TC04272

Appeal number: TC/2010/06376

VALUE ADDED TAX – input tax - "Fleming claim" – whether input tax previously claimed in respect of services supplied in connection with share issues - documents no longer in existence – jurisdiction of the Tribunal - burden of proof :legal and evidential - appeal allowed in part – issues relating to quantum and jurisdiction adjourned

FIRST-TIER TRIBUNAL
TAX CHAMBER

PERENCO HOLDINGS **Appellant**

- and -

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

TRIBUNAL: JUDGE GUY BRANNAN
MRS GILL HUNTER

Sitting in public at Bedford Square, London on 5 November 2014

Hui Ling McCarthy, Counsel, for the Appellant

Philip Rowe, Presenting Officer, for the Respondents

DECISION

Introduction

1. This appeal relates to the Appellant's ("Perenco") claim for allegedly unrecovered input tax in the amount of £331,455 in relation to the services supplied by lawyers and accountants in respect of share issues by Perenco between June 1987 and March 1989. In this decision we shall, for convenience, refer to the Appellant as "Perenco" or "the company" notwithstanding the fact that the Appellant changed its name at various times.

2. Perenco's claim is what is commonly known as a "*Fleming* claim". *Fleming* claims are claims for under-declared or overpaid VAT, in some cases going back as far as the introduction of VAT in 1973. They have followed the House of Lords judgments in January 2008 in the cases of *Fleming t/a Bodycraft v HMRC* and *Conde Nast Publications Ltd v HMRC [2008] STC 324* ("*Fleming*") which concerned the way that the three year time limit on making claims had been introduced.

3. For simplicity, we shall refer to both the Court of Justice of the European Union (as it has been called since the entry into force of the Treaty of Lisbon on 1 December 2009) and to the Court of Justice of the European Communities (as it was previously known) as the "CJEU".

The issues

4. The parties have agreed a Statement of Agreed Issues which reflects the matters in contention. What follows is taken from the Statement of Agreed Issues. The issues are:

(1) Was input tax recovered when it was incurred in respect of the expenses incurred in connection with the share issues by the Appellant between 25 June 1987 and 7 March 1989 inclusive (identified at paragraphs 8.b. to d. and 11.a. to e. of the Statement of Agreed Facts – see below) which is the subject of the Appellant's claim currently under appeal? (The **"Prior Recovery Issue"**)

(2) Insofar as the answer to the first question is "no", has a reliable estimate been made of those parts of the share issue expenses of:

(a) £1,288,000 as recorded in the financial statements of Concorde Energy PLC for the year ended 31 December 1987; and

(b) £2,788,000 as recorded in the financial statements of Kelt Energy PLC for the 15 months ended 31 March 1989

which were not standard-rated expenses? ("**the Quantum Issue**")

Fleming claims, the burden of proof and the principle of effectiveness

5. It is a characteristic of many *Fleming* claims that, because the claims relate to VAT periods many years and sometimes decades ago, documentary evidence tends to be sparse. Often the relevant tax invoices and VAT returns will no longer exist or, as in this case as regards VAT returns, are no longer retrievable. The personnel involved in the original transactions may have long since moved on and, in any event, after so many years memories will have faded.

6. It is, of course, the duty of this Tribunal to establish the facts and to make findings of fact where possible, recognising that perfection may not be attainable. This can be particularly challenging in *Fleming* claims where contemporaneous documentation is scanty or non-existent and inferences must be drawn as best they can from surrounding circumstances. Against this background, it is hardly surprising that questions of the burden of proof, both legal and evidential, loom large. Furthermore, the principle of effectiveness means that domestic procedural law must not make it impossible or excessively difficult to enforce rights derived from EU law, such as the right to obtain a deduction for input tax by credit or repayment. Thus, the principle of effectiveness requires HMRC to give an effective remedy to a taxpayer who has wrongly overpaid VAT or been incorrectly denied an input tax credit. Again, this case raises questions concerning the principle of effectiveness and its application to the exiguous evidence available in *Fleming* claims.

The decision of the CJEU in *Kretztechnik*

7. The claims in this case are based on the decision of the CJEU in *Kretztechnik AG v Finanzamt Linz* c-465-03 (26 May 2005). In that case the CJEU established that the issue of shares by a public limited company in return for capital invested was not a supply for VAT purposes. Thus, the VAT incurred on associated costs was residual input tax because the share issue was carried out by Kretztechnik in order to increase its capital for the benefit of its economic activity in general. Kretztechnik only made taxable supplies and, therefore, the input tax was fully recoverable.

8. It is fair to say that the CJEU's decision came as something of a surprise. Until the *Kretztechnik* decision, it was commonly supposed that the issue of shares by a UK company was an exempt supply, except where the shares were issued to shareholders who belonged outside the EU (in which case, the supply was zero-rated): see the decision of the Court of Appeal in *Trinity Mirror Plc v Customs & Excise* [2001] STC 192. Therefore, before the *Kretztechnik* decision input tax on expenses (such as

lawyers' and accountants' fees) attributable to share issues by a UK company was generally non-creditable, except where the shares were issued to non-EU persons.

9. It is the *Kretztechnik* decision that lies behind this appeal. Perenco says that it did not obtain credit for input tax on services supplied in connection with its share issues from June 1987 to March 1989. If the shares were issued only to UK or EU subscribers the supply was treated as exempt and, in the view of HMRC at that time, no input tax was recoverable. If the shares were issued to both UK/EU and non UK/EU shareholders input tax was recoverable in accordance with the issuing company's partial exemption method.

10. The decision of the CJEU in *Kretztechnik* changed all this. Because Perenco was a fully taxable trader in all VAT periods relevant to this appeal (see paragraph 17 of the Statement of Agreed Facts, below), it would be entitled to a full repayment of the VAT suffered if its claim is successful.

The facts

a) The Statement of Agreed Facts

11. The parties also very helpfully produced a Statement of Agreed Facts which, so far as relevant, we set out below:

"STATEMENT OF AGREED FACTS

….

1. The appeal concerns the Appellant's ("**Perenco**") claim for under-recovered input tax of £331,455 in relation to expenses incurred on share issues which took place between June 1987 and March 1989.

CORPORATE HISTORY - OVERVIEW

2. Perenco was founded in 1975. It began its operations in the oil and gas industry as a marine services company. It later diversified into marine services, tanker storage and service barges. The company subsequently expended into the upstream business in the 1980s, acquiring several oil and gas fields.[1]

[1] http://www.perenco.com/about-us/group-history.html

3. Perenco became involved in the UK market when it acquired an existing UK entity in 1987 by means of a reverse takeover. This entity was first incorporated in the UK as Beatmore Ltd on 6 June 1980. That company changed its name a number of times over the years:

a. Beatmore Ltd to Plantex International Ltd on 31 December 1981;

b. to Petranol PLC on 29 December 1983;

c. to Concorde Energy PLC on 17 July 1987;

d. to Kelt Energy PLC on 13 May 1988;

e. to Perenco PLC on 4 April 1995 (at which point it also delisted from the London Stock Exchange ("**LSE**")); and

f. in July 2000 the company converted from a PLC to an unlimited company and changed its name to Perenco Holdings, a holding company which continues to operate in the oil and gas industry.

4. The company number of the incorporated entity throughout this period has been, and continues to be, 015689650. Unless stated otherwise, all references to "Perenco" or to "the company" in this Statement of Agreed Facts are to this entity.

THE SHARE ISSUES

….

1987

5. In the year ended 31 December 1987, there were four share issues:

a. On 19 February 1987, 2,750,496 new ordinary shares of 10p each were issued pursuant to a 1 for 9 rights issue at 36p per share. The proceeds of the issue amounted to £990,000 (£929,000 net of expenses). The reason for the

issue was to provide funds to settle liabilities arising from the successful defence of a takeover bid and an unsuccessful rights issue in 1986, to provide funds for the exploration of the company's UK onshore interests and to provide additional working capital. [This share issue is not one of those involved in this appeal.]

b. On 25 June 1987, 136,111 new ordinary shares of 10p each were issued at 36p each for cash to a shareholder who was ineligible to participate in the rights issue of 19 February 1987.

c. On 25 June 1987, 30,044,281 new ordinary shares of 10p each were issued as consideration for Petroholding Limited.

d. On 20 November 1987, 16,831,530 new ordinary shares of 10p each were issued at 78p each for cash in order to finance the acquisition of Great Lakes Properties Inc., a US corporation with oil and gas production interests in California.

6. The total VAT inclusive expenses incurred in connection with the 19 February rights issue were £61,179.

7. The total VAT inclusive expenses incurred in connection with the 25 June 1987 and 20 November 1987 share issues were £1,226,821.

1988/89

8. A major share issue and restructuring took place in 1988. In the 15 months ended 31 March 1989, there were 5 share issues:

a. On 29 January 1988, 1,500,000 new Ordinary shares were issued at 50p each for cash to an overseas institutional investor to assist in financing the acquisition of Kelt UK Ltd (then known as Taylor Woodrow Energy Ltd).

b. On 29 April 1988, the issue of 30,000,000 6% Convertible Cumulative Redeemable Preference shares of £1 each for cash at par was announced.

c. On 3 June 1988, the company issued 215,838,115 new Ordinary shares at par as consideration for the whole of the issued share capital of Kelt Holdings, which comprised 200,315,000 Ordinary shares of $1 each.

d. Following the completion of the acquisition of Carless PLC, 2,443,938 new preference shares were issued at par on 18 January 1989 to those investors in Carless PLC who opted for the share alternative.

e. On 7 March 1989, 365,000 new Ordinary shares were issued at 56p to Cluff Oil PLC as final consideration for certain exploration interests in Indonesia.

9. The total VAT inclusive expenses incurred in connection with the share issues were £2,788,000.

ACCOUNTS – COMPLIANCE WITH UK GAAP

10. It is common ground that the accounts for the years ended 31 December 1984 and 31 December 1987 and the 15 months ended 31 March 1989 in which these share issues and share issue costs are recorded are compliant with UK Generally Accepted Accounting Principles ("UK GAAP").

VAT REGISTRATION

11. The company has been registered for VAT since around the time it was first incorporated. A copy of a certificate of VAT registration issued in July 1987 shows the effective date of registration of what was, in 1987, Petranol PLC as 27 July 1981. The VAT Registration number was 367 9039 14.

12. Following the reverse takeover and the acquisition of the Kelt Energy companies, Petranol PLC joined the Kelt VAT Group in 1989. With effect from 1 July 1989, the VAT registration number was 503 4305 94.

13. This VAT group has since become the Perenco VAT group.

VAT PERIODS

14. Until 30 September 1989, Perenco made VAT returns for calendar quarters. From this date onwards, monthly VAT returns were filed. Perenco was fully taxable throughout the relevant period under appeal. Given the nature of its activities, which were mainly outside the scope of VAT or zero-rated, Perenco was generally in a repayment position throughout the period (on account of its Head Office costs) although only to a small extent.

VAT VISITS

15. On 13 November 1989, Mr. David Humphries of HMRC undertook a VAT visit to the company's offices in 130 Jermyn Street. Checks in respect of only the VAT period 09/89 were carried out.

16. Further VAT visits were undertaken between 13 November 1989 and April 1993 in respect of VAT periods after 09/89.

VAT RETURNS AND OTHER VAT RECORDS

17. Neither Perenco nor HMRC hold any contemporaneous VAT returns for the period under appeal.

18. Perenco no longer holds any VAT invoices (either its own or those issued by its suppliers) for the period under appeal.

Document retention – taxable persons

19. Taxable persons (such as Perenco) are required to keep records and accounts of all taxable goods and services received or supplied in the course of their business for a period of 6 years (VATA 1994, Sch.11 para.6(3); and para.19 of VAT Notice 700, given statutory force by the VAT Regulations 1995 (SI 1995/2518, reg.31(2))).

Document retention - HMRC

20. HMRC uses three main systems in the administration of VAT:

a. The accounting system where the record of VAT payable or repayable, as shown on VAT Returns, assessments and default surcharges raised, etc., together with a record of payments received and repayments made. This is known as VISION.

b. The Departmental Trader Register ("DTR") is a requirement of the legislation (currently s.3 VATA 1994). This is the main record of registered taxpayers, whether compulsorily or voluntarily registered. This also incorporates the VAT debt management system.

c. Electronic Folder is a system introduced to replace paper files for taxpayers. Most documents received from a taxpayer are scanned and retained electronically. Replies from HMRC are similarly retained. Some items generated by the other systems are transferred to this record (e.g. Notices of Assessment) whilst others are not (e.g. VAT Returns issued and received).

21. Insofar as is relevant to the period under appeal, HMRC's policy on document retention includes:

a. Forms VAT 100 (the VAT return): Paper returns were microfilmed and destroyed after 7 days. Microfilm record is subsequently retained for 20 years before being destroyed.

b. Visit reports: The primary record of an officer's visit is their notebook. These are retained for 6 years from the date of the last entry before being destroyed. Some notebooks may be retained for a longer period if there is a valid reason for doing so. Visit reports are written up from the Officer's notebook and these were scanned onto the Electronic Folder. These records are retained until the taxable person becomes "redundant".[2]

c. Correspondence: So far as is relevant to the issues under appeal, correspondence is kept on the Electronic Folder until the taxpayer is redundant.

THE CLAIM

22. At the time of the above share issues, HMRC's view of the VAT treatment (which was consistent with the view of the tax profession as a whole) was as summarised in Business Brief 12/05:

> *"Until [26 May 2005], HM Revenue & Customs' treatment of share issues has been guided by the Court of Appeal decision in* Trinity Mirror plc v C & E Commissioners *[2001] STC 192. This had established that the issue of shares in the UK by a company for the purpose of financing its business was an exempt supply under Item 6 of Group 5 of Schedule 9 to the VAT Act 1994. Any input tax that was attributable to the costs of making the issue was therefore generally not deductible."*

23. The decision of the ECJ of 26 May 2005 in the case of *Finanzamt Linz v Kretztechnik AG* (C-46/03) established that this treatment was incorrect. HMRC summarised the judgment in *Kretztechnik* and gave their view of the revised treatment of share issue transactions in the following terms in Business Brief 12/05:

> *"On 26 May 2005, the European Court of Justice (ECJ) gave its judgment in* Kretztechnik*. The ECJ had been asked to rule upon whether or not a first issue of shares by a public limited company is a supply and whether or not the VAT incurred on the costs of such an issue is deductible input tax. The judgment endorsed the earlier Opinion given by the Advocate General on 24 February 2005, ruling that such an issue is not a supply and that the VAT incurred on the costs is recoverable to the extent that the company's outputs are taxable transactions.*
>
> …
>
> *Companies that make a first issue of shares in circumstances that are the same as those in* Kretztechnik's *case are now entitled to recover the input tax incurred on the costs of the issue to the extent that they make taxable*

[2] A taxable person becomes "redundant" following deregistration. At that point the records

supplies. Therefore companies with wholly taxable outputs will be entitled to recover all of the relevant input tax, while those with both exempt and taxable outputs will be entitled to recover a proportion in accordance with their partial exemption method. Claims for input tax in respect of past share issues will be accepted subject to the three-year 'capping' rules. Notice 700/45 'How to correct VAT errors and make adjustments or claims' gives detailed guidance on capping and claim procedures.

There are a number of other situations in which a company may issue shares where the circumstances will differ greatly from those which existed in Kretztechnik*. In particular, a share issue may take place as part of a company merger, demerger or other restructuring. HM Revenue & Customs are taking legal advice on the extent to which* Kretztechnik *applies to these other share issue situations and further guidance will be issued to businesses after this advice has been received. Any claims for repayment received in the interim will be acknowledged but not processed until this advice has been received."*

24. On 23 January 2008, the House of Lords in *Fleming t/a Bodycraft v HMRC; Conde Nast Publications v HMRC* [2008] STC 324 (dismissing HMRC's appeal against the judgment of the Court of Appeal of 15 February 2006) held that, in the absence of transitional arrangements in 1997, the three year cap had to be disapplied for input tax claims in respect of which the right to deduct had accrued at 1 May 1997. HMRC also accepted that the terms of the judgment applied to claims to recover VAT overpaid or over-declared in accounting periods ending before 4 December 1996. HMRC then invited claims for the earlier periods. Section 121 of Finance Act 2008 provided a transitional period running until 31 March 2009 giving businesses an opportunity to make claims falling within the above parameters before they were brought within the scope of the normal time limits.

25. On 24 March 2009, Perenco submitted a voluntary disclosure in respect of input tax incurred, but previously not claimed, for a number of share issues which took place between 1984 and 1989.

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are retained for a further 6 years.

26. HMRC received the claim on 25 March 2009 and it was therefore within the time allowed.

REJECTION OF CLAIM, REVIEW AND APPEAL TO THE TRIBUNAL

27. On 14 September 2009, HMRC rejected the part of the claim relating to share issues in 1984 and February 1987 – being £111,440.26 of the total claim. This decision was upheld following an independent review of the decision, notified to Perenco on 24 December 2009. On 22 January 2010, Perenco subsequently notified an appeal against this decision to the Tribunal (TC/2010/01654). This appeal was subsequently withdrawn and therefore forms no part of the current proceedings.

28. On 30 April 2010, HMRC rejected Perenco's claim relating to the remaining share issues (June 1987 to March 1989). This decision was upheld following an independent review of the decision, notified to Perenco on 9 July 2010. Perenco's appeal was notified to the Tribunal on 2 August 2010 (TC/2010/06376)."

b) The evidence of Mr Steven Savage

12. In addition to the Statement of Agreed Facts, Mr Steven Savage, an employee of Perenco, gave evidence and was cross-examined.

13. Mr Savage's evidence, which we accept (save as set out below), was as follows.

14. Mr Savage had been employed by Perenco at its London offices since May 2003. He currently holds the position of Tax and New Business Manager for Perenco. Mr Savage is both a Chartered Accountant (qualified 1988) and a Chartered Tax Adviser (qualified 2003).

15. Mr Savage did not work for the Perenco group between 1988 and 1989 (i.e. the period material to this appeal). He had, however, researched the history of the Perenco group in the UK in relation to its corporation tax position concerning capital losses derived from Perenco's acquisitions made between 1987 and 1989. No one currently working in the finance department of Perenco was employed by the group at the relevant time and no one else had any first-hand knowledge of the share issues in question or how they may have been treated for VAT purposes.

16. Mr Savage had searched through Perenco's archived records for information to support its claim. He had also contacted the firms who had provided professional services to Perenco at the relevant time to enquire whether they had any retained records. These firms were Perenco's lawyers in respect of the share issues (Clifford

Chance) and the company's auditors and tax advisers (Arthur Andersen & Co, now Deloitte LLP).

17. Many of the contemporaneous records (e.g. VAT invoices, VAT returns etc) were no longer available given the passage of time.

18. Perenco moved offices in 1995 and again in 2003. The 2003 move prompted a decision to clear out old accounting records no longer required. Mr Savage thought it likely that the VAT invoices, returns etc relating to the period 1988-1989 would have been destroyed at this time. This was some 14 years after the share issues in question and two years before HMRC changed their treatment of share issues in May 2005 as a result of the judgment of the CJEU in *Kretztechnik*, which provided the basis for the current repayment claim.

19. Documents such as prospectuses for share issues would have been kept by the legal department rather than the finance department which explained why some of these prospectuses still survived.

20. Mr Savage explained Perenco's current data management policy. This policy was set up in 2003 when a data management software system was installed and a dedicated data management function created. At the time, there was an exercise to transfer any existing spreadsheet-based records onto new software. Mr Savage searched the software for records dating back to the 1980s and was able to find some of the old documents the legal department happened to have retained and transferred onto this system. Mr Savage confirmed that the legal department had not retained any relevant records in hardcopy which were not transferred onto the system.

21. Under the current data management system, Mr Savage explained that routine paper accounting records were generally kept on site for at least two years, before being "tagged" and taken off-site to sub-contracted warehouse storage where they were held for a further five years. Non-routine records might be kept on-site for longer but were then subject to the same minimum period for off-site retention of five years. At the expiry of the initial off-site retention period and after referral to the employee assigned as the "owner", the data managers had discretion to destroy those documents which were six years old. Overall, there was no formal company policy on document retention but the data management team adhered to the professional standards on the subject set by the Records Management Society of Great Britain as well as other respected guidelines, in particular the International Guidance of the legal firm Herbert Smith. As a consequence of adhering to those standards, the volume of documentary evidence relevant to the share issues and the VAT treatment was limited to those documents placed in evidence before the Tribunal.

22. Mr Savage also commented on Perenco's accounting for share issue expenses. He explained that the treatment of expenses incurred in relation to share issues was set out in the share capital and reserves notes to the financial statements which formed part of the annual report and accounts of the company for the year ended 31 December 1987 and the 15 month period ended 30 March 1989 respectively.

23. In particular, the company's audited annual financial statements expressly recorded in the notes to the share premium account amounts against the items "issue expenses" and "expenses associated with the issue of shares". These are the figures which have been used as the basis of the claim. Moreover, accounting standards and s.130 of the Companies Act 1985 strictly prescribed what could be included as "issue expenses" in the accounts. For example, expenses incurred in connection with share acquisitions (as opposed to share issues) cannot be so included – these would have to be written off through the profit and loss account as they were incurred. Only costs incurred directly in connection with the issue of capital instruments, such as shares, could be included in the accounts as "issue expenses." Moreover, internal costs would never be capitalised – the accounting rules were clear. In Mr Savage's experience accountants and auditors tightly controlled the costs that could be recorded as issue expenses.

24. For these reasons, Mr Savage's view was that share issue expenses recorded in the audited accounts would have followed standard practice and been limited to external fees and costs directly related to share issues. Furthermore, the costs incurred were easy to classify. There were three main headings – professional fees, printing costs and, where applicable, capital duty.

25. As noted in the Statement of Agreed Facts, Perenco would have been a small repayment trader for VAT purposes because its function within the group was restricted to a head office holding company and did not form a VAT group with its UK subsidiaries. In those circumstances, Mr Savage's view was that, if input tax in relation to share issue costs had been recovered in the period 1988 to 1989, it would have triggered a VAT visit prior to the recorded visit on 13 November 1989 or at least, the earlier periods would have been the subject of HMRC's checks. Mr Savage noted that there was only one recorded visit by HMRC on 13 November 1989 and the Inspector only went back as far as the 09/89 VAT period. In Mr Savage's view this strongly suggested that no repayment claims had been made in the prior periods.

26. For the VAT quarter 09/89, Perenco submitted a repayment claim of £201,578. This claim was the subject of an HMRC visit and it was clear that the claim included a significant level of input tax on solicitors and accountants fees. However, Mr Savage considered that this needed to be considered in the light of developments in Perenco's business over the previous six months.

27. First, in March 1989 the Appellant had completed the acquisition of a company called Carless. At the same time, the company's head office management and administrative functions were expanded to support the increased scale and complexity of what Mr Savage described as the "upstream" business. By "upstream" business we understood Mr Savage meant the exploration and production side of the oil business. Upstream business is usually contrasted with "downstream" business which usually refers to the refining and distribution of oil products. As part of this expansion, the company recruited a number of additional accounting/finance staff, including its first tax manager.

28. Secondly, Perenco's business in the first six months of its new financial year beginning 31 March 1989 included some further small asset acquisitions but also included the disposal of Carless' "downstream" business realising some £122 million in cash. This share disposal resulted in a significant level of professional fees being incurred.

29. Furthermore, Perenco did not undertake any further share issues because a bank facility, in conjunction with the cash proceeds from the Carless disposal, provided the funds for further development of its "upstream" business.

30. Accordingly, Mr Savage's view was that the solicitors' and accountants' fees which gave rise to the repayment claim of £201,578 in 09/89 related to disposals and (to a lesser extent) acquisitions and had nothing to do with issues of shares.

31. We note that in relation to the HMRC visit report of 13 November 1989, the officer (Mr Humphries) recorded that in the VAT quarter 09/89 input tax had been claimed in the amount of £201,578.21. The officer's manuscript notes of the visit stated that this amount:

> "… comprises mainly of accountants' and solicitors' fees for advice in acquiring and disposing of companies in the new formed group…. Examined all invoices in respect of solicitors' and accountants' fees
>
> I/T claimed – Clifford Chance £78,000 7 invoices
>
> Arthur Andersen £58,260 4 invoices."

32. It will be observed that the note states that the fees had been incurred "for advice in acquiring and disposing of companies". In other words, there is no indication in this note that the professional fees concerned related to share issues.

33. Mr Savage accepted that there had been a share issue in March 1989, but said this was a small issue. According to Mr Savage's second witness statement there were, in fact, two share issues in January and March 1989. The combined value of the share issues was £2.6 million and the total of apportioned legal and accounting fees inclusive of VAT was only £16,682.The bulk of the share issue costs were incurred up to 12 months prior to the 09/89 repayment claim.

34. Mr Savage described Perenco's accounting/finance function in the UK. Before March 1989, Perenco had only a small number of administrative staff in the UK. This included an accounting/finance staff of no more than five persons. This department, which had no in-house tax expertise, managed the company's VAT affairs during this period. The company's auditors and tax advisers, Arthur Andersen & Co (now Deloitte LLP), have confirmed that they did not have a dedicated team advising the company on VAT matters and they cannot recall providing any advice in relation to VAT at the time.

35. Mr Savage noted that the share issues in question took place on the London Stock Exchange. He believed that at the time Perenco would have treated the shares as being issued in the UK (regardless of the fact that some of the shares may have

been acquired by overseas investors). Perenco would therefore have treated the input VAT on the share premium expenses as irrecoverable in line with common practice at that time. Mr Savage confirmed that his understanding of the position was based on advice from Deloitte LLP (and we note that this was reflected in the correspondence between Deloitte LLP and HMRC).

36. In relation to a suggestion made in HMRC's Statement of Case that Perenco may have used a so-called "golden share", Mr Savage did not believe that the company would have been in a position to know about (let alone take advantage of) this sort of VAT planning at the time because of the absence of VAT expertise available to it. Essentially, "golden share" planning involved the issuer company seeking to zero-rate its share issues by issuing one share to a non-EU investor which, Mr Savage understood, would enable the company to reclaim input tax on the issue in full. We saw no evidence that Perenco had used a "golden share."

37. Mr Savage also referred to a letter dated 10 April 2012 from Mr Bill Dodwell of Deloitte LLP. Mr Dodwell had advised Perenco for many years in relation to corporate tax matters. Mr Dodwell wrote to inform Mr Savage of his recollections concerning Perenco during the period from June 1987 and March 1989. Mr Dodwell confirmed that Perenco did not have an in house tax team during that period. Secondly, Mr Dodwell understood that the finance team in Perenco manage the business's VAT affairs during the relevant period. Mr Dodwell recalled that the finance team comprised a Mr Nic Fallows in the UK and a small team in France. Mr Savage, however, noted that Mr Fallows had any been employed from 1992 onwards. Finally, Mr Dodwell confirmed that Arthur Andersen did not have a dedicated team advising Perenco on VAT matters and he could not recall providing any advice in relation to VAT at the time.

38. Mr Savage confirmed that there was no correspondence from Perenco's solicitors, Clifford Chance, relating to the share issues relevant to this appeal.

39. Mr Savage also gave further details concerning the various share issues.

40. As regards the share issues in 1987, Mr Savage explained that Mr Hubert Perrodo became a controlling shareholder of Perenco by taking up most of the company's new issues of equity in 1984 to 1986. The mid to late 1980s was a time when UK oil and gas revenue was increasing and this led to upstream businesses listing on the London Stock Exchange. Many of these businesses had an international investment strategy. Perenco aimed to become recognised as a significant medium-sized "independent" upstream business.

41. In relation to the share issue on 25 June 1987, the proceeds of issue amounted to £50,000. Mr Savage said it was not clear whether the subscribing shareholder was Mr Perrodo. Mr Savage described this share issue as incidental to the much bigger share issue to Mr Perrodo on the same day of 30,044,281 new Ordinary shares. The shares in this larger share issue were issued as consideration for the acquisition of Petrolding Limited. Petrolding Limited was a UK holding company with an indirect interest in and upstream business in California held via a US corporation called Del Amo Energy

Inc. The shares were issued to Scarletsdale Corporation NV, a Netherlands Antilles company beneficially owned by Mr Perrodo. The accounts of Perenco (then named Concorde Energy PLC) for the year ended 31 December 1987, disclosed that Scarletsdale Corporation NV held a 50.01% interest in Perenco. In cross-examination, Mr Savage accepted that in this instance Perenco's shares appear to have been issued to a non-EU company. The Petrolding transaction was treated in Perenco's accounts as a merger of interests and was, in substance, a non-hostile reverse takeover. Since the 1970s, Mr Perrodo had built up a vessel business servicing upstream oil companies and he had then diversified into the upstream business. Mr Perrodo took this Petrolding deal as an opportunity to manage a listed company alongside institutional shareholders and to have access to the international capital markets. Mr Perrodo moved his base to London and became UK resident.

42. The accounts of Perenco for the year ended 31 December 1987 showed that there were two shareholders with substantial interests: Mr Perrodo (holding indirectly through Scarletsdale Corporation NV) and Dr A Marwan. Mr Savage believed that Dr Marwan was an associate of Mr Perrodo and, like Mr Perrodo, held his interest indirectly through an offshore company. According to the 31 December 1987 accounts, Dr Marwan owned a 7.5% interest in Perenco.

43. Mr Savage believed that the 20 November 1987 share issue would have included UK institutional investors as well as some overseas investors, although Mr Savage noted that this was not disclosed in any document. Mr Savage did not, in his witness statement, explain the basis for his belief, and in the absence of any explanation or documentation this seemed to us to be mere speculation. In cross-examination, Mr Savage thought that the other shareholders would be "a good mix of institutional and private shareholders", some of which would be UK and some of which will be non-UK shareholders. His belief was evidently based on his view that Perenco had an international business which would be attractive to a wide range of investors. However, it seemed to us that Mr Savage's belief appeared to be speculative rather than based on facts within his knowledge. In addition, in cross-examination, Mr Savage accepted that it would be reasonable to assume that Mr Perrodo and Dr Marwan took up a "good proportion" of the shares issued.

44. By the end of 1987, therefore, Perenco had expanded its head office function but not radically; it was awarded some North Sea exploration licences during 1987 but only incurred expenditure of £74,000 on them in the year; and by then had a UK subsidiary (Petrolding) but the subsidiary only functioned as an intermediate holding company with no other activities. Therefore, in Mr Savage's view, at the end of 1987, Perenco would have remained a small repayment trader.

45. The acquisition of Kelt UK Ltd in June/July 1989 meant that Perenco acquired a modest UK upstream business, which included 15 employees and an office in Jermyn Street, London. It was not clear, however, whether the shares issued on 29 January 1988 were issued to an EU or non-EU overseas institutional investor.

46. As regards the share issue on 29 April 1988, Mr Savage thought it likely that institutional investors took the main part of the issue. He said the two UK institutions

took substantial interests, and it was likely that overseas institutions also participated. Mr Perrodo did not subscribe for any of the shares. Moreover the offering circular for the share issue contained restrictions which prevented the offering of the shares to US and Canadian persons. However, Mr Savage accepted, in cross-examination, that he did not know whether the shares were issued to EU or non-EU investors.

47. In relation to the issue on 3 June 1988, Kelt Holdings (the company acquired in consideration for the issue of the shares) was owned indirectly by Mr Perrodo and was formed as a preliminary step to the share issue. The shares were issued to a company beneficially owned by Mr Perrodo. In Mr Savage's evidence in chief, we were given no details about the identity or place of business of the company to which the shares were issued. In cross-examination, however, Mr Savage accepted that there was no reason to believe that Kelt Holdings was not also owned by Scarletsdale Corporation NV (in the same way as shares were issued in the larger share issue on 25 June 1987 – see above) and thought that the circular to shareholders implied that the shares had been issued to Scarletsdale Corporation NV.

48. The 30 March 1989 the accounts of Perenco show Mr Perrodo as holding 74.9% of the issued ordinary share capital and Dr Marwan as holding 10.2% of the issued preference share capital. Popeshead Nominees Ltd is shown as holding 6% of the company's convertible preference shares and Royal Bank of Scotland Edinburgh Nominees Ltd is shown as holding 6.5% of the company's convertible preference shares.

49. As regards the share issue on 18 January 1989, the shares were issued in consideration for the acquisition of Carless PLC. Most Carless shareholders opted for cash, but a minority elected to receive shares. Mr Savage thought it was likely that Carless would have a significant minority of UK private investors many of whom will be attracted by the share exchange to obtain rollover relief and therefore deferral in respect of their capital gains. Mr Savage could not estimate the size of the minority shareholding.

50. In Mr Savage's view, throughout the periods under appeal there would have been no change in the VAT status of Perenco as a small repayment trader.

Jurisdiction – the Prior Recovery Issue

51. This is a late claim for a repayment of under-declared input tax. Such late claims for input tax arise under regulation 29 of the VAT Regulations 1995. Regulation 29 (1) provides search late claims for input tax must be made "… as the Commissioners may otherwise allow or direct either generally or specially…" In general terms, Notice 700/45 provides for claims to be made in essentially the same manner as output claims under section 80 VATA 1994 and regulation 37 of the VAT Regulations 1995. In other words, HMRC require that the claimant should set out the basis of the error (i.e. the under-claim of input tax), the amount being claimed, details of how that amount has been calculated and to provide supporting documentation or other evidence in support of the claim.

52. Regulation 29 (2) provides, in effect, that if the trader does not have the relevant VAT invoices on which input taxes claimant then "… where the Commissioners so direct, either generally or in relation to particular cases or classes of cases, a claimant shall hold will provide such other evidence of the charge to VAT as the Commissioners may direct." These final words are often referred to as the "proviso" or the "tailpiece" to regulation 29 (2).

53. It is well-established that in an appeal against the exercise of the Commissioners' discretion under the proviso to regulation 29 this Tribunal has only a supervisory and not a full appellate jurisdiction: see the decision of Schiemann J in *Kohanzad v Customs and Excise Commissioners* [1994] STC 967 in relation to substantially similar earlier provisions to those contained in regulation 29 (2).

54. Although the point was not referred to specifically, in their skeleton arguments and in their arguments before the Tribunal at the hearing both parties appear to proceed on the basis that the Tribunal's jurisdiction in relation to the Prior Recovery Issue was a full appellate jurisdiction rather than merely a supervisory jurisdiction. It is, however, necessary for the Tribunal to satisfy itself as to the limits of its jurisdiction regardless of any agreement between the parties (actual or implied).

55. The point is, obviously, of some importance in this case. If our jurisdiction was a supervisory one we would be confined to looking at whether HMRC's decision on the Prior Recovery Issue was reasonable in an administrative law sense. Moreover, that question would be determined solely by looking at the evidence and material before the decision-maker at the time the decision was taken.

56. We have concluded that the parties' assumption that the Tribunal had full appellate jurisdiction was correct. We have been greatly assisted in reaching this decision by the careful analysis of this Tribunal in *Market & Opinion Research International Ltd v Revenue & Customs* [2013] UKFTT 779 (TC) (Judge Raghavan and Mrs Debell) ("*MORI*"). In that case HMRC argued that in determining the issue of the Tribunal's jurisdiction on the question of prior recovery, the Tribunal's jurisdiction was supervisory. The Tribunal rejected this argument. It held that the question whether input tax had previously been reclaimed was an objective factual question which was a precondition to the exercise by the Commissioners of their discretion under regulation 29 (2). The Tribunal noted that regulation 29 (2) dealt with the possibility of the Commissioners accepting evidence other than a VAT invoice and said at [42]:

> "It [the proviso to regulation 29 (2)] does not subsume the logically prior question of whether there is no entitlement to input tax in the first place because the entitlement has already been satisfied through the input tax having been recovered previously."

57. We respectfully agree with the Tribunal's analysis on this point. Accordingly, we conclude that the jurisdiction of this Tribunal in relation to the Prior Recovery Issue is a full appellate jurisdiction rather than a supervisory jurisdiction. This has the consequence that we can take account of evidence which was presented to us but which was not before the decision-maker.

58. We shall deal with the Tribunal's jurisdiction in relation to the Quantum Issue later in this decision.

The relevant statutory provisions

59. Perenco's right to recover input tax is governed by sections 25 and 26 VATA 1994.

60. So far as material, section 25 (2) VATA 1994 provides that the end of each VAT period a taxable person is entitled to:

> "credit for so much of his input tax as is allowable under section 26, and then to deduct that amount from any output tax that is due from him."

61. Section 25 (3) VATA 1994 provides:

> "if either no output tax is due at the end of the period, or the amount of the credit exceeds that of the output tax then… the amount of the credit or, as the case may be, the amount of the access shall be paid to the taxable person by the Commissioners…."

62. Section 26 (1) and (2) VATA 1994 provide, in summary, that the amount of input tax for which a person is entitled to credit at the end of any VAT period shall be the amount attributable to taxable supplies made or to be made by the taxable person in the course or furtherance of his business.

63. Regulation 29 VAT Regulations provide for late claims in respect of input tax and for claims for input tax in the absence of a VAT invoice. Regulation 29 provides as follows:

> 1) Subject to paragraphs (1A) and (2 below, and save as the Commissioners may otherwise allow or direct either generally or specially, a person claiming deduction for input tax under section 25 (2) of [VATA 1994] shall do so on a return made by him for the prescribed accounting period in which the VAT became chargeable….
>
> 2) At the time of claiming deduction of input tax in accordance with paragraph (1) above, a person shall, if the claim is in respect of—
>
> (a) a supply from another taxable person, hold the document which is required to be provided under regulation 13 [i.e. a VAT invoice]
>
> provided that where the Commissioners so direct, either generally or in relation to particular cases or classes of cases, a claimant shall hold or provide such other . . . evidence of the charge to VAT as the Commissioners may direct.
>
> (3) Where the Commissioners are satisfied that a person is not able to claim the exact amount of input tax to be deducted by him in any period, he may estimate a part of his input tax for that period, provided that any such estimated amount shall be adjusted and exactly accounted for as VAT deductible in the next prescribed accounting period or, if the exact amount is still not known and the

> Commissioners are satisfied that it could not with due diligence be ascertained, in the next but one prescribed accounting period.
>
> (4) Nothing in this regulation shall entitle a taxable person to deduct more than once input tax incurred on goods imported or acquired by him or on goods or services supplied to him.*
>
> [*Regulation 29 (4) applies with effect from 1 April 2009 and, therefore, does not apply to the claims which form the subject matter of this appeal.]

64. Section 121 (2) Finance Act 2008 provides that a trader may make a claim before 1 April 2009 for VAT periods ending before 1 May 1997 if the claimant held the required evidence in a prescribed accounting period ending before 1 May 1997.

65. Neither party was, rather oddly, able to produce the relevant VAT legislation in respect of exemption and zero-rating as it applied to the relevant to share issues in 1987 to 1989. However, with a little rummaging through the old books, we were able to ascertain the applicable legislation, as follows.

66. Group 5 Item 6 (a) "Finance" Schedule 6 VATA 1983 provided exempt treatment for:

> "The issue, transfer or receipt of, or any dealing with, any security or secondary security being:
>
> (a) shares, stock, bonds,…"

67. Group 9 Item 6 (a) "International Services" Schedule 5 VATA 1983 zero-rated supplies to a person who belongs in a country, other than the Isle of Man, which is not a member State of the Economic Community of any service comprised in paragraphs 1 – 7 of Schedule 3 to VATA 1983 (other than some services which are not relevant to the present appeal). Schedule 3 paragraph 5 VATA 1983 included banking, financial and insurance services.

68. The issue of shares was, before the decision in *Kretztechnik*, regarded as a supply of a financial service.

69. So far as material to the current appeal, Note (5) to Group 9 provided that Item 6 did not include services comprised in any Group other than those comprised in Group 5 of Schedule 6 to this Act (relevant).

70. Thus, by reading all these provisions together one arrives at the conclusion, which was common ground between the parties, that issues of shares to persons who belonged outside the EC (as it then was) were regarded, in the periods under appeal, as zero-rated services. The issue of shares to persons who belonged in the EC (including, of course, the UK) were regarded as exempt supplies.

71. Section 8 VATA 1983 provided rules determining where a person belonged. Section 8 (3) provided that if the supply of services was made to an individual and received by him otherwise than in a business capacity, the individual was treated as belonging in whatever country he had his usual place of residence. Section 8 (4)

provided that where section 8 (3) did not apply, the recipient of the service would be treated as belonging in a country if (a) he had a business establishment or some other fixed establishment in that country; or (b) if he has no such establishment, the place where he had his usual place of residence; or (c) if he has establishments in more than one country, the country of the establishment which was most correctly concerned with the supply.

72. Regulation 30 VAT General Regulations 1985 dealt with the attribution of input tax to taxable and exempt supplies. In short, where input tax related to the making of both exempt and taxable supplies, regulation 30 (1) (d) provided that it was necessary to establish the extent to which the supplies giving rise to the input tax were used in making taxable supplies. The extent to which the supplies are used in making taxable supplies is ascertained and expressed as a proportion of whole use made of such supplies. The input tax deductible is the proportion of the "remaining" input tax (ie input tax which is not either wholly used for taxable or for exempt supplies) as corresponds to the above proportion.

73. In other words, if a company issuing shares incurred input tax in relation to legal and accounting expenses which related to the share issue and the company issued 60% of its shares to non-EU shareholders and 40% of its shares to UK/EU shareholders, 60% of its input tax on those expenses would be deductible.

74. Regulation 30 (2) permits HMRC to allow a trader to deduct "remaining" input tax in the proportion that the value of taxable supplies by the trader bears to the value of all supplies made by it. This part of the method requires that value of share transactions that are incidental to the trader's business activities are ignored for the purposes of the calculation. There is, however, no evidence in this case that HMRC permitted this method of input recovery.

The Prior Recovery Issue

The Appellant's Arguments

75. In short, Ms McCarthy accepted that the Appellant bore the burden of proof to show that Perenco had incurred input tax in relation to the relevant share issue expenses and had a *prima facie* entitlement to deduct that input tax. As regards HMRC's argument that Perenco was more likely than not to have already recovered that input tax, Ms McCarthy argued that the burden of proof lay upon HMRC. She argued that it was for HMRC to show that the input tax which was the subject of Perenco's repayment claim had already been repaid and it was not for Perenco to prove a negative i.e. that it had not already recovered that input tax.

76. Ms McCarthy submitted that HMRC had failed to produce evidence to show that Perenco had already been repaid the claimed input tax. This was so notwithstanding HMRC should have retained the necessary VAT records relevant to the claim for VAT periods ending after February 15, 1986, but had failed to do so.

77. In the alternative, if Perenco was wrong on the question of the legal burden of proof and that it was for Perenco to establish on the balance of probabilities that it had not already recovered the input tax claimant, then Perenco had adduced sufficient evidence to establish a *prima facie* case that the input tax has not already been recovered. At this point, the evidential burden of proof de facto shifted to HMRC who had failed to discharge it (see *Wood v Holden* [2006] STC 443 at [30] to [33] and *RB Kensington & Chelsea v HMRC* [2014] UKFTT 729 (TC) ("the *RBKC*" case)).

HMRC's arguments

78. Mr Rowe argued that the legal burden of proof remained with Perenco to establish that it had a valid claim (*Dickinson v Minister of Pensions* [1952] 2 All ER 1031 and *WMG Acquisition Co UK Ltd v Revenue & Customs* [2013] UKFTT 215 (TC) (Judge Demack).

79. Mr Rowe accepted that Perenco had an entitlement to credit in respect of the supplies of services in question. The issue was whether on the balance of probabilities Perenco had put forward a valid claim which should be paid by HMRC. In Mr Rowe's submission it was not a valid claim because HMRC's view was that it was more likely than not that the relevant input tax would have been recovered in the periods in which it was incurred.

80. As regards the retention of records, VAT was effectively a self-assessed tax. HMRC would have had no evidence of the input tax claimed in the relevant periods – that evidence would have been in the hands of the trader submitting its returns. All HMRC would have seen when the trader submitted its returns were the figures for input and output tax and not how they were made up.

81. Mr Rowe submitted that Mr Savage's evidence did not establish that Perenco has suffered irrecoverable input tax.

82. In relation to the share issue on 25 June 1987 of 136,111 ordinary shares, it was not clear to whom the shares were issued. As regards the larger share issue of 30,044,281 ordinary shares also on 25 June 1987, the shares were issued to Scarletsdale Corporation NV, a Netherlands Antilles company owned by Mr Perrodo. That share issue would, therefore, be zero-rated so that any input tax would have been recoverable in the VAT period of the issue. In relation to the share issue on 20 November 1987, there was no evidence as to where the subscribing shareholders were located. Accordingly, it was not clear whether there had been a restriction on input tax recovery. It was known by virtue of the accounts for the year ended 31 December 1987 that Mr Perrodo and Dr Marwan were substantial shareholders, but Mr Savage's evidence was that they both held their shareholdings through offshore companies. Therefore, HMRC believed that there was no restriction on the recovery of input tax in relation to this share issue.

83. As regards the share issue on 29 January 1988, it was not clear whether the overseas institutional investor belonged in the EU or outside the EU. In relation to the share issue on 29 April 1988, Mr Rowe accepted that there may have been some

restriction on the recovery of input tax but Mr Savage did not know how much was subscribed by EU and non-EU shareholders.

84. In relation to the share issue on 3 June 1988, the evidence was that Mr Perrodo held his shares in Perenco through a Netherlands Antilles holding company, no doubt to avoid inheritance tax implications in relation to UK *situs* assets.

85. As regards the issue on 18 January 1989 it was not clear to whom the shares were issued.

86. In summary, therefore, Mr Rowe accepted that it was likely that there had been some input tax restriction, but that it was unquantifiable since there was no record of the identity of the shareholders to whom the shares, in the various share issues, had been issued. Moreover, on the balance of probabilities it was likely that a considerable proportion of the input tax had already been recovered.

Discussion of the Prior Recovery Issue

Legal burden of proof

87. In this case, it is not in dispute that Perenco incurred input tax in 1987, 1988 and 1989, as described above, in respect of solicitors' and accountants' fees relating to Perenco's various share issues and that it was entitled to a credit in respect of that input tax. What is in dispute, however, is whether Perenco has already received the benefit of a deduction for input tax in the VAT periods in which it was incurred and who bears the burden of proof of showing either no deduction was obtained or that a deduction was obtained.

88. There is, perhaps surprisingly, very little authority on this point. We were, however, referred to two decisions of this Tribunal.

89. In *RB Kensington & Chelsea v HMRC* [2014] UKFTT 729 (TC) (Judge Perez and Mr Midgley) the appellant local authority charged VAT on its building control fees, in accordance with HMRC guidance. The guidance later changed to say, in effect, that VAT should not have been charged on certain of these fees. HMRC agreed with the local authority that those persons ("the third parties") who had been incorrectly charged VAT by the local authority could apply directly to HMRC who would process and pay claims for refunds of incorrectly charged VAT on behalf of the local authority. One of the questions before the Tribunal, on a claim by the local authority for repayment of overpaid VAT, was whether the burden of proof was on the local authority to prove what claims had not been made directly to HMRC by the third parties (as HMRC contended) or on HMRC to prove that claims had been made (as the local authority contended).

90. The Tribunal found that the local authority never had evidence or knowledge of claims made by third parties to HMRC. Instead, HMRC were the only ones (as between the parties) who would have held that evidence and had such knowledge. It was accepted that the relevant evidence had since been destroyed. Consequently, the

Tribunal considered that HMRC should have retained the relevant evidence beyond the normal six-year period if it did not wish to accede to claims such as that brought by the local authority. The tribunal, therefore, found that the evidential burden was on HMRC to prove what claims had been made rather than on the local authority to prove that claims had not been made. Because HMRC had destroyed the records of claims made under the agreement (there was no suggestion that this was done in bad faith) HMRC were unable to discharge the evidential burden of proof and, accordingly, the Tribunal allowed the local authority's appeal.

91. It is, of course, possible to distinguish the *RBKC* case from the facts of the present appeal. In the *RBKC* case, the taxpayer never had the information (viz the information on what claims had been made directly to HMRC) which was critical to the determination of the appeal. It was HMRC and HMRC alone that had possessed that information. In this case, however, Perenco did at one stage have the information but had destroyed it in accordance with document retention policy. HMRC had a microfilm of the VAT returns, but the necessary reference numbers had been destroyed and therefore the microfilm could not be retrieved. Therefore, for different reasons, neither party had access to the necessary records from 1987 to 1989.

92. In fact, Mr Rowe explained that the relevant microfilms were still in existence but the cross referencing which would enable the microfilm to be retrieved had been destroyed when Perenco's old VAT registration became redundant and disappeared in 1995/1996. If Perenco's VAT number had not changed then the microfilm could have been found. Only a few of the earlier paper records (including the November 1989 visit report) were put onto HMRC's new electronic folder system. Effectively, therefore, the relevant records were lost in HMRC's systems prior to the decision of the CJEU in *Kretztechnik* (26 May 2005) and before the Court of Appeal's decision in *Fleming* (15 February 2006), which was subsequently upheld by the House of Lords on 23 January 2008.

93. The second relevant decision of this Tribunal came in *WMT Acquisition Co UK Ltd v HMRC* [2013] UKFTT (Judge Demack) where the Tribunal considered another *Fleming* claim. The appellant had sought to recover input tax allegedly incurred by its employees on travel and subsistence expenses. In this case, the Tribunal held that the burden of proving that the appellant had not previously recovered the input tax on the travel and subsistence expenses fell upon the appellant. The point, however, did not appear to have been the subject of detailed (or any) argument.

94. Similarly, in a decision of this Tribunal (which was not cited to us) in *KDM International Ltd v Revenue & Customs* [2013] UKFTT 315 (TC) (Judge Sadler and Mrs Gill Hunter), which concerned a *Fleming* claim in respect of input tax in respect of share issue, it was common ground that the burden of proof on the question whether the appellant had already recovered its input tax lay upon the appellant. The Tribunal said:

> "57. …It is common ground that if, and to the extent that, the Appellant can establish that it did not recover the VAT charged to it on the supplies made in relation to the sequence of share capital issues it

> undertook in the years 1987 to 1990 and again in 1996, then it is entitled to recover those amounts of VAT now, together with simple interest from when it could have recovered those amounts by way of credit in the relevant VAT returns it made.
>
> 58. The only question we have to decide is whether the Appellant has shown from the evidence that, on the balance of probabilities, it did not recover the VAT which it now claims was charged on those expenses of issuing share capital."

95. It is clear that no trader has a right to double recovery of input tax, as this Tribunal recognised in *MORI* at [45]. We also agree with the Tribunal's comments in relation to regulation 29 (4) of the VAT Regulations 1995 which provides:

> "(4) Nothing in this regulation shall entitle a taxable person to deduct more than once input tax incurred on goods imported or acquired by him or on goods or services supplied to him."

96. Regulation 29 (4) has effect from 1 April 2009 and, therefore, does not apply to this appeal. Nonetheless, as the Tribunal in *MORI* held, regulation 29 (4) was, in effect, a provision which declared the existing law and confirmed that once a deduction for input tax had been given no further entitlement to the same input tax could arise.

97. The question whether Perenco has previously recovered the input tax the subject of this appeal is one which goes to the heart of the validity of its claim that it is entitled to a repayment of VAT. If it has already been given a deduction in respect of this input tax in the periods in which it originally arose then there is no further entitlement to credit or repayment of that same input tax. In our view, it falls to Perenco to make good its case that it has a valid claim. A claim for previously recovered input tax is simply not a valid claim. HMRC 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 in dealing with the taxable person's claims generally : see per Lightman J in *R (on the application of UK Tradecorp Ltd) v Customs and Excise Commissioners* [2005] STC 138 at [18]. It is for HMRC to satisfy itself that the claim is valid on the basis of the evidence produced by the taxpayer and any other information available to it. But it does not fall to HMRC to prove whether the taxpayer has already received full value for the claim which it is now making. As we have said, this goes to the heart of the claim's validity and it must fall to the taxpayer to establish the validity of its claim. For good measure, we do not think it can possibly be argued that HMRC's requirement that Perenco satisfy it that the same input tax had not already been deducted was disproportionate – it is simply the performance by HMRC of its statutory management function.

98. We therefore hold that the legal burden of proof to establish that Perenco has not already received a deduction in respect of the relevant input tax in the periods in which it was incurred lies upon Perenco.

99. For completeness, we do not think that placing the legal burden of proof on Perenco contravenes the principle of effectiveness. EU principle of effectiveness requiring that national authorities must secure effective remedies to protect EU rights: it must not be 'excessively difficult or impossible for an individual to exercise his right to obtain a remedy' (*Rewe* [1976] paragraph 19). We do not, however, consider placing the burden of proof on Perenco to offend against this principle. We consider that Perenco must establish that it has a right to a refund of wrongly paid VAT – in this case the right can only arise if Perenco has not already obtained a deduction for the relevant input tax. Once the right is established, the UK cannot make the exercise of the right impossible or excessively difficult.

Shifting of the evidential burden of proof

100. Ms McCarthy, however, argued that even if the legal burden of proof lay upon Perenco, so that it is for Perenco to establish on the balance of probabilities that it had not already recovered the input tax in question, then Perenco had adduced sufficient evidence to establish a *prima facie* case that the input tax has not already been recovered. At this point, in Ms McCarthy's submission, the evidential burden shifted to HMRC who had failed to discharge it.

101. Ms McCarthy cited the decision in *Wood v Holden* [2006] STC 443. In that case the taxpayers had entered into a scheme to mitigate the charge to capital gains tax on the disposal by the taxpayers of their company. The case turned on the residence of a company, Eulalia, incorporated in the Netherlands. HMRC had charged capital gains tax, on the basis that Eulalia was resident in the UK for tax purposes. The Special Commissioners had dismissed the taxpayers' appeal, holding that the taxpayers had not established that Eulalia was not resident in the UK for tax purposes. They had held that Eulalia's central management and control was situated in the UK, and that Eulalia was therefore resident in the UK and not in the Netherlands. The taxpayers appealed to the High Court (Park J). Park J reversed that finding, upholding the taxpayers' appeal. HMRC appealed to the Court of Appeal. The Court of Appeal dismissed HMRC's appeal, stating:

> "**[30]**…The judge [Park J] accepted that the Special Commissioners had been correct, in principle, to approach the matter on the basis that it was for Mr and Mrs Wood to show that the amendments made to their self-assessments in October 2001 had been wrongly made [in view of section 50(6) of the Taxes Management Act 1970]…But he went on:
>
> *'However, there plainly comes a point where the taxpayer has produced evidence which, as matters stand then, appears to show that the assessment is wrong. At that point the evidential basis must pass to the Revenue.'*
>
> The judge's conclusions at para [63] must be read with those observations in mind.
>
> **[31]** At para [63] of his judgment the judge said this:

> *'[63] … in so far as the Commissioners decided this appeal against Mr and Mrs Wood on grounds relating to the burden of proof (and the opening part of para SC145 suggests that those were the critical grounds for the decision), I consider that they were in error.'*
>
> He could not have been intending to suggest, in that paragraph, that the Special Commissioners had been wrong in principle to approach the matter on the basis that it was for Mr and Mrs Wood to show that the adjustments to their self-assessments had been wrongly made. Rather, I think, he was stating his conclusion that the Special Commissioners had been wrong in failing to appreciate that the evidential burden had passed to the Revenue in the present case. He had set out his view of the position at para [60]…
>
> **[32]** As the judge pointed out, the Revenue had produced no positive material to show where the central control and management of Eulalia was. It was not enough (as the judge thought) for the Revenue to criticise the lack of evidence from some of those at Price Waterhouse and ABN AMRO who had been involved in the transaction in 1996…
>
> **[33]** In *Rhesa Shipping Co SA v Edmunds, The Popi M* [1985] 1 WLR 948 at 955-956 Lord Brandon of Oakbrook pointed out that a judge is not bound, always, to make a finding one way or the other with regard to facts averred by the parties: *'He has open to him the third alternative of saying that the party on whom the burden of proof lies in relation to any averment made by him has failed to discharge that burden'*. But that is not a course which should be adopted unless 'owing to the unsatisfactory state of the evidence or otherwise, deciding on the burden of proof is the only just course for him to take'. It is a feature of tax litigation—not least where the litigation arises from a tax avoidance scheme—that, in the first instance, the facts are likely to be known only to the taxpayer and his advisers. The Revenue will not have been party to the transaction; and will know only those facts which have been disclosed by the taxpayer or others; following, perhaps, the exercise of the Revenue's investigatory powers. I have no doubt that there are cases in which the evidence before the Special Commissioners is so unsatisfactory that the only just course for them to take is to hold that the taxpayer has not discharged the burden of proof which s 50(6) TMA 1970 has placed upon him. But, equally, I have no doubt that the judge was correct, for the reasons which he gave, to hold that the present case was not one of those cases. There was no reason to think that the material facts had not been disclosed; and the commissioners did not hold that it was for that reason that they were unable to decide the question of residence. I agree with the judge that, in the present case, the 'third alternative' to which Lord Brandon referred in Rhesa Shipping was not one which was properly open to the Special Commissioners."

102. We accept Ms McCarthy's submission that, where the legal burden of proof lies upon the taxpayer, if the taxpayer adduces sufficient evidence to establish a prima facie case in favour of the validity of its claim the evidential burden then passes to HMRC so that, if HMRC produces no evidence of its own, the taxpayer must win.

103. We also accept Ms McCarthy's submission that the principle of effectiveness does not require perfect accuracy in relation to the underlying facts: see *The Prudential Assurance Company Ltd & Anor v Revenue and Customs* [2013] EWHC 3249 (Ch) per Henderson J at [111].

104. Ms McCarthy's case that the evidential burden had now shifted to HMRC rested on the following propositions.

105. First, if Perenco had sought to recover input tax in respect of its significant share issue expenses from 1984 onwards, there would have been a VAT visit by HMRC before November 1989. The absence of records of VAT visits prior to November 1989 supported Perenco's case that there had been no previous significant repayment claims until the 09/89 VAT period (which triggered the visit by an HMRC officer).

106. Secondly, the officer's notes in respect of the November 1989 visit referred to input tax having been recovered in respect of "acquiring and disposing of companies" and not in respect of share issues.

107. Thirdly, because Perenco was generally in a small repayment position in VAT periods to which the appeal related, it would have been apparent from the VAT returns whether Perenco had recovered the significant amounts of input tax incurred on the share issue expenses. It would be unreasonable and unjust and would deny Perenco an effective remedy if Perenco was required to prove that it had not already recovered input tax relevant to its claim because that information was in HMRC's hands but HMRC had destroyed the references necessary to retrieve the information.

108. Finally, as regards the location of shareholders to whom the shares were allotted, HMRC had no evidence to show whether the allottees of the shares in question were within the EU or outside the EU. In any event, the share issues took place on the London Stock Exchange. Mr Savage's unchallenged evidence had been that the shares would therefore be treated as having been issued in the UK.

109. We accept that if an appellant produces sufficient *prima facie* evidence to justify a claim or to show that an assessment is incorrect, the evidential burden then shifts to HMRC to show why the claim should be denied or the assessment is correct. In this case, the question is whether Perenco has adduced sufficient evidence to shift the evidential burden to HMRC. If it has, then Perenco's appeal must succeed because HMRC has put forward no evidence of its own. In considering this question, however, we must take account of the totality of the evidence before us, including both the Statement of Agreed Facts and Mr Savage's evidence.

110. Taking the points put forward by Ms McCarthy in turn, we make the following comments and observations.

111. First, as regards the VAT visit in November 1989, it seemed to us more probable that the absence of records of earlier visits simply indicated an absence of records rather than the fact that there were no visits. Following the reverse takeover and acquisition of the Kelt Energy group in July 1989, Perenco joined the Kelt VAT

could (now the Perenco VAT group) under a new registration number. Perenco's previous VAT registration would have been cancelled and, as Mr Rowe explained, the records relating to it were then destroyed. This happened before the decision of the CJEU in *Kretztechnik* (26 May 2005) and before the Court of Appeal's decision in *Fleming* (15 February 2006) i.e. before the relevance of the records in relation to a potential claim for input tax would have been appreciated.

112. Secondly, we find that the notes of the November 1989 VAT visit are of no assistance to either party. They cover a VAT period outside that in which the last share issue in March 1989 occurred. Furthermore, the reference to input tax being incurred in respect of "acquiring and disposing of companies" does not seem to us, contrary to the suggestion put forward by Mr Rowe, to relate to input tax in respect of share issues.

113. Thirdly, because Perenco was a small (fully taxable) repayment trader we accept that it would almost certainly have been apparent from the VAT returns whether the company had claimed for the share issue expenses in the VAT periods in which they were incurred. The problem is, however, that neither party has retained the VAT returns. Perenco probably destroyed its records in 2003 and HMRC probably destroyed the reference numbers which would have enabled it to access the microfilm records of the VAT returns at some time in 1995/1996. In both cases, the actions which resulted in the VAT returns becoming unavailable were taken at a time before the potential significance of the need to retain those records would become apparent.

114. The final point made by Ms McCarthy raises a more difficult issue. The evidence of Mr Savage in relation to the possible location of shareholders to whom the shares were issued seemed to us seemed to indicate three outcomes: that the location of the shareholders in respect of some issues was unknown, in respect of some share issues a substantial proportion of shares were issued to non-EU-based shareholders (in particular, Scarletsdale Corporation NV) and, in relation to some share issues, shares were issued to UK/EU shareholders.

115. As regards the issue on 25 June 1987 of 136,111 new ordinary shares of Perenco, it is unclear to whom the shares were issued and in which country the share allottee belonged. Accordingly, we are not satisfied that Perenco has shifted the evidential burden to HMRC in respect of this share issue. If the allottee was based outside the EU, then there would have been no restriction on the recovery of input tax insofar as expenses attributable to this issue were concerned. In other words, Perenco have not persuaded us that the allottee was based in the UK/EU.

116. As regards the larger issue on 25 June 1987 of 30,044,281 new ordinary shares, the evidence is that the shares were issued to Scarletsdale Corporation NV, a Netherlands Antilles company beneficially owned by Mr Perrodo. This was, therefore, an issue of shares to a person who on the balance of probabilities belonged outside the EU. There was, therefore, no restriction on the recovery of input tax incurred on expenses attributable to this issue. Again, we are not satisfied that Perenco has shifted the evidential burden of proof in relation to this issue. Indeed, we consider it more likely than not that Perenco issued shares on this occasion to a person

who belonged outside the EU and that there was no restriction on the recovery of input tax. Since Perenco can be assumed to have been a compliant taxpayer, we consider it more likely than not that Perenco recovered input VAT in respect of this share issue in accordance with its legal entitlement at the time (as it was then understood).

117. In relation to the issue by Perenco on 20 November 1987 of 16,831,530 new ordinary shares it is unclear to whom these shares were allotted and where the allottees belonged for VAT purposes. All we know is that Mr Savage believed that the issue on 20 November 1987 would have included UK institutional investors as well as some overseas institutional investors. It is not clear on what basis Mr Savage held this belief. There is, therefore, nothing to tell us whether Perenco recovered input tax in relation to this issue. Accordingly, we consider that Perenco has not shifted the evidential burden to HMRC in relation to this issue.

118. In relation to the issue on 29 January 1988 of 1,500,000 new ordinary shares, it is not clear whether the overseas institutional investor belonged in the EU or outside the EU. Again, therefore, we consider that Perenco has failed to shift the evidential burden of proof.

119. The issue of 30 million convertible cumulative preference shares on 29 April 1988 was, according to Mr Savage, mainly taken up by institutional investors in the UK and from overseas. We know that Popeshead Nominees Ltd and Royal Bank of Scotland Edinburgh Nominees Ltd held respective interests of 6% and 6.5%. We, therefore, assume that these two UK institutions were allotted shares in this issue. Beyond that, however, we have no information as to the identity or location of the shareholders who were allotted shares in this issue. We consider that in relation to the two UK institutions referred to above, Perenco has shifted the burden of proof to HMRC and that HMRC has not produced any evidence to rebut the company's evidence. Accordingly to the extent that shares were issued to these two UK institutions, we consider that Perenco has established that it has suffered a restriction on its right to claim input tax on part of its expenses in relation to the issue. As regards shares issued to other shareholders, we consider that Perenco has failed to shift the evidential burden to HMRC.

120. As regards the issue of 215,838,115 Ordinary shares on 3 June 1988, the shares were issued as consideration for the whole of the issued share capital of Kelt Holdings. Mr Savage's evidence (paragraph 47 above) was that these shares had probably been issued to Scarletsdale Corporation NV (in the same way as shares were issued in the larger share issue on 25 June 1987), a Netherlands Antilles company i.e. a company outside the UK and EU. Accordingly, it was more likely than not that issue expenses attributable to the share issue were fully recoverable (and was therefore recovered) at the time.

121. In relation to the issue of 2,443,938 preference shares on 18 January 1989, these were issued to Carless shareholders who opted for the share alternative. We accept Mr Savage's evidence that that it is more likely than not that these shareholders would have been attracted by the share exchange in order to obtain rollover relief in respect

of their capital gains and that these shareholders were, therefore, more likely to have been based in the UK. We consider that the use of a share alternative in a UK takeover is sufficiently well-known practice that we can take notice of it. Accordingly, we consider that Perenco has shifted the evidential burden to HMRC and that it has made good its claim that it has suffered a restriction as regards input tax on the share issue expenses in relation to the issue of these shares.

122. As regards the share issue on 7 March 1989, 365,000 new ordinary shares were issued to Cluff Oil PLC, a UK company. These shares were issued to a UK company and therefore it was more likely than not that there was a restriction on the recovery of input tax on associated expenses. We therefore consider that Perenco has shifted the evidential burden to HMRC and has established that it has suffered a restriction in its right to claim input tax in relation to the expenses of this share issue.

123. We have considered what weight, if any, to give Mr Savage's unchallenged evidence that he believed because all the relevant share issues by Perenco were listed on the London Stock Exchange Perenco would have treated the shares as being issued in the UK regardless of the fact that some of the shares may have been issued to overseas shareholders. It was clear from Mr Savage's responses to questions asked by Ms McCarthy that Mr Savage's belief was based on advice received from Deloittes concerning common practice in the periods under appeal rather than from facts within his own knowledgeand was therefore hearsay evidence. The question for the Tribunal in respect of hearsay evidence is essentially one of weight. Moreover, his evidence on this point seemed to be non-independent expert opinion evidence rather than evidence of fact within his own knowledge. Evidence of common practice in a specialist area would usually be given by an expert witness. For these two reasons we attach no weight to Mr Savage's evidence on this point. If Perenco wished to rely upon evidence of common practice in this specialised field it should have called an independent expert to give evidence, but it chose not to do so.

Quantum Issue

124. There was some confusion at the hearing on this topic. In Ms McCarthy's skeleton argument it was stated that it was not clear whether the Quantum Issue was in dispute. At the hearing Mr Rowe asked for the Quantum Issue to be adjourned because a colleague within HMRC who was considering this matter had been unable to supply his response to Mr Rowe because of ill-health.

125. At the hearing, we provisionally indicated that we would hear submissions on the Quantum Issue. On reflection, however, in order to deal with the matter fairly and justly, bearing in mind that Mr Rowe was unprepared on this point and the issue we shall raise about jurisdiction, we think it is more sensible and fairer to adjourn the appeal on this point. Hopefully, the parties may be able to reach agreement, failing which they may apply for a hearing on this point to be relisted.

126. The jurisdiction point is as follows. Earlier in this decision we concluded that this Tribunal had full appellate jurisdiction in relation to the Prior Recovery Issue, for the reasons given above. We are not clear whether the same reasoning would apply to

the Quantum Issue. In other words, we would wish to have further submissions on whether the Tribunal's jurisdiction on the Quantum Issue was a supervisory or a full appellate jurisdiction in relation to regulation 29 (2) VAT Regulations 1995. At any resumed hearing we would expect the parties to address us on this issue.

Conclusion

127. As regards legal and accountancy expenses incurred in connection with:

(1) the issue on 25 June 1987 of 136,111 new ordinary shares, the appeal is dismissed;

(2) the issue on 25 June 1987 of 30,044,281 new ordinary shares, the appeal is dismissed;

(3) the issue on 20 November 1987 of 16,831,530 new ordinary shares, the appeal is dismissed;

(4) the issue on 29 January 1988 of 1,500,000 new ordinary shares, the appeal is dismissed;

(5) the issue of 30 million convertible cumulative preference shares on 29 April 1988, we allow the appeal in principle, subject to the Quantum Issue, in respect of shares issued to Popeshead Nominees Ltd and Royal Bank of Scotland Edinburgh Nominees Ltd but dismiss the appeal in respect of other shares issued;

(6) the issue of 215,838,115 Ordinary shares on 3 June 1988, the appeal is dismissed;

(7) the issue of 2,443,938 preference shares on 18 January 1989, the appeal is allowed in principle, subject to the Quantum Issue; and

(8) the share issue on 7 March 1989, 365,000 new ordinary shares the appeal is allowed in principle, subject to the Quantum Issue.

128. We now adjourn the appeal until a suitable date can be arranged for a hearing on the Quantum Issue (including the question of jurisdiction), unless the parties reach agreement on this issue in the meantime.

129. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it 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.

GUY BRANNAN
TRIBUNAL JUDGE

RELEASE DATE: 4 February 2015