

Retrospective claims for VAT bad debt relief

[GMAC UK plc \[2010\] UKFTT 202 \(TC\)](#)

Summary

The First Tier Tribunal has allowed an appeal against HMRC's decision to refuse to pay retrospective claims for VAT bad debt relief (BDR) in the context of hire purchase of cars. The decision, that certain UK conditions for BDR claims were incompatible with EU law and that certain time limits for retrospective BDR claims must be disapplied, should pave the way for UK businesses which were unlawfully deprived of BDR to obtain retrospective refunds.

Background

This case is the third concerning the VAT treatment of supplies of motor vehicles on hire purchase (HP) terms.

In the first case (GMAC I), the High Court ruled that the Taxpayer, having accounted for output VAT on the full value of the supply of goods when the sale took place, was entitled to adjust the output VAT when the HP agreement terminated by means of either a 'voluntary' termination (where the purchaser returned the vehicle in accordance with the terms of the agreement) or a 'hostile' termination (where the purchaser breached the terms of the agreement and the Appellant enforced, where possible, rights of repossession). The High Court confirmed that certain elements of the adjustments constituted adjustments to the agreed consideration (adjustable under reg 38 VAT Regulations 1995 (SI 1995/2518)) and certain elements constituted BDR. The High Court also confirmed that the sale of repossessed vehicles did not constitute a supply for VAT purposes provided that the conditions of the VAT (Cars) Order 1992 (SI 1992/3122) were satisfied, notably that the vehicle was in the 'same state' when sold as when repossessed.

In the second case (GMAC II), the VAT & Duties Tribunal decided that the claims in respect of Reg 38 reductions in consideration taking place between 1 January 1978 and 31 December 1989 were not subject to the s 80 VAT Act 1994 time limits or unjust enrichment provisions.

This third case (GMAC III) concerns HMRC's decision to resist the elements of the Appellant's claims which fell to be treated as BDR. HMRC's contentions were, in summary:

- that the claims were invalid because the BDR regime imposed a condition (the 'insolvency' condition) which prevented BDR claims except where the defaulting customer had become insolvent, a condition which applied to supplies made between 1 January 1978 and 31 March 1989;

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- that the claims were also invalid because the BDR regime imposed a condition (the 'reservation of title' condition) which prevented BDR claims in respect of supplies of goods where title to the goods had not passed to the defaulting customer, a condition which applied to supplies made between 1 January 1978 and 19 March 1997;
- that the Appellant's entitlement to BDR, combined with the other reliefs (i.e. desupply of the sale of repossessed vehicles and reg 38 adjustments) could yield the result that the Appellant would not be taxed on the full amount of the consideration actually received, and non-taxation would occur (contrary to the intention of the EU law) if the First Tier Tribunal allowed the Appellant the benefit of BDR in these circumstances; and
- that s 39(5) Finance Act 1997 time-barred BDR claims in respect of supplies made before 1 April 1989 (it was common ground that this time-bar point did not affect supplies made between 1 April 1989 and 19 March 1997).

Held

The First Tier Tribunal held that:

- the 'insolvency' condition and the 'reservation of title' condition were incompatible with art 11 EC Sixth Council Directive 77/388/EEC (which came into effect on 1 January 1978 and included a directly effective right to adjust consideration in the event of partial or non-payment) because those conditions did not respect the EU principle of equality of treatment, and the Member States' entitlement to make conditions was limited to procedural and evidential matters;
- the Appellant's entitlement to BDR was not defeated or curtailed by the end result of the combination of BDR with the other reliefs; and
- s 39(5) Finance Act 1997 had been introduced without a period of transitional relief, had unfairly deprived taxpayers of their accrued rights to claim BDR in respect of those supplies, and must therefore be disapplied.

Implications

Opportunities for businesses

It appears that this decision creates an opportunity for retrospective BDR claims by taxpayers which were prevented from making claims:

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- for the period from 1 January 1978 to 31 March 1989, because of the 'insolvency' condition and/or because of the unlawful imposition of the s 39(5) time limit; and/or
- for the period from 1 January 1978 to 19 March 1997 because of the 'reservation of title' condition.

It is arguable that the disapplication of the s 39(5) time limit for claims should, as in the 'Fleming' case, require HMRC to announce a period of transitional relief in respect of BDR claims for the period to 31 March 1989. Due to the absence of time limits in respect of claims for BDR for the period to 19 March 1997, the effective period for claims will be almost 20 years. It is likely that HMRC will publish its views on this judgment in the near future in a business brief.

Submission of claims

Businesses which are contemplating claims will have to ensure that they are compliant with the conditions for BDR claims which were in place at the relevant time (barring those rejected by the Tribunal in this case, and the ECJ in Goldsmiths (Jewellers) Ltd (C-330/95) which rejected the condition that BDR could only be obtained for supplies made for a consideration in money rather than for non-monetary consideration).

HMRC has indicated in the past that it would not accept extrapolated claims for BDR but we consider that, in the context of the disapplication of time limits unlawfully imposed by HMRC, the requirements for evidence should be relaxed so that it is not made excessively difficult for businesses to exercise their directly effective rights once again.

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