay at all between submission of the claim and repayment, even where the delay is directly attributable to the taxpayer's own conduct or where the Commissioners have acted reasonably and proportionately. That paragraph provides that VAT shall be under the care and management of the Commissioners. Whilst those words are sufficient when read in the context of the legislation as a whole to authorise the Commissioners to make interim payments, I do not think that, in the context of legislation which expressly gives authority only in the strictly limited circumstances defined in section 78 and section 79 to award interest, the words can or should be read as conferring any other power to do so, let alone the extensive power suggested by the Claimant.

RUNNING ACCOUNT

17. The VAT regime requires that a running account is kept between the taxable person and the Commissioners. For the purpose of the running account a distinction must be drawn between claims for refunds and repayment which have been admitted or upheld and claims which have not been admitted or upheld. I shall later consider and reject the Claimant's contention that there is no distinction between the two. It is sufficient to say at this stage that for reasons which I will elaborate later a claim which has been admitted or upheld (and only such a claim) gives rise to a right of deduction and, if the deduction exceeds the amount of tax due, a prima facie right to immediate payment. The right to payment is only prima facie because the Commissioners may be entitled to refuse to pay without account being taken of a cross-claim by the Commissioners against the taxable person. Where there is such a prima facie right, the onus is placed on the Commissioners to justify any failure or delay in making immediate payment e.g. by establishing a substantial claim against the taxable person which the Commissioners are entitled to set-off against the entitlement to the sum prima facie due to him. A claim which has not been admitted or upheld gives rise to no such prima facie right, but merely gives rise to a legitimate expectation that the claim will be subject only to a reasonable and proportionate investigation.

DUTY TO INVESTIGATE AND ACT PROPORTIONATELY

18. The Commissioners are under a duty to conduct a reasonable and proportionate investigation into the validity of claims for a refund and repayment and a duty to act proportionately both in respect of the investigation and in dealing with the taxable person's claims generally. see R (oao Deluni Mobile Limited) v. CCE [2004] EWHC 1030 ("Deluni"). The duty to investigate is applicable both to the claim to the refund and repayment and to the question whether there is a right to set-off (or indeed a claim for a further payment from the taxable person). The duty embraces an obligation to keep all investigations under review. The Commissioners are entitled to take a

reasonable time to investigate claims prior to authorising deductions and repayments and what is a reasonable time within which to complete an investigation must depend on the particular facts: Strangewood at 505. The availability and proper exercise of the Commissioners' powers of investigation are essential to maintain the fiscal neutrality of VAT and prevent refunds being made to parties not entitled to them. The postponement of repayment of input tax pending the outcome of the investigation is, as a matter of principle and subject to questions of proportionality, entirely compatible with the Sixth Directive. Whilst the burden of proof is upon the taxable person to establish that the investigation of his unadmitted and unadjudicated claim and the failure to make a part or interim payment is unreasonable or disproportionate, the burden is on the Commissioners to justify non-payment of it once the claim is admitted or established and the period of investigation of any cross-claim.

19. VAT Notice 700-58 states that 90% of correct repayment returns are authorised by the Commissioners within ten working days. But the very nature of the Claimant's business in this case and the need to undertake inquiries into the correctness of its claims take the investigation outside the normal and precluded its claims from being processed within that period. When the Commissioners have reason to suspect that the underlying transactions form part of a MTIC fraud, the enquiry process will inevitably be complex and therefore lengthy and will be further protracted when the taxable person is not forthcoming with information requested of him. The legislation lays down no fixed timetable. So far as any guideline is provided, it is provided by section 79 which imposes a sanction if the Commissioners exceed thirty days and the period during which inquiries are being pursued as there set out.
20. The Community law principle of proportionality requires that there must be a reasonable relationship of proportionality between the means employed and the aim pursued, and accordingly in this context between the legitimate aim of the Commissioners to protect the revenue (and preserve the neutrality of VAT by ruling out improper claims) and the means employed of subjecting taxable persons' claims to an exercise of verification before they are accepted and payment is made. The principle of proportionality in this context requires satisfaction of two conditions. I shall consider each in turn.
 - (a) Maintenance of balance
21. The first is that a balance is maintained between the conflicting interests of the Commissioners as collectors of tax in the protection of VAT revenues and of the taxable person as claimant to the repayment of input tax and (most particularly where this is applicable) the need of the taxable person for early repayment to finance the continued conduct of his business. The interest of the taxable person as claimant for repayment must ordinarily carry greater weight for this purpose if his claim in whole or in part is admitted or established but is subject to a cross-claim by the Commissioners than if his claim has yet to be admitted or established. If and when in the course of an investigation, a claim is in whole or in part admitted or established, then there arises a prima facie entitlement to deduction and payment and (if the deduction exceeds the tax due) the taxable person should be so informed and, unless there is established on the part of the Commissioners a right of retention, the payment should be made. Implicit in the duty of the Commissioners to maintain a balance is a duty to keep under consideration whether any particular investigation should be continued or concluded and whether an interim or part payment can or should be made.

22. In the course of an investigation the relevant interest or factors in the balancing exercise include the following:
- i) the need to protect the Revenue (referred to by the Advocate General in Molenheide as the “overriding interest”). The need to protect the Revenue must figure large in a case such as the present given the background of widespread MTIC fraud and suspicious circumstances surrounding the Claimant’s trades;
 - ii) the likely outcome of the investigation (so far as ascertainable) and (in particular) of acceptance or establishment of the claim and repayment of input tax;
 - iii) the effect (if any) of withholding funds on the trader and his business and the representations made in this regard. In this case there were references in general terms in the Claimant’s letters to the Commissioners to the adverse effect on business occasioned by the withholding of input tax, but no suggestion was made of imminent insolvency or inability to trade. It must be incumbent on the taxable person to bring to the attention of the Commissioners, with any necessary supporting evidence, any relevant consideration within his special knowledge;
 - iv) the nature and complexity of enquiries necessary to verify the claim (including length of time involved and the likelihood of securing additional relevant information);
 - v) whether either the Commissioners or the trader have contributed to any delay in the verification process. The Claimant in this case unhelpfully elected not to specify the particular respect in which it originally contended in general terms that the Commissioners’ investigations were unreasonable, unnecessary or not conducted with sufficient expedition and thus precluded any investigation or evaluation of the contentions by this court. On the other hand the Claimant itself did delay the verification process;
 - vi) whether an interim or part payment or full repayment should be made ahead of the conclusion of the investigations and for this purpose whether, having regard to the taxable person’s “track record” or his provision of security or guarantees, a refund of a repayment is likely to prove recoverable if it subsequently turns out that the repayment was not due to the taxable person. In this case the Claimant made no response to the Commissioners’ offer of interim payment on condition that security was provided and did not suggest that security was not available nor indeed did the Claimant request an interim payment;
 - vii) whether there is any scope for judicial review of Commissioners’ conduct; and
 - viii) whether there is any recompense for delay in repayment.
23. The witness statement of Mr Birchfield, Senior Executive Officer of Customs and Excise, reveals that the Commissioners very much had the relevant considerations and interests in mind. The judgment of Moses J in R (oao GSI Distribution Europe Ltd) v. CCE [2002] EWHC 2521 (“GSI”) makes plain that the Commissioners do consider making, and where appropriate do make, interim payments pending completion of

their investigations. The principle of proportionality does not (as suggested by the Claimant) require promulgation of a more formal system prescribing the test to be applied in the balancing exercise. The system in play is fully adequate.

24. Before I leave this topic I should say a word on the contentious issue whether the failure on the part of the taxable person to answer questions put by the Commissioners going to the entitlement to claim input tax obviates the obligation on the part of the Commissioners to seek expeditiously to verify the claim. As it seems to me, the refusal does not obviate the obligation, but may delay the conclusion of the investigation and may oblige the Commissioners to reject the claim. The Commissioners cannot be criticised for affording time to the taxable person to consider carefully the implications of his refusal to answer (e.g. that adverse inferences may be drawn) and the other consequences (e.g. the consequent need on the part of the Commissioners to pursue other inquiries) and the potential impact on the outcome. But the duty of the Commissioners throughout continues to be to process the claim expeditiously.

(b) Judicial control

25. Secondly the Community principle of proportionality requires the availability at all times of effective judicial control over the actions of the Commissioners at the instance of the taxable person. The availability of judicial control has two elements. The first element is that the national legal system must afford to a taxable person at all times access to a court which can scrutinise, supervise and monitor the due performance by the Commissioners of their duties, and that embraces scrutiny both of the decisions made and the decision-making process. This requirement in the case of the Claimant is plainly met, for at any time the Claimant could (as it has done) invoke the jurisdiction of the Administrative Court. The Administrative Court's role includes ensuring that the Commissioners in accordance with their duty expeditiously determine the applications for refunds and reach fair and proportionate decisions whether (e.g.) to proceed with an investigation or whether to make part or interim payment. Further after the Commissioners' decision the taxable person can appeal to the Tribunal on the merits and make claims before the Tribunal for interest and supplementary payments as previously outlined. There is much to be said for the proposition that the supervisory jurisdiction of the Administrative Court in regard to the Commissioners could more conveniently, expeditiously and economically be exercised by the Tribunal as an adjunct to its appellate function, but I cannot think that the present procedure in any way falls short of the standard required by the principle of proportionality.
26. The second element is an obligation on the part of the Commissioners to give reasons for and explain its actions: consider Unectef v. Heylens paragraph 15 of Judgment of the European Court. The extent of the obligation obviously turns on the facts of the particular case. The obligation may be expressed as an obligation (so far as it is compatible with the efficient and economic performance of their duties and so far as it is reasonably practicable) to inform the taxable person as to the reasons for withholding payment and the stage which the investigation has reached, to explain any apparent undue delay in the progress of their investigations and to answer sensible and proper questions relating to the investigation. The standard required is that of good administration. This exercise should not be such as to distract the Commissioners from their foremost task of processing their investigations with all due speed. The information to be provided need not ordinarily be detailed or reveal

confidential information, but it must be sufficient to show whether the Commissioners are continuing to discharge their duties in respect of the investigation. The Commissioners in the ordinary course should at an appropriate time raise with the taxable persons matters which emerge in their investigation which call for comment or explanation by the taxable person or on which the taxable person may reasonably be expected to have some input and the taxable person should be allowed to rebut an adverse inference e.g. that the dating of a valuation raises questions whether it was fabricated.

27. Generally it is incumbent on the taxable person to bring to the attention of the Commissioners any special facts and matters known to him which can or should be taken into account in determining the progress of the investigation and make requests for any interim direction or provision (e.g. an interim payment) for which he has any special need, so that these matters may receive the attention they merit: see Deluni paragraph 8.

ENTITLEMENT TO DEDUCT INPUT TAX

28. I turn now to the first of the two issues of law of importance raised before me, namely whether (as the Claimant contends) the taxable person has an entitlement to deduct input tax and (where the deduction exceeds the amount of tax due) a prima facie right to repayment of output tax upon submission in proper form of the Claimant's claims to input tax in accordance with Article 18 or whether (as the Commissioners contend) the entitlement only arises after the Commissioners have accepted the claim either summarily or on completion of their investigation or after the claim has been upheld by the Tribunal or (on appeal) by the court. The entitlement of the taxable person to repayment in either event is only prima facie because (as I have already said) the Commissioners may have a cross claim which entitles them to defer repayment pending determination of the cross-claim and to set off what is due under the cross-claim.
29. The answer to this question has implications, most particularly as regards the liability of the Commissioners to pay interest and the duties of the Commissioners in regard to making payment without delay or deduction. It is clear that, where under the Sixth Directive there is an entitlement to deduction and payment, there is a prima facie right to immediate payment which legislation of Member States should respect and not reduce or abrogate: CCE v. France [1988] ECR 4797 paragraph 16; and any derogation from that entitlement must be shown by the Commissioners to be objectively justified necessary and not disproportionate.
30. I shall first consider the question without reference to Molenheide. Article 17 provides that "the right to deduct shall arise at the time that the deductible tax becomes chargeable". That means that the right to deduct arises in respect of the transactions generating the input tax and can be deducted in respect of output tax incurred in the same VAT accounting period. The taxpayer cannot be required to defer the deduction to later output transactions or later returns. The right to deduct arising under Article 17, if it is to be exercised, must be exercised in accordance with Article 18.1 and 18.2 and if so exercised may give rise to a right to a refund under 18.4. But it is clear that there is no right to a refund, and no right to a refund is triggered, unless the right to deduct is exercised in respect of taxes actually due: see Genius Holdings v. Staatssecretaris Van Financien [1989] ECR 4227 at 4226 at paragraphs 13 and 15 ("Genius"). The Commissioners' investigations are the

appropriate means to verify whether or not there exists a valid claim to deduction. Until the claim is accepted or established, there is no right to payment.

31. For his proposition to the contrary the Claimant places reliance on the decision in Molenheide. In that case at issue was the validity of provisions of Belgian law dramatically skewed in the tax authority's favour which authorised (and indeed required) the tax authorities as a protective measure free from any judicial supervision to take measures (the urgency and necessity for which were to be irrebuttably presumed): (a) to retain (or "provisionally attach") refundable amounts of VAT pending determination of claims against the taxpayer of tax evasion and of the existence of VAT debts owing to them and (b) to withhold interest on those refunds which was otherwise payable under Belgian law. In a word the legislation laid down an inflexible regime which provided that the taxable person should be kept out of the money to which he was prima facie entitled for an indefinite period under a blanket rule allowing for no consideration of the relevant circumstances. There could be no judicial review and no compensation in the form of interest or otherwise in respect of the loss of use of the money in the interim. The European Court held that these provisions of Belgian law were not inherently prohibited by Article 18 of the Sixth Directive, but that the provisions for attachment went further than was required to protect the revenue and were the subject of a successful challenge on grounds of lack of proportionality. In particular it was disproportionate (1) to require attachment in all cases; (2) to exclude any jurisdiction of the Belgian court to lift the attachment and e.g. substitute security for attachment; and (3) to preclude the award of interest. The European Court held that "the right to deduct VAT" was a fundamental principle of the common system of VAT established by the Sixth Directive and that Member States must not adopt measures designed to preserve the rights of the treasury undermining the right to deduct VAT. Any measures adopted must go no further than is necessary to attain their objective and must admit of effective judicial review.
32. Mr Maugham submits that the case is authority for two further propositions namely: (1) that the right to deduct arises as soon as the claim to deduct is duly made; and (2) even if the right does not so arise, that the claim itself is entitled to the same protection from derogation by national legislation as the right to deduct and repayment when established. Whilst there are passages in the Opinion of the Advocate General and the Judgment of the European Court which might be read as supporting both propositions, in my view neither proposition is correct for three reasons.
33. The first reason is that there is authority binding on me to this effect. I have in mind the decisions of Neuberger J in Capital One Developments Ltd v. CCE [2002] STC 479 and of Moses J in GSI. Neuberger J held that there was a critical distinction between an unadjudicated claim to input tax and an admitted or established claim; that the decision in Molenheide proceeded on the basis that the Belgian authorities in that case had admitted the claims and had merely raised a cross claim; and that the protection from derogation afforded to admitted or established claims did not extend to claims which were neither admitted nor adjudicated upon. Moses J cited with approval and followed that line of reasoning. The second reason is the line of reasoning having reference to the terms of the Sixth Directive and the decision in Genius which I have set out above. The third is practical common-sense. It must surely be incumbent on the taxpayer to satisfy the Commissioners of his entitlement to a deduction. Fiscal neutrality requires that this should be so and that repayments should not be made to taxable persons who have or show no such entitlement. Surely

it cannot be sufficient merely to make a claim to be entitled or treated by the law as entitled or have the same protection.

34. I accordingly conclude that there is no prima facie duty on the part of the Commissioners to repay input tax until the claim has been agreed or upheld.

DUTY TO PAY INTEREST

35. The second important question of law is whether the Commissioners are under a duty to pay interest as from the date that the claim for a refund of input tax was duly made or whether any such duty can only arise (if at all) from the date that the obligation to repay output tax arises. There is no express provision for payment of interest in the Sixth Directive. But the Claimant contends that the entitlement arises from the date of the claim under and by virtue of the principles of neutrality of VAT and proportionality and that its existence is supported by the Opinion of the Advocate General and in the Judgment of the Court in Molenheide.

36. The starting point, as it seems to me, must be the Opinion of the Advocate General in Molenheide. In his conclusion in paragraph 55, after stating that national provisions that permit the preventive retention of VAT credits supposedly due to a taxable person are compatible with the Sixth Directive so long as they are (1) necessary to protect the fiscal interests of the Member State in ensuring the effective collection of VAT and (2) proportionate, the Advocate General went on to say:

“In all preventive retention cases, the VAT administration must undertake in the event of the taxable person being ultimately successful in the main action concerning the retention, to pay interest on the sum retained from the moment when, in accordance with the normal deduction rules applied in that member state in the implementation of the Sixth Directive, the sum would have been paid to that taxable person.”

37. As I read the passage in the Opinion, what the Advocate General is saying perfectly generally is that, where by reason of the taking of preventive retention action payment of accepted or established claims for repayment of input tax is delayed by retention action and the taxable person eventually succeeds in the retention action and accordingly establishes that there was no justification for withholding payment, interest should be paid from the date that under the deductions rules in the Member States the sum would have been payable to the date of payment.

38. Reference to liability to pay interest in the judgment of the European Court is to be found in paragraphs 62-64 which read as follows:

“62. Fifth, the plaintiffs state that, under Belgian law, in the event of release of the retained VAT balances, interest is not payable by the treasury unless the sums retained have not been duly returned by 31 March of the year following that in which the refundable balances came into being and unless the amount refundable is at least BF 10,000, the last VAT return for the calendar year in which the VAT credit arose was signed at the place on the form indicated for that purpose and all the VAT returns have been filed within the prescribed time limits.

63. In that regard, it must be observed that it is not necessary, in order to attain the objective pursued by legislation such as that at issue in the main proceedings, namely to ensure recovery of the amounts due, for interest to be calculated from a date other than that on which the retained VAT balance would normally have been paid under the Sixth Directive, and therefore that the principle of proportionality precludes the application of such legislation. The same applies to the other conditions mentioned above: in particular, lateness in filing returns can be penalised in a manner unconnected with the retention procedure and without affecting the right to refund of the VAT balance.

64. The answer to be given must therefore be that it is for the national court to examine whether or not the measures in question and the manner in which they are applied by the competent administrative authority are proportionate. In the context of that examination, if the national provisions or a particular construction of them would constitute a bar to effective judicial review, in particular review of the urgency and necessity of retaining the refundable VAT balance, and would prevent the taxable person from applying to a court for replacement of the retention by another guarantee sufficient to protect the interest of the treasury but less onerous for the taxable person, or would prevent an order from being made, at any stage of the procedure, for the total or partial lifting of the retention, the national court should disapply those provisions or refrain from placing such a construction on them. Moreover in the event of the retention being lifted, calculation of the interest payable by the treasury which did not take as its starting point the date on which the VAT balance in question would have had to be repaid in the normal course of events would be contrary to the principle of proportionality.”

39. These observations again were directed at delays in payment of admitted or established claims to repayment of input tax.
40. It is not entirely clear to me whether the European Court was intending to lay the same broad proposition as was advanced by the Advocate General or whether its observations were intended to be limited to the feature of Belgian law which it found to be objectionable, namely that the general right to interest under Belgian law was limited in the way that it was. I incline to the former which brings the judgment in line with the Opinion of the Advocate General. The European Court gives no indication of any disagreement with him. But neither the Opinion nor the Judgement has any application to the facts of this case, for there is no question raised in this case of any delay occasioned by preventive action or otherwise in payment of accepted or established claims. The question raised related to delay prior to acceptance or establishment.
41. I may add that the absolute obligation to pay interest from the date of the claim to repayment advanced by the Claimant, as it seems to me, cannot arise from the doctrine of proportionality. Indeed it is scarcely consistent with it. The Claimant's

contention is advanced: (a) notwithstanding the clearly established principle that national VAT authorities are bound to investigate and defer payment of claims to refunds; and (b) irrespective of the reasons for any delay in the conclusion of the investigation and accordingly payment, even if the reason is the deliberate obstruction of investigations by the Commissioners. The principle of fiscal neutrality of VAT does not, as it seems to me require (if it extends to payment of interest at all) payment of interest in respect of the period prior to the acceptance or establishment of the right to deduct and repayment.

42. In my judgment Community law does not oblige Member States to pay interest on repayments of input tax from the date of the making of the claim to repayment. It may require payment of interest (as Molenheide indicates) if repayment is wrongly deferred from the date that the claim has been accepted or established. That is a question which, if and when it arises, may well merit a reference to the European Court. As I have already said, that is not the situation in this case. Community law obliges Member States to proceed with any investigation of claims to input tax expeditiously and proportionately and to pay claims which are (or to the extent that they are) admitted or established promptly, subject only to any due exercise of rights arising from cross-claims. It is possible that breaches of those duties may give rise to a claim under Community or English law for compensation for the period during which the taxable person is kept out of his money (in effect interest). Whether or not there is such a claim under Community law may require consideration of the question whether the taxable person has an adequate remedy under English law and in particular under the provisions of sections 78, 79 and 84(8) of the VATA. In this case it is sufficient to say that there is now no allegation of breach of duty and no claim to damages. The only claim for a declaration of entitlement is to interest in respect of the period between the making and the agreement or establishment of the claim to a refund and for the reasons which I have given that claim clearly cannot be sustained. The law in this regard is quite clear and there is no such uncertainty that require a reference to the European Court.

CONCLUSION

43. I accordingly grant the Claimant no relief in this action.

1. MR JUSTICE LIGHTMAN: For the reasons set out in the judgment which I have just handed down I decline to grant the claimants the relief they seek.
2. MR MCKAY: Would your Lordship kindly grant the Commissioners their costs please?
3. MR MAUGHAM: My Lord, I see that the claimant achieved a substantial degree of success in relation to the larger of the two issues before your Lordship, the conduct point. If your Lordship were to look at paragraph 2 of the claimant's skeleton -- I am not suggesting your Lordship needs to -- your Lordship would see that the claimant says that the claim is pursued so that the claimant can have guidance in relation to the way in which the Commissioners ought to proceed.

4. My Lord, I say that the absence of the finding of disproportionality, the absence of specific relief, flows from the decision not to go into the facts for reasons that your Lordship indicated in your Lordship's judgment. The Commissioners said your Lordship had no jurisdiction and, my Lord, you did not accept that contention, and the Commissioners said that they did not want guidance and your Lordship has given guidance. My Lord, the only other thing I note is that in giving leave Moses J referred to the fact that the Commissioners should also have guidance. Although the Commissioners did not want it, the exercise has been a far from useless one so far as the Commissioners are concerned.
5. My Lord, I say in relation to the question of costs that that is something which, in my respectful submission, might be reflected in your Lordship's order.
6. MR MCKAY: My Lord, I have to say I resist that. Two points: first of all, the Commissioners said in their submissions, my Lord, that it was impossible for the court to give anything other than the most general guidance, and that has been reflected in your Lordship's judgment at paragraph 5. The guidance that your Lordship actually gave, which is at paragraph 22 of the court's judgment, reflects, in my submission, the document the Commissioners prepared headed "Factors material to the application of proportionality", where the Commissioners put forward seven matters to be considered. Your Lordship appears to have accepted all of them but added an eighth. So for my learned friend to argue that he has achieved a substantial measure of success on the guidance issue is, in my submission, misguided. The Commissioners have been successful on this issue. Submissions they made to you, my Lord, were accepted.
7. As to the jurisdiction point, the Commissioners submitted that the court has no jurisdiction to review the decision to undertake the investigation and, my Lord, the court did not review the decision. The court undertook an exercise of analysis of the authorities but not of the facts and gave such guidance as your Lordship felt necessary on the principle of proportionality. In my submission, that is a long way from the proposition that the claimant has achieved a large measure of success. It has failed and it has failed on a number of points before your Lordship and it has withdrawn others. That is what I say, my Lord.
8. MR JUSTICE LIGHTMAN: Thank you. I have no doubt that the defendants ought to have their costs of this application. This is a bona fide application. It sought various forms of relief and sought various forms of guidance. In tune with the judgment of Moses J when he granted permission I have sought to provide as much guidance as I can. On the substantive issue, as it seems to me, the defendants have succeeded and the right order to make is that they should have their costs.
9. MR MAUGHAM: My Lord, the application always seems so disrespectful.
10. MR JUSTICE LIGHTMAN: There is no disrespect.
11. MR MAUGHAM: My Lord, I am grateful.
12. MR JUSTICE LIGHTMAN: You want permission to appeal?
13. MR MAUGHAM: My Lord, yes, I do.
14. MR JUSTICE LIGHTMAN: On what issue?

15. MR MAUGHAM: My Lord, in relation to, firstly, the interest point.
16. MR JUSTICE LIGHTMAN: You mean on the question as to whether interest is payable in respect of the period prior to determination or (inaudible).
17. MR MAUGHAM: My Lord, yes. My Lord, I say that that is obviously a point of some considerable importance. Your Lordship's finding in relation to interest is predicated upon what Neuberger J said in Capital One about Molenheide. My Lord, in my respectful submission, there is very real doubt about what Neuberger J said in Capital One. My Lord, I ask rhetorically whether there is a better case than this to have that question tested.
18. My Lord, in relation to the question whether your Lordship's court is the appropriate court for one to seek to scrutinise withholdings in the meantime, your Lordship has said that the claimant does have a right to judicial control of the Commissioners' actions, and that judicial review is how one exercises that right. Your Lordship says that at paragraph 25.
19. My Lord, the claimant says that there is obviously a degree of tension between that your Lordship is holding and your Lordship's other holding that it would be an inappropriate use of your Lordship's time to go into the facts. My Lord, I also say that your finding --
20. MR JUSTICE LIGHTMAN: It is inappropriate to go into the facts when the only issue is the grant of a declaration, not settling a point of damages or compensation.
21. MR MAUGHAM: My Lord, yes. My Lord, I also say that your finding is one which is liable to have repercussions. They may be serious repercussions for the case lawyers of the Administrative Court. My Lord, I say that the matter is one which will have to be adjudicated at some stage. Previously the practice of the Administrative Court has been not to give permission. My Lord, as I understand your Lordship's judgment, permission will in appropriate cases now have to be given. My Lord, I say that that may have serious repercussions for the case of the court, and again I pose the rhetorical question: is there a better (inaudible) than now for the issue to be cleared up?
22. MR JUSTICE LIGHTMAN: I shall not give permission to appeal. It seems to me that if there is going to be an application for permission to appeal that is for the Court of Appeal. I do not think that an appeal has any real prospect of success, but it is open to you to persuade the Court of Appeal otherwise.
23. I have completed the form so you can go off to the Court of Appeal as fast as you can. Anything else?
24. MR MAUGHAM: No, my Lord.
25. MR JUSTICE LIGHTMAN: I thank you again. It was not an entirely easy case.