[2018] UKFTT 470 (TC)

TC06648

**Appeal number: TC/2013/7185, TC/2013/7187
TC/2013/7188**

VAT – claim for overpaid output tax on bonuses – validity of claim depending on whether VAT could have been offset - whether fleet leasing companies entitled to reclaim input tax on purchase of cars before 1 August 1995 – not on facts – appeal allowed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

BRAMALL CONTRACTS LIMITED **Appellant**
BMG CONTRACTS LIMITED
COMET VEHICLE CONTRACTS LIMITED

- and -

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

TRIBUNAL: JUDGE Barbara Mosedale

Sitting in public at Taylor House, Rosebery Avenue, London on 9-12 October 2017

Mr A Hitchmough QC, instructed by Ernst & Young LLP, for the Appellant

Mr J Puzey, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

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PRELIMINARY DECISION

Background to appeal

1. During the time relevant to this appeal (1988-1995), the appellants carried on the business of fleet leasing; in other words, they were in the business of leasing fleets of motor vehicles to business customers. During the course of their business, it is accepted by HMRC that motor manufacturers would have paid them bonuses based on the numbers of cars purchased, even though the appellants would have purchased the cars from car dealerships and not direct from the manufacturers.

2. In 1996, the CJEU gave its decision in *Elida Gibbs* C-317/94, ruling that bonuses paid by manufacturers to purchasers further down the supply chain, and not just to their immediate customers, should be treated as discounts on price. Up until that point, HMRC had treated such bonus payments as consideration for a standard rated supply to the manufacturer by the recipient of the bonus. On 21 July 1997, following the *Elida Gibbs* ruling, HMRC invited VAT registered businesses who believed that they had over-accounted for VAT, on the basis of what was now known to be incorrect VAT treatment by HMRC, to make claims for recovery of the overpayment.

3. The appellants made such claims as it is accepted that they were in receipt of bonuses from car manufacturers and would have paid output tax on those bonuses. HMRC has refused to pay the claim and it is that decision dated 3 April 2013 which is under appeal.

The correct appellant?

4. The first issue of the hearing was an application by HMRC to amend its statement of case to deny the claim of the first appellant on the basis that the claim arose out of transactions undertaken a company called Albany Lease Ltd ('Albany'), and while Bramall Contracts Ltd had at some point been the representative member of the group to which that company belonged, it was not at the time of the transactions the subject of the appeal the representative member of the VAT group to which Albany belonged at that time.

5. The appellant objected to the application. Its position was that it has always been HMRC's view of the law that a claim must be made by the representative member of the VAT group to which the taxpayer belonged at the time of the events at issue; the recent Upper Tribunal decision in *MG Rover* which came to the same conclusion was therefore scarcely news to HMRC. It was too late, said the appellant, to raise this issue now.

6. Secondly, the appellant objected to the application because, it said, it was procedurally prejudicial for it be raised so late. In particular, had this objection to the claim been made earlier, Bramall could have investigated whether there was an

assignment of causes of action when Albany was purchased by Bramall in 1999. It was harder to investigate now, particularly as Bramall itself had been sold to the Pendragon group in 2004.

7. It was also said to be procedurally prejudicial because the Upper Tribunal decision in *MG Rover* at [184] indicated that in some cases the claim could properly be brought by the 'real world supplier' and this might be one of those cases because the appellants believed that the representative member of Albany's VAT group at the time of the supplies was no longer in existence. It was more difficult to investigate this now.

8. Thirdly and alternatively, while this claim was made in 2003 the window to make the claim closed in 2009, so it was far too late for Albany's representative member (if it still existed) to make a claim now. Had HMRC raised the point earlier, it might have been in time to do so.

9. HMRC's response was that as the appealed decision was only made in 2013, the prejudice had already occurred and so it made no procedural difference whether the objection was taken in 2013 or 2017. Moreover, the appellant had undertaken no research on the point since the objection had been raised.

10. My decision on the application was to allow the amendment to the statement of case: I did not accept that there was significant procedural prejudice in the objection being taken in 2017 rather than 2013. In particular, if the original representative member no longer existed and could not make the claim, the appellant might fall within the special case mentioned by the Upper Tribunal. And I considered that the appellant ought to have investigated its own title to make the claim at the time it first made it. There was general public interest in VAT repayments only being made to persons who were entitled to claim.

11. The hearing for all three appellants was only ever one of principle, as all were agreed that I would not determine quantum. For the first appellant, the issue of whether it had standing to make the claim was to be left stayed behind the final determination of the appeal in *MG Rover* if it succeeded in principle in this hearing.

Application to admit evidence

12. The next application was by HMRC to admit a document, published by the British Vehicle Rental and Leasing Association ('BVRLA') in association with Price Waterhouse in 1996 called *The Full Circle: VAT.*

13. The appellant had had virtually no warning of this application: Mr Robert Lewis was a retired HMRC officer and a witness in this case and he had only just remembered the existence of the document, having read a recent witness statement from one of the appellant's witnesses. A copy of the publication was located in HMRC's archives and produced just before the hearing commenced.

14. Nevertheless, the appellant accepted its relevance and that its witness (Mr John Lewis) had some recollection of the document. Moreover, it was published by the BVRLA of which Mr John Lewis had been Chief Executive from 2000.

15. I admitted it. It was relevant and not new to the appellant's witness who was to be asked about it. Moreover, there was time for Mr John Lewis to re-read the document before he was due to give evidence.

The claim period

16. The claims covered a long period of time: the ability of the appellants to make claims covering such long periods was not in dispute. The claims had been made before the law changed to effectively introduce a time limit on claims.

17. The claims as originally made covered all periods back to when the appellants commenced in business in the 1970s; ultimately the appellants restricted their claims to a start date of 1 January 1988 as it was accepted that before that date bonuses paid by manufacturers did not fall within the scope of the *Elida Gibbs* ruling.

18. The first two appellants' claims ceased for periods after 1 August 1995. That was because the VAT (Input Tax) Order 1992 SI 3222 ('the Input Tax Order') was amended with effect from 1 August 1995. On 1 August 1995 and after, the appellants were able to recover input tax on cars that they purchased. Therefore, they accept that, although they overpaid output tax on the bonuses on and after that date, from that date the overpayments of output tax were matched by corresponding overclaims of input tax. In other words, they would have recovered the input tax charged on the full, and not discounted, price of the car.

19. The third appellant's claim ends on 31 December 1991 because it ceased to purchase or make new leases of vehicles from that date, and therefore would not have been in receipt of manufacturer's bonuses after that date.

20. All that explains why this appeal is concerned with the period 1988-1995 but it doesn't explain why a Tribunal, sitting in 2017, was dealing with a period which started nearly 30 years ago and ended more than 20 years ago.

21. The reason for that is two fold. Firstly, the ruling in *Elida Gibbs* was given just after the three year cap on claims for overpaid output tax was (apparently) introduced. At that time, the appellants took the view that the quantum of claim for three years did not justify making the claim; however, when the three year cap was overturned in 2003 by the CJEU's ruling in *Marks & Spencer,* the appellants lodged their claims going back to the 1970s.

22. HMRC rejected the claims on the basis of unjust enrichment; appeals by the appellants against that decision were stayed for many years pending the second round of litigation in *Marks & Spencer* which resulted in a successful challenge to the unjust enrichment legislation in 2008. The appellants withdrew those appeals as HMRC (implicitly, at least) withdrew the decisions refusing the claims.

23. For the years 2009-2012 the parties negotiated on quantum, ultimately leading to a revision in the claim from approximately £1.5million to £5,621,176.66. The revised quantum was based on the appellants' statutory accounts and, as I have said, I am not concerned with its calculation.

24. However, on 3 April 2013, HMRC issued a second decision rejecting the appellants' entire claims in principle. The reason given was that, said HMRC, it had become apparent that the appellants financed the purchase of their cars by selling them to finance houses and so the input tax paid on the undiscounted purchase price would have been recovered, said HMRC, even before the 1 August 1995 changes in the law. That decision was upheld at review on 19 September 2013 and that review decision is the subject of this appeal.

The dispute

Why an Elida Gibbs dispute is about input tax and not output tax

25. The dispute between the parties was whether, during the claim period, the appellants were entitled to recover input tax on the purchase price of the cars it leased.

26. The reason why that is the question in this appeal is because HMRC have accepted that the appellants would have received bonuses on their cars and, with the benefit of hindsight and the decision of the CJEU in *Elida Gibbs*, all were agreed that the bonuses paid by manufacturers to fleet leasing businesses should have been treated as discounts on the price of the car paid by the fleet leasing businesses to the car dealers from whom they purchased the cars.

27. In fact, as was accepted by HMRC, the appellants would have paid output tax on the bonuses because, at the time, HMRC had (wrongly) required them to do so. And, it necessarily follows, if they recovered input tax on the purchase of the cars, they would have recovered it on the full purchase price because the bonus (wrongly) was not treated as a discount on the purchase price. These two mistakes would have been self-cancelling.

28. While the parties were agreed that had the appellants recovered input tax it would have been recovered on the full, undiscounted price of the cars, they did not agree whether any input tax would have been recovered at all.

29. I was asked only to determine whether input tax incurred on the purchase of fleet leasing cars would have been recoverable in law, and not to determine whether in fact the appellant recovered it. I understand that the reason for this was that the appellant accepted that, if the law was that the input tax had been recoverable, in the absence of any evidence, they could not prove that they had not recovered it. However, if in law the input tax was not recoverable, HMRC accepted that the appellants would not have recovered it. In practice, in the hearing there was a great deal of evidence over industry practice on VAT recovery before August 1995 and as I was effectively asked to do so, I reach a conclusion on what that industry practice was and whether the appellants would have followed it (see §§58-91).

30. The sole legal question was whether the input tax incurred by the appellants on purchase of cars for their fleet leasing businesses was recoverable under the law as it stood in the relevant period (1 January 1988 to 1 August 1995), as interpreted by the Tribunal in 2017 (now 2018). I was therefore referred to authorities on how to interpret the law which post-dated the relevant period: both parties were agreed that I should interpret the law as it would be interpreted now, and not as it may have been interpreted if a Tribunal had been asked the same question in 1995.

The input tax block

31. The law which I am required to interpret is quite short, and is paragraph 7 of the Input Tax Order. Although this Order is dated 1992, the parties were agreed the input tax block on the purchase of certain cars was in essentially the same form from 1973 to 1 August 1995 and so I was referred only to the 1992 order and not its predecessors. It relevantly provided at paragraph 7:

> (1) Subject to paragraph (2) below tax charged on -
>
> (a) the supply to a taxable person;
>
> ….
>
> of a motor car shall be excluded from any [input tax] credit.
>
> (2) Paragraph (1) does not apply where –
>
> ……
>
> (c) the motor car is unused, and is supplied to….the taxable person for the purpose of being sold.

32. As I have already said, that SI was amended with effect from 1 August 1995 to narrow the scope of the block and both parties are agreed that from that date the appellants were entitled to recover input tax on the purchase of cars. The question is whether the appellants were entitled to recover input tax on the purchase of cars before that date.

Fleet leasing companies using finance to fund their business

33. If a fleet leasing business was self-financing, it is clear that it would not have been entitled to recover input tax on the purchase of the cars. It would not have fallen within the exception in sub-paragraph 7(2) because the cars were not supplied by the dealer to the fleet leasing business 'for the purpose of being sold' but for the purpose of being leased.

34. The dispute arises here because the accounts of the appellants make it apparent that the appellants required finance to purchase the fleets of cars for their fleet leasing businesses.

35. HMRC's position is that, as a matter of law, the input tax block did not apply to the appellants as their business model was to finance the purchase of cars it intended to lease to their customers by immediately selling the vehicles to a finance company and taking title back in the form of hire purchase or finance lease.

36. The appellants did not agree that financing the vehicles would have qualified them to recover the input tax on the purchase of the cars. They did not accept that as a matter of law they would have met the requirements of paragraph 7(2) of the VAT (Input Tax) Order 1992 (and its predecessors) for two reasons:

5 (a) when they purchased the vehicles, they did not do so 'for the purpose' of selling them; while the cars were sold to the finance house for the purpose of obtaining finance, the purpose (says the appellant) in buying the cars was to lease them to its customers.

(b) Moreover, says the appellant, as a matter of fact the appellants
10 would enter into the lease with their customers before they entered into the hire purchase agreement with the finance house so that the cars would not be 'unused' at the date of sale to the finance house.

37. Both questions (a) and (b) involved questions of fact as well as of law. So far as (a) was concerned, it appeared accepted that, as the appellants' accounts in the
15 relevant period showed that they leased (virtually) all of the cars they purchased to their customers, and that they financed the purchase of (virtually) all of those cars by offering the cars as security to the finance house, they must have intended to do both of these things. The question of law was whether either or both the sale to the finance houses or the lease to their customer were the 'purpose' for which the cars were
20 supplied to the appellants. The question of fact was the order in which the sale and the lease took place and whether (as a matter of law) that order affected the 'purpose' of the purchase of the car by the fleet leasing company.

38. Question (b) was also partly a question of fact. I was asked to decide what 'unused' meant as a matter of law; but I was also asked to determine whether as a
25 matter of fact the cars were unused.

Findings of fact

Evidence and standard of proof

39. I was referred to a number of cases on how I should approach the evidence (and in particular the lack of direct evidence) in this case.

30 40. The appellant considered that *Guide Dogs for the Blind Association* [2012] UKFTT 687 (TC) at [11] which made a presumption of continuity in favour of the appellant, reflected the right approach for a tribunal to take. They also referred me to *Perenco Holdings* [2015] UKFTT 65 (TC) where the Tribunal had relied on EU law to suggest that domestic rules on the burden of proof should 'not make it impossible
35 or excessively difficult to enforce rights….' and at [103] that '…the principle of effectiveness does not require perfect accuracy in relation to the underlying facts'.

41. HMRC, on the other hand, referred me to *Loss Relief Group Litigation Order v HMRC* [2013] EWHC 205 (CH) at [52]:

> '….It is the claimants who have chosen to bring their claims, involving very large sums of money, and the evidential burden lies on them to demonstrate that the no possibilities test is satisfied. The Revenue cannot reasonably be blamed for making searching enquiries when so much is at stake….it is in my view a burden which [the appellants] have brought upon themselves and about which they cannot legitimately complain.'

42. And also to *Why Pay More for Cars v HMRC* [2013] UKFTT 497 (later upheld in Upper Tribunal at [2015] UKUT 468) where the FTT said:

> 'In particular, we adopted the sentiments set out in *Dr I Syed v HMRC* that *Jonas v Bamford* expressed no legal principle but rather a common sense approach which must be applied to the specific facts of a case. In the cases relied upon by the Appellant [*Culver, GDBA, Syed]* there was direct evidence from the appellants upon which the Tribunal felt able to draw inferences. No such evidence was available in this case and on the particular facts of this case and the evidence available to us, we do not feel able to draw what we believe would be an improper and sweeping inference as to the practices of manufacturers in the silent periods.'

43. As the appellants accept, they have the burden of proof. That means that they must prove their factual case on the balance of probability, and in my view, in particular, it follows that:

(a) where there is a convincing explanation for the absence of evidence (such as passage of time), its absence should not be the basis of an adverse inference against the appellants. Nevertheless, the absence of evidence may make it impossible for the appellants to prove their case.

(b) in some cases, it may be appropriate to assume continuity, as was done in *GDBA*. But it could only be appropriate to do so where the appellant has proved that continuity was more likely than not.

(c) if *Perenco* is to be read as suggesting that EU law in some way modifies the burden of proof in VAT proceedings, then I do not agree with it: while I accept that domestic procedural law cannot make proving claims excessively difficult, it is clear that a rule that merely requires a party to prove its case on the balance of probabilities does not do so.

(d) there is no presumption that a trader adopted industry practice; if the appellants rely on industry practice to support their case, they must prove on the balance of probability what it was and then prove on the balance of probability that they would have followed it.

44. In this appeal, while the appellant accepts that it must prove its case to win, it acknowledges that the documentary and witness evidence is rather thin. Its explanation is the passage of time that has elapsed since the relevant period of 1988-1995. HMRC invite me to make an adverse inference against the appellant over the lack of direct evidence. They point out that the claim was made in 2003, which was

only 8 years after the claim period ended and say it is surprising there was no documentary or witness evidence about the appellant's business practices.

45. However, I do not consider it surprising. As the statement of agreed facts made clear, the rejection of the claim the subject of this appeal only took place in 2012; none of the appellants continued to trade after 2004, and none are now owned by the groups which owned them at the relevant time. So I make no adverse inferences from the thin evidence, but nevertheless, it remains for the appellants to prove their entitlement to the repayment they claim.

Direct evidence

46. The only direct documentary evidence of what the appellants did was in their accounts. As I have said, these showed that the appellants financed their purchase of cars with hire purchase and finance leases, and in the case of Albany in 1994-5 with 'agency hire contracts'. I had no evidence of the actual terms of contracts by any of the three appellants nor direct evidence of the order of the financing and leasing transactions. The appellants relied on evidence of industry practice. I consider whether they proved their case below.

47. I note that the only direct witness evidence about any of the appellants was given by Mr de Rousset-Hall. In his role with Ford, in the 1970s he allocated cars to J Blake & Co Leasing, which was VAT representative member of the group to which Albany (Albany being, as I have said, the company whose transactions gave rise to the claim pursued by the first appellant) . Mr De Rousset-Hall thought it likely that Albany financed its business by sale and HP back but was unable to be categoric about this. I cannot rely on this evidence as it is too uncertain and indeed the evidence was only given in passing. However, the evidence is consistent with what the accounts show up to 1994 and on which I do rely.

Appellants' witness: Mr Peter de Rousset-Hall

48. Mr de Rousset-Hall was, throughout the period relevant to this appeal, an employee of Ford Motor Company and Ford Motor Credit Company; his job meant that he had extensive knowledge of sales to, and funding of, fleet leasing companies. In 1999-2005 (after the period in issue), he became Managing Director of Ford Credit, Britain, the captive finance house that dealt with the lending activities of Ford, Jaguar, Land Rover, Volvo and Mazda. In 2000, he became director of the Finance and Leasing Association which is the trade body of companies in the finance and leasing sector within the UK. He retired in 2005 but continued to advise motor manufacturers and banks on matters relating to motor finance.

49. He was never an employee of any of the appellants and could offer no direct evidence of what they did apart from as stated above.

50. He was not a VAT professional but had to understand the VAT rules in relation to motor cars and finance in order to do his job.

Appellants' witness: Mr John Lewis

51. Mr John Lewis held various senior management roles within contract hire and fleet management companies from 1984 onwards. In 2000, just after the period at issue in this appeal, he became chief executive of the British Vehicle Rental and Leasing Association which represented the automotive leasing and rental industry in the UK. More specifically, he represented the leasing industry in discussions with HMRC surrounding the 1995 changes to VAT treatment of cars; and in 2005 represented the industry in discussions with HMRC in relation to *Elida Gibbs* repayment claims.

Appellants' witness: Mr Neal Francis

52. Mr Francis had many years of experience of fleet leasing companies; he had worked for Lombard Vehicle Management, a large fleet leasing business, from 1991; and then for Pendragon, as managing director of its fleet leasing arm, since 2004.

53. I accepted the evidence of all these three witnesses: between them they had had many years' experience of the fleet leasing industry at the time relevant to this appeal and their evidence was very consistent. It was consistent with what documents were available and made commercial sense. Mr de Rousset-Hall and Mr John Lewis corroborated each other's evidence; Mr Francis agreed with all that Mr De Rousset-Hall and Mr John Lewis said in their witness statements about fleet leasing businesses save in respect of VAT in which he was no expert.

HMRC's witness – Mr Robert Lewis

54. Mr Robert Lewis had worked for HMRC for many years before his retirement in 2013. In 1994, HMRC set up its Motor Trade Unit of Expertise in order to pool knowledge on the motor trade and ensure consistency of motor traders' treatment by HMRC, and Mr Robert Lewis was appointed as its manager, a post he held until retirement.

55. To a large extent, his witness statements were expressions of opinion which he had formed on the evidence; I deal with his opinions as submissions; they were not evidence.

56. His evidence, which I accept, was that he had toured the UK in 1995 with the BVRLA to explain to motor traders the 1995 changes to the Input Tax Order. He had worked closely with BVRLA during the tour; *The Full Circle* was written by BVRLA in conjunction with PwC (particularly Teresa Ahern) after the tour and been approved by Mr Robert Lewis' team at HMRC. *The Full Circle* was then referred to by his team to advise traders on the implementation of the changes to the Input Tax Order in 1995.

57. His evidence was that *The Full Circle* was revised (and the revision approved by HMRC) in about 2000. Mr John Lewis, chief executive of BVRLA from 2000 and therefore also in a position to know, did not agree that the Full Circle had ever been revised: it was his evidence that BVRLA published other VAT guides over the years

but never published a revised version of *The Full Circle*. I did not read anything into this difference of opinion between the two Messrs Lewis: whether or not there was a revised edition of *The Full Circle* in 2000 was not relevant to the appeal and it was merely a matter of detail as both Messrs Lewis were agreed that BVRLA did continue to publish VAT guides over the years. This difference in evidence did not cause me to doubt the reliability of the evidence of either. For reasons explained below at §83-84, however, I did not accept as reliable, whether it was evidence or opinion, Mr Robert Lewis' views on what HMRC's position was at the time.

Was VAT recovered on purchase of cars sold to finance houses?

Was VAT recovered on purchase of cars sold to finance houses? – witness evidence

58. If the appellants had simply bought the cars and then leased them to their customers it was crystal clear that as a matter of law they would not be entitled to recover the VAT charged by the dealer on the sale as the 'purpose' of the purchase would be to lease, and not sell, the cars. However, the parties accepted that the appellants' accounts showed that the cars were used as security for loans from finance houses of funds to buy the cars.

59. There was a significant amount of evidence over whether fleet leasing companies recovered VAT on the purchase of cars which they used as security for finance. As I have said at §29, the parties' position was that the appeal should be determined on the legal issue of whether the appellants were entitled to recover the input tax and not whether they actually did. HMRC appeared to accept that if the appellants were not entitled to recover the input tax, then more likely than not they would not have done so.

60. Nevertheless, as I was given the evidence, I record my conclusions on it.

61. Mr de Rousset-Hall and Mr John Lewis said that in their experience, which was very extensive, VAT on purchase of cars was never recovered by fleet leasing companies prior to August 1995, even though fleets leasing companies financed their acquisition of the fleets. Prior to that date, fleet leasing companies never issued VAT invoices to the finance houses. Moreover, prior to that date the finance from the finance houses would have been based on the VAT inclusive price, while after that date, it was based on the VAT exclusive price of the car. Finance houses did not recover nor charge VAT on the financing transactions prior to 1 August 1995.

62. The witnesses remembered 1 August 1995 as introducing a major change in the VAT position for fleet leasing companies. Mr John Lewis explained that the fleet leasing industry had lobbied the Government for a long time to permit recovery of input tax on vehicles purchased for leasing because the inability to recover input tax made the hire price of fleet cars unduly high. After 1995, rental costs dropped by about 7%.

63. In apparent contrast, Mr Robert Lewis' evidence was that HMRC's position was and had always been that a fleet leasing company could recover VAT on sale of the

cars to the finance house and he believed that *The Full Circle VAT* correctly reported HMRC's position at the time.

64. He recognised that what he said was apparently in conflict with evidence from Mr John Lewis and Mr De Rousset-Hall that fleet leasing companies never recovered VAT on the purchase of the fleets. His explanation for this was that mathematically it made no difference to the finance house or fleet leasing company whether the input tax was blocked on the purchase of the car from the dealer or on the hire purchase from the finance house: if not blocked on the purchase from the dealer, it would be blocked on purchase from the finance house. Therefore, he accepted that, as it would have been administratively easier, cutting out a great deal of paperwork, fleet leasing companies were likely to have treated the block as applying to their purchase of the car from the dealer, all subsequent transactions with the finance house being VAT free.

65. In other words, at root his evidence appeared to largely corroborate Mr John Lewis' and Mr de Rousset-Hall's evidence that fleet leasing companies which used the cars as security for finance would not in practice have recovered VAT on the purchase of their fleets from the dealers.

66. I move on to consider the documentary evidence on whether or not VAT was recovered on the purchase from the dealer.

Was VAT recovered on purchase of cars? – documentary evidence

VAT: The Full Circle

67. As I have said, the Messrs Lewis were aware of this document at the time it was published. Mr John Lewis accepted that, as a member of BVRLA, he had some input into its contents. He explained that its main purpose to help with the operational impact of the 1995 changes to input tax order especially in respect of contract hire agreements and auctions.

68. The Guide set out the new VAT treatment but in doing so made reference to the previous VAT treatment of certain contracts. It stated as follows:

> **2.4 Hire purchase after 1 August 1995**
>
> Contract hire companies purchase their cars in a variety of ways, eg outright purchase, lease purchase, hire purchase. The main point to note under any of these arrangements is that you will need to obtain a tax invoice to entitle you to recover the VAT, in particular, where you fund your acquisitions through back-to-back arrangements with a finance house involving HP.
>
> VAT on the initial purchase of the car will be recoverable by you provided you do not use the car for private use before selling it to the finance house. The finance house would then recover this VAT on the basis that it is selling the car back to you under the HP agreement.

> *Prior to 1 August, leasing companies were unable to recover the VAT charged on the HP back to them.* The finance house would therefore normally incorporate this VAT into the calculation of the monthly rental, effectively as a hidden charge, together with interest and other costs.
>
> Since 1 August 1995 leasing companies have been able to recover the VAT under these back-to-back arrangements; accordingly, the finance house now needs to show that VAT charged on a tax invoice which you can recover in your VAT return, subject to the normal rules.
>
> It follows from this that charges made by the finance house should be less after 1 August 1995 (because the VAT will not be included within the instalments as part of the capital repayments over the life of the contract).
>
> (my emphasis)

69. The sentence in italics indicated that the finance house charged VAT to the fleet leasing companies; in turn that suggested that the fleet leasing company had charged VAT to the finance house on the sale of the car, and that in turn implied that the fleet leasing company would have recovered as input tax VAT paid on the purchase of the car from the dealer.

70. However, I agree with the appellant that the reliability of this sentence as a reflection of what actually happened is made dubious by the immediately following sentence. And that's because that sentence refers to the finance house wrapping up the VAT as part of the overall rental charge: yet if the finance house had really been charging VAT to the fleet leasing company it ought to have issued proper VAT invoices. Indeed, its ability to recover the input tax which the first sentence implied would have been charged to it by the fleet leasing company on the sale of the car would have depended on its ability to demonstrate it made an onward taxable supply. The finance house would not have treated such VAT as a hidden charge.

71. On the contrary, the VAT could only have been a hidden charge if the fleet leasing company treated its input tax on its purchase from the dealer as blocked, and then treated its sale to the finance house as VAT free, and then, similarly, the finance house would treat the sale back to the fleet leasing company as VAT free, but necessarily the total charge by the fleet leasing company to the finance house and by the finance house to the fleet leasing company would reflect the irrecoverable VAT incurred by the fleet leasing company on its purchase from the dealer. This would be a 'hidden charge' and not an actual VAT charge.

72. Rather than taking the implication of the sentence in italics to be that leasing companies were unable to recover VAT on charges by the finance house because the input tax was blocked, it is possible to read it as implying that leasing companies were unable to recover VAT on charges by the finance houses because it was not a true charge to VAT at all, but merely a charge which reflected irrecoverable VAT costs higher in the chain. Reading that sentence in italics in that fashion results in it being consistent with the second sentence: reading it as suggested by HMRC results in a mis-match between the two sentences of that paragraph.

73. So I do not consider paragraph 2.4 of *The Full Circle* calls into question the evidence of Mr John Lewis or Mr de Rousset-Hall. On the contrary, read properly, I think it corroborates it.

74. Having said that, a rather less ambiguous statement was made in the same document when considering sale and lease back:

> **3.1 Contract Hire Fleet**
>
> If you have financed your acquisition under sale and lease-back arrangements, you will be the lessee as well as the lessor. Prior to 1 August 1995, where a leasing company purchased a car and sold it to a finance house for a subsequent lease-back, the leasing company could recover the VAT on the initial purchase, but the finance house was unable to recover the VAT since its supply was one of leasing.
>
> After 1 August all the VAT washes through under these arrangements, provided you do not use the car for private use before selling it to the finance house…….

75. While this was concerned with finance leasing rather than finance via HP, it did on its face contain a clear statement that the fleet leasing company could recover VAT on the purchase of the cars from the dealer. It suggests that perhaps I am wrong in how the words in italics in section 2.4 ought to be read.

76. Mr John Lewis' view is that 3.1 contained an incorrect statement of the position. Mr Puzey put it to him that if he had thought that at the time, he would have got it corrected. Mr Lewis' reply was that he might not have noticed it as he may only have read the bits on which his input was requested and, in any event, as the document was to set out future treatment, he would not have been concerned if it failed to correctly reflect past treatment.

77. I accept that 3.1 of *The Full Circle* did not reflect the position as Mr John Lewis and Mr de Rousset-Hall remembered it. I am therefore faced with something of a conflict in the evidence. Mr Puzey's view was that I should prefer the contemporaneous documentary evidence over the witness evidence, as memories of events of around 30 years ago were likely to be faulty. Before concluding on this dilemma, I refer to two other contemporary pieces of documentary evidence and they are HMRC's *Notice 700* from 1987 and the *Tolley's VAT Guide* from 1989.

Notice 700 (1 October 1987)

78. HMRC's published guidance stated as follows;

> [18] Unless you are a car dealer, you cannot reclaim VAT charged on the purchase or importation of a car. This applies even if it is sued wholly for business purposes – for example, a car purchased by a driving school.
>
> Purchase means not only outright purchase but also any purchase made under a hire-purchase, lease-purchase or other agreement whereby property in the car eventually passes to you.

> The special rules for car dealers are set out in paragraph 21.'

Then at [21] it stated:

> [21] If you are a car dealer – a person whose business is the selling of cars – you can reclaim VAT you are charged on unused cars purchased or imported for sale. When you sell a car you must charge VAT on the full selling price. If you buy a car for use in your business, such as for demonstration, you must not reclaim the VAT charged.
>
> ……

Tolley's VAT Guide (1988/89)

79. The *VAT Guide* largely repeated Notice 700 verbatim; at §45.3 it concluded:

> 'a person who is not a car dealer cannot reclaim VAT paid on the purchase or importation of a car. This applies even if it is used wholly for business purposes. 'Purchase' means not only outright purchase but also any purchase made under a hire purchase, lease purchase or other agreement whereby properly in the car eventually passes to you.

80. Then, under heading 'car dealers' it said:

> 'If you are a car dealer, a person whose business is selling of cars, you can reclaim VAT you are charged on used cars purchased or imported for sale.'

Conclusion whether fleet leasing companies recovered VAT

81. Mr Puzey's view was that the *Tolley's VAT Guide* and *Notice 700* were not dealing with position of car leasing companies and were simply high level and general statements of the law. What was said in *VAT: The Full Circle* should be preferred, he said, because it was specific to car leasing companies and therefore much more likely to be an accurate reflection of their VAT position.

82. I am, however, unwilling to accept the evidence from *The Full Circle.* Firstly, it was concerned with the post-1995 position and its priority cannot have been accurately reporting the past position; secondly, for reasons given above, its reporting of the past position was less than clear; thirdly, it was inconsistent with the admittedly more general, but also contemporaneous statements in the Tolley's and the HMRC notice; fourthly, it was in complete opposition to the consistent, clear and convincing evidence of Mr John Lewis and Mr de Rousset-Hall. Although they were remembering the position from very many years ago, it seemed to me likely that they would remember the position both before and after the major changes of 1 August 1995. Moreover, even Mr Robert Lewis appeared to accept that fleet leasing companies did not in practice recover VAT on the purchase from the dealer.

83. It was also my impression that Mr Robert Lewis was really offering his opinion, rather than evidence, on where HMRC would have seen the block as being had they been asked this question in the period 1988-1995. In so far as it was evidence of what HMRC's opinion was, I did not think it reliable as he himself accepted that the

industry before 1995 would have treated the block as being on the purchase from the dealer, so it seemed to me that, before 1995, HMRC would not have been required to take a view before 1995 on exactly where the block was. In any event, for the reasons given at §§120-121 below, I was unable to accept that HMRC fully understood how the fleet leasing industry operated and so their view on where the block applied would not be reliable.

84. It was also Mr Robert Lewis' view that, had HMRC understood that the lease was in place before the car was sold to the finance house, it would not have altered their view that in law the VAT on the charge from the dealer was recoverable. However, this appeared to me to be no more than a surmise of the view that HMRC would have taken had they known something that they did not, in fact, know: it was not evidence. And in any event, the parties were agreed that the question was whether the VAT was recoverable as a matter of law and not whether they would have recovered it in practice.

85. Mr Puzey also pointed out that there was evidence in the case of *Why Pay More for Cars* that car dealers who financed demonstrators by sales to finance houses and HP back did recover their input tax. That suggestion was not put to the appellants' witnesses: but the answer, it seems to me is obvious, and that is that the VAT position for dealers financing demonstrators was different to fleet leasing companies financing cars purchased from dealers.

86. HMRC suggested that the appellants cannot be presumed to follow industry practice because the evidence of what they did in respect of their order of transactions as given by Mr Mathieson in his email of 6 March 2012 (to which I refer below) was not in accordance with the appellants' witnesses' evidence of industry practice. However, I don't accept that because (for reasons explained below) I don't accept that what Mr Mathieson's email said on order of transactions was reliable. As there is no evidence to suggest that the appellants did not follow industry practice, and as the evidence I have accepted was that it was universal, I find it more likely than not the appellants would not have recovered the VAT on the purchase of the fleets.

87. My conclusion is that it is proved that fleet leasing industry never recovered VAT on purchases of fleet cars before 1 August 1995; it seems to me more likely than not that the appellants would have adopted what the appellants' witnesses described as effectively a universal practice: no fleet leasing company recovered VAT on the purchase of cars before 1 August 1995.

Relevance to appeal

88. In any event, although I accept that fleet leasing companies did not in practice recover the VAT charged to them by dealers, that does not answer the question of whether they were entitled under the law at the time to recover it, and that is what the parties have agreed matters.

89. In so far as HMRC rely on the *Full Circle* to support their case that the VAT was recoverable in law, they can get no assistance from it. Even if it had contained a

clear statement that VAT was recoverable on sales to finance houses, it cannot influence my interpretation of the law. It represents nothing more than the opinion of BVRLA and HMRC at the time. And in any event at best it was ambiguous.

90. In the hearing, HMRC's position was that a block on input tax *in law* only applied to the VAT which should have been charged (say HMRC) by the finance house to the fleet leasing company. In other words, the fleet leasing company was entitled to recover its input tax on its purchase from the dealer, but should have accounted for VAT on the sale to the finance house; in turn the finance house should have recovered that VAT and then accounted for VAT on its charges to the fleet leasing company. And it was that VAT which should have been blocked.

91. In other words, both parties agreed that fleet leasing companies suffered blocked input tax but they did not agree on when. The appellants' position was that the block was in all cases on the purchase of the cars from the dealer; HMRC's position was that for fleet leasing companies which financed the purchase of the cars via finance houses, the block should have been on the charges from the finance house, although Mr Robert Lewis accepted in practice it was applied on the purchase from the dealer.

Order of transactions

92. So the next question of fact was the order in which the transactions undertaken by the appellants took place, as it was the appellants' case that the order of transactions meant they were not in law entitled to recover VAT on the purchase of cars from dealers. The appellants relied on proof of industry practice. As I have said, HMRC considered that they could not rely on industry practice because there was evidence of what the appellants had actually done in the form an email written by one of the appellants' advisers, Mr Steward Mathieson, a partner at Ernst & Young.

93. I consider what this email showed, if anything, first and then move on to consider industry practice. In the course of doing so, I consider the evidence of Mr Mathieson, Ms Tellwright and Mr Bailey as their evidence was only relevant to the issue of the disputed email and a subsequent related letter.

HMRC's witness – Mr Ian Cathie

94. Mr Cathie was the HMRC officer who issued the decision the subject of this appeal. His evidence was unchallenged and I accepted it. He explained that his reaction to Mr Mathieson's email of 6 March 2012 was to deny the claim on basis that the input tax on purchase from the dealers would not have been blocked as it would have been attributable to the what he saw as the first transaction with the car which was, he considered, a sale to the finance house.

Appellants' witness – Mr Stewart Mathieson

95. Mr Mathieson worked for HMCE in 1989-1996 with some responsibility for car manufacturers, dealers and leasing companies and was aware of the impact of the car

blocking order. He then joined PwC and worked with Teresa Ahern, a partner in PwC with expertise in car-related VAT matters and who had BVRLA as a client (see §56). In 2003, he joined E&Y and acquired responsibility for the claim the subject of this appeal when it was released from the stay behind *Marks & Spencers* in 2008 (see §22).

96. During his time with PwC and E&Y, Mr Mathieson worked on a number of *Elida Gibbs* claims for motor dealers and manufacturers: apart from the claims the subject of this appeal, he had no fleet leasing companies as clients and, before 2015, had little understanding of the operational side of the fleet leasing business.

The email of 6 March 2012

97. In the course of pursing the claims the subject of this appeal, he wrote an email to HMRC (Mr Cathie) on 6 March 2012. It appeared to set out the order of transactions undertaken by the appellants on the purchase of any car and, as I have said, directly led to Mr Cathie's decision to refuse the *Elida Gibbs* claim on the basis that, in Mr Cathie's opinion, the order of transactions indicated that the input tax incurred on the sale by the dealer would not have been blocked.

98. Specifically, Mr Mathieson's email gave the order of transactions being that the appellants would have sold any car purchased to the finance house, and re-acquired it on hire purchase, before they would have leased it to their customer.

99. The appellants called Mr Mathieson as a witness to explain that his email was written without any knowledge that that was the correct order. HMRC did not accept the email was erroneous and challenged his evidence on this. However, I accept that it was erroneous. In particular, I accept the evidence of Mr Mathieson that he did not know the actual order of transactions when he wrote the email, and had not been instructed on the actual order of transactions.

Appellants' witness - Ms Diane Tellwright

100. Ms Tellwright was Group VAT accountant at Pendragon from 1999. She was called to give evidence about the email of 6 March 2012.

101. She corroborated Mr Mathieson's evidence: she accepts she may have spoken to Mr Mathieson before the email of 6 March 2012 and would have spoken to him before a letter was written in August 2012 which appeared to corroborate it. She had no knowledge of the operational side of the fleet leasing business. She did not know and did not appreciate the significance of the order of the transactions to the VAT claim until much more recently.

Appellants' witness - Mr Neil Bailey

102. Mr Bailey was head of tax at Pendragon since 1995. He corroborated the evidence of Ms Tellwright and Mr Mathieson in relation to the disputed email and letter.

Conclusion on email of 6 March 2012

103. HMRC were very critical of Mr Mathieson; they considered his email misleading. I agree that it was misleading and erroneous on a number of points. However, I also accept Mr Mathieson's evidence that it was not intentionally so and I did not find Mr Mathieson to be untruthful. In brief, as it does not really affect the outcome of this appeal, I accept that at the time of the email Mr Mathieson was conducting correspondence with HMRC the subject of which was the appellants' entitlement to recover the output tax on manufacturer bonuses. Mr Cathie had queried whether manufacturers would even pay bonuses to fleet leasing companies which financed their fleets via finance houses. Mr Mathieson's email was intended to convince him that the finance would make no difference. It did contain what appeared to be an order of transactions but Mr Mathieson had not realised at that point that the order of transactions might be critical to the claim; the email also said he had 'validated' the order with his client and I accept that he might well have spoken to Ms Tellwright on the phone about it, but she knew no more about the correct order of transactions than did Mr Mathieson. Mr Mathieson realised he had made (a different) error in the email within a week and immediately informed Mr Cathie; it took longer for him (and Ms Tellwright) to realise and correct his error over the order of transactions.

The August 2012 letter

104. The error in the 6 March 2012 letter appeared perpetuated by a letter written by Mr Mathieson to HMRC in August of the same year as it referred back to what was said in that email.

105. HMRC suggested that the evidence of Ms Tellwright and Mr Bailey was unreliable; Mr Puzey appeared to suggest that they must have known the order of transactions was significant because Pendragon (current owner of the appellants and employer of both witnesses) had, to their knowledge, been refused a similar claim on the same basis.

106. Ms Tellwright agreed that she had known that Pendragon itself made a claim for recovery of input tax in around 2006 and that HMRC refused it in 2007 on the basis that Pendragon financed its cars by selling them to a finance house and for that reason HMRC said that its input tax was not blocked. However, I accept her evidence that she had not agreed with HMRC on this and the real reason Pendragon did not pursue the claim any further was that Mr Bailey decided, when HMRC refused to pay it, that the claim was too small (about £100K) to be worth pursuing, particularly as (at that time) it appeared it might be defeated by the defence of unjust enrichment. Moreover, I accept that she did not remember nor appreciate in 2012 that the order of transactions might be significant.

107. Mr Bailey signed off on the letter of 13 August 2012. While HMRC read it as reiterating the order of transactions given in the email of 6 March 2012, Mr Bailey at the time did not focus on the order of the transactions as being significant and he did not see the letter as validating the chronology apparently set out in the earlier email. He corroborated Ms Tellwright's evidence on why Pendragon dropped its own claim.

While he now sees the similarity between HMRC's challenge to the Pendragon's claim and these claims, he only realised this when he read Mr Cathie's letter refusing the claims the subject of this appeal.

108. I accept the evidence of Mr Mathieson, Ms Tellwright and Mr Bailey that at the time none of them understood what the order of transactions would have been. While it might have been careless to make an assumption and not check it carefully before the email of March 2012 and certainly before the letter of August 2012, I accept there was no intention to mislead: the email and letter were written to address a different point because even in August 2012 the appellants' advisers had not appreciated HMRC's concerns with the order of transactions. In any event, the order of transactions set out in the email of 6 March 2012 and implicitly in the letter of August 2018 had no basis in fact and is not evidence of the actual order of transactions. It could not have been as none of the three persons involved had any knowledge of the actual order of the appellants' transactions in the period 1988-1995 or at any other time.

The order of transactions – documentary evidence

109. Having concluded that neither the email of 6 March 2012 nor letter of august 2012 set out an accurate chronology of events, I move on to consider what would have been the chronology.

110. There were 3 sets of documents from Pendragon bracketing the date of Mr Mathison's email and therefore from a time period 17 years after the last date covered by the claim; there was 4 sets of documents from Bramall (the first appellant and the company which now owns the company (Albany) which received the bonuses the subject of the appeal) but they date to 2004/2005, 9 years after the last date covered by the claim. I accept Mr Bailey's evidence that these 7 transactions were randomly selected. I also accept that there was no contemporary documentary evidence: the transactions at issue took place before Pendragon purchased the companies which received the bonuses the subject of this appeal.

111. The documents show the chronology of events for Pendragon and Bramall was as follows:

(1) the fleet leasing company and its customer entered into an agreement for the lease of a car. The make, model and specification of the car would be stated as would be the amount and number of rental payments. The name of the end user of the car (the employee of the fleet leasing company's customer) would be given. The fleet leasing company would estimate a delivery date. The lease would not commence until the car was delivered to the end user; once the car was delivered, the first rental payment would be due for immediate payment.

(2) Next, the fleet leasing company would order the specified vehicle from the dealer.

(3) When the dealer obtained the vehicle from the manufacturer, the vehicle would be registered in the name of the fleet leasing company on or immediately

before delivery of the car; the car would be delivered by the dealer direct to the end user.

(4) the fleet leasing company sold the vehicle to a finance house several days, and sometimes weeks after the date of delivery and commencement of the lease.

(5) The invoice from the dealer often (but not invariably) post-dated delivery and lease of the car and normally preceded the sale to the finance house, although in one instance was on the same date as the sale to the finance house.

The chronology of events – the witness evidence

112. This evidence was given by Mr John Lewis, Mr De Rousset-Hall and Mr Francis. They each agreed with each other and I accept their evidence.

113. In summary, what they said was as follows. Fleet leasing companies looked to finance the entire cost of the car, and finance houses were wiling to lend the full cost of the car to the fleet leasing companies; but lending to fleet leasing companies was regarded as risky. As is well known, cars depreciate rapidly at the start of their life. While finance houses protected themselves against risk by making loans secured on the cars, securing a loan on a car was risky because if the borrower failed to make repayments, particularly at the start of the loan, the car might well not be worth the outstanding amount of the loan.

114. The position was different if the car was leased. The lease payments were for fixed amounts over the term of the lease; if the borrower (the fleet leasing company) failed to make payments due under the terms of the finance, while the car might not be worth the outstanding amounts of loan payments, the outstanding *lease* payments ought to cover the outstanding amounts of loan payments. So it was much safer for the finance house to lend money to a fleet leasing company only once the car had been leased to the fleet leasing company's customer. In the event of default by the fleet leasing company, the finance house would have the benefit of the customer's promise to pay the rentals.

115. The evidence of these three witnesses was based on many years' experience and made commercial sense. Moreover, Mr Robert Lewis (in his witness statement and evidence and through Mr Puzey) challenged it without success. He questioned why the finance company would make a loan based on full price of the car at a time when the car had already been leased and therefore already undergone the substantial depreciation that happens when a new car becomes used. But the explanation for this was the explanation given in the previous paragraph: the security for the loan was really the value of the lease, and the lease, at least at the start of the contract, was worth more than the used value of the car.

116. This meant, of course, that the fleet leasing company had to fund the purchase of new cars from sources other than the finance house; it was explained that they would do this out of their own resources or from overdrafts or other methods of finance. They also relied on credit from the dealers which was often for 7-10 days (see §170).

117. I accepted this evidence that the invariable practice of finance houses was only to lend finance to the fleet leasing companies once they had leased the car to a customer. In particular, this meant that the car would be registered and delivered to customer, and the lease would have commenced, before the sale to finance house.

118. It was also their evidence (which I accept) that there was no reason for the fleet leasing company at the time of the purchase of the car to have decided which finance house would be used to finance that purchase. In the same way that the fleet leasing company and its customer would have a master hire agreement, to which schedules would be added for the lease of individual cars when agreed upon, the finance house and the fleet leasing company would have a master finance agreement. This would give the fleet leasing company a 'credit line' for identified customers, which would enable the fleet leasing companies to enter into leases with specific customers up to specified values and within certain parameters in the knowledge that they would be entitled to financing from the finance house if they kept within these limits. Any particular fleet leasing company would have a number of such agreements with various finance houses: when they chose to finance the cars (which they would already have purchased and leased), they would select the finance house (with which they had a master finance agreement) which was offering the best rates at that time.

119. It was also their evidence, which I accept, that the finance house would only make loans once the dealer had been paid; they also said that it was quite normal for fleet leasing companies to finance their fleet in batches. While its agreement with its customer might be for a large fleet of cars, the fleet would be provided on a rolling basis as new employees were taken on and existing leases came to an end. This meant a fleet leasing company would be buying and leasing cars on a rolling basis; it might decide, however, to batch up recently leased cars and finance them on the same day with the same finance house. This was the explanation for why some sales to finance houses occurred within days of the lease while others might not take place for weeks. It also explained why in the seven example transactions, the sale to the finance house never took place before the date on the invoice from the dealer.

HMRC's views

120. In his witness statement, Mr Robert Lewis doubted the evidence given by Mr John Lewis and Mr de Rousset-Hall that the car was used before the sale to the finance house but nevertheless sold for the full purchase price paid to the dealer: his opinion was that this made no economic sense. In the hearing, he appeared to come to accept that his opinion was wrong and fleet leasing companies had operated their business in the manner described by the appellants' witnesses and it made economic sense for the reasons explained above.

121. While he was clearly prepared to listen to the other side's evidence and was open to revising his opinions in the light of it, this exchange did indicate that at the relevant time (and after) HMRC's Motor Trade Unit of Expertise did not fully understand how the fleet leasing businesses operated. Even if Mr Robert Lewis was right to say that at the time HMRC would have regarded the VAT charged by the dealer as recoverable by the fleet leasing companies, that was no more than a

statement of what HMRC's opinion would have been, and it was clear such opinions would have been formed without fully understanding the business. Moreover, HMRC's opinions are not relevant to interpretation of the law.

Conclusion on order of transactions of the appellants

122. In conclusion, HMRC's position that the chronology of events contained in the email of 6 March 2012 was correct made no sense. Mr Mathieson, Mr Bailey and Ms Tellwright themselves had no first-hand knowledge of how the three appellants conducted their business nor was there any reason to suppose they could have obtained this information (taking into account the time lag). The email was not reliable evidence of the true order of transactions of the appellants.

123. And in contrast to the order of transactions set out in that email, randomly selected documentation (albeit from a later time and in relation to different fleet leasing companies) showed that the order of transactions was that the lease to the customer preceded the sale to the finance house. Mr John Lewis and Mr De Rousset-Hall were able to convincingly explain the commercial reason for this and it was their evidence that the invariable order of transactions at the relevant time was what these documents demonstrated.

124. There was no direct evidence of the order of the appellants' transactions. Nevertheless, the witnesses' evidence was that the order of transactions was in their wide experience invariable: the appellants must have dealt with the same finance houses as other fleet leasing businesses, some of whose transactions the two witnesses would have known about from first-hand experience. I thought it more likely than not that the appellants' transactions would have occurred in the same order as those of all other fleet leasing businesses. The lease to the customer would have taken place before the sale to the finance house.

125. While I said at §43(d) that there is no presumption that a trader adopted industry practice and if the appellants rely on industry practice, they must prove on the balance of probability what it was and then prove on the balance of probability that they would have followed it, I find that the appellants have done this in relation to the order of transactions.

Undisclosed agency agreements

126. It became clear that back to back sale and hire purchase/finance lease agreements were not the only method by which a fleet leasing company might finance its operation. As I understood, it HMRC's point was that the appellants may have used undisclosed agency agreements, and that if they did, they would have been entitled to recover the input tax on the purchase of the cars from the dealer.

127. In summary, and it was not in dispute, under undisclosed agency agreements the fleet leasing company purchased the cars as agents for the finance house. The oral evidence on them came from Mr John Lewis, Mr de Rousset-Hall, and Mr Francis. There were also four undisclosed agency agreements in evidence before the Tribunal.

128. The first agreement was dated 1991 and was entered into between Pendragon Contracts Ltd and a finance house. It was retrieved from HMRC's archives and was accompanied by the letters with which it had been sent to HMRC: these were letters from PKF (an accountancy firm) querying the VAT treatment of the cars on their disposal at the end of the leases.

129. The other three agreements were located by the appellants at HMRC's request during the course of the hearing. They were also between Pendragon Contracts Ltd and finance houses and were dated 1993, 1996 and 2013 respectively. They increased in length and sophistication over time.

130. The 1991 and 1993 agreement required the finance house to approve every individual car lease; the 1996 agreement permitted Pendragon to enter into leases without prior approval as long as the hire was with an approved customer and within pre-set parameters (rather like the credit line discussed above). Otherwise, as in the earlier undisclosed agency agreements, the finance house had to pre-approve each lease. Therefore, the earlier undisclosed agency agreements differed from the standard back to back hire purchase/finance lease arrangements which, as I have said, had credit lines (see §118).

131. Despite the legal nature of such agreements being that the fleet leasing company purchased the car from the dealer as agent for the finance house, I find that the practical reality was that the finance house would not advance funds to the fleet leasing company until a lease to the customer was in place. This was Mr John Lewis' and Mr de Rousset-Hall's evidence that this was the invariable practice in the fleet leasing business for the reasons given at §117. This evidence was also corroborated by the documentation, as it was Mr Francis' evidence that the 4 sets of Bramall paperwork referred to at §110 above were all funded via undisclosed agency agreements, yet all showed that the sale to the finance house was after the lease was granted to the customer.

132. I find that undisclosed agency agreements started to be used in the 1980s and came more widely to be used in the 1990s. They were never universal (eg Ford never used them) but it is clear that Bramall did use them, at least by the time of the documents in evidence. PKF's letter with the 1991 agreement referred to Pendragon entering into substantially similar agreements with other finance houses and this is consistent with the witness evidence that the larger fleet leasing businesses tended to use undisclosed agency agreements by the early 1990s.

133. While the evidence was that the appellants were unlikely to have taken up the use of undisclosed agency agreements as early as larger fleet leasing companies, it was imprecise evidence from which I am unable to draw any firm conclusions on what percentage of vehicles were purchased under hire purchase or finance lease or similar agreements and what percentage were purchased under undisclosed agency agreements

134. However, evidence which led to much more precision in identifying the nature of the finance used by the appellants was that the original purpose of undisclosed

agency agreements, in contradistinction to hire purchase agreements was, at least in part, to keep the fleets of cars off the balance sheets (particularly relevant to public limited fleet leasing companies which wished to maintain share price). While none of the witnesses mentioned this, contemporaneous documentary evidence (Albany's accounts) shows, and I find, that there was a change in accounting practice (FRS5 and Reporting the Substance of Transactions) in 1994 after which agency hire vehicles had to be shown on the balance sheet. I did not understand that this was in any event seriously in dispute.

135. While Albany's accounts for 1994 showed that it used hire purchase, finance leases and 'agency hire contracts', it follows from the above that prior to 1994 its accounts (and therefore its claim in this Tribunal) did not include any cars financed under undisclosed agency agreements. I find that this is also true of Bletchley and Comet. In any event, Comet ceased trading before 1994 and all its accounts show that it financed cars through finance leases; Bletchley's accounts show, and I find, that it financed cars through hire purchase.

Was VAT recovered on undisclosed agency cars?

136. HMRC's position was that fleet leasing companies would have been entitled to, and did, recover VAT on the purchase of cars which were financed by undisclosed agency agreements. I will deal with the question of entitlement below.

137. As to whether they did recover VAT, Mr de Rousset-Hall's and Mr John Lewis' evidence was, as I have already said, that fleet leasing companies did not recover VAT.

138. The 1991 agreement supported that evidence in that it made no mention of VAT, thus indicating the fleet leasing company and finance house did not have to consider any VAT implications of their relationship. HMRC referred me to the accompanying letters from PKF, which were about VAT on the disposal of the cars at the end of the leasing term. However, one of the letters (dated December 1992) stated 'VAT is accounted for on all hire charges by both [finance house] and Pendragon with Pendragon taking an appropriate input tax deduction in respect of its own charge from [finance house]. The VAT treatment is straightforward for the duration of the lease…..' and went on to talk about the VAT treatment on disposal of the cars at the end of the hire period.

139. HMRC suggested this part of the letter indicated VAT was charged by the fleet leasing company to the finance house but I find it does not: it was clearly referring to the lease charges to the fleet leasing company's customer, which (as it was an undisclosed agency agreement) was really the finance house's customer: those charges were subject to VAT and always had been. This sentence in the letter said nothing about whether the fleet leasing company charged VAT to the finance house on the cost of the car.

140. HMRC also pointed out that the 1993 agreement referred to Pendragon issuing a VAT invoice to the finance house (with a copy of invoice from dealer). This did

appear to relate to the purchase price of the car: however, another term said that the contract was VAT exclusive when VAT was 'applicable'. So despite the term about the VAT invoice, the contract clearly anticipated that not all sales would carry VAT. And as the agreement applied to new and used cars and new light commercial vehicles, it was clear that VAT was not always applicable. VAT would not have been applicable, nor seen as applicable, on the sale of second-hand cars sold for the same price for which they were purchased. VAT would have been applicable on certain commercial vehicles which were not within the input tax block. Therefore, the requirement for a VAT invoice in the 1993 contract did not make it clear whether VAT was charged by Pendragon to the finance house on sales of new cars.

141. What the 1996 and 2013 agreements said on VAT, of course, was not relevant as they were after the 1995 changes to the Input Tax Order.

142. In conclusion, I find none of the documents demonstrated that Mr John Lewis' and Mr de Rousset-Hall's evidence that fleet leasing companies before August 1995 never charged VAT on sales to finance houses was unreliable: I considered, on the contrary, that their evidence reliable on this as on other matters in this appeal and accept it. In other words, I accept that even where the finance was through an undisclosed agency agreement, the fleet leasing companies did not recover VAT on the purchase price of the car.

143. That, of course, leaves unanswered the question of whether fleet leasing companies were entitled as a matter of law to recover VAT on cars financed via undisclosed agency agreements.

Why did the appellants buy cars?

144. The appellants' business, as shown from its accounts, was leasing cars to business customers. They did not buy cars to make a profit on selling them unused.

145. The evidence of industry practice, from the witnesses and from the documents, which I accept, was that the appellants were more likely to have adopted than not, was that fleet leasing companies did not buy cars on 'spec'. They bought them to order: the end user/customer would select a specific make, specification and colour of car which would then be ordered from the dealer with the intention of leasing it to the customer when it was delivered. The customer was indeed contractually committed to accepting the lease on the agreed terms once the car was delivered.

Input tax block – the law

146. Having determined the facts, I now determine the law. Both parties were agreed, as do I, that I should interpret the law in light of principles known now. Even though the question is whether the appellants would have been entitled to recover their input tax on their purchase of the cars some 20-30 years ago, when EU and national VAT case law was less developed than it is now, both parties were agreed that the question is the proper interpretation of the input tax block. I do not have to consider what a Tribunal might have made of this question 20 years ago.

147. And, as I have already said, the appellants accept that their claim fails even though they did not recover their input tax, if they had a right to do so. So, as I have said, the question is whether the appellants were entitled to recover input tax on the purchase of the new cars. The relevant legislative provision was short and I repeat it:

5 (1) Subject to paragraph (2) below tax charged on -

(a) the supply to a taxable person;

….

of a motor car shall be excluded from any [input tax] credit.

(2) Paragraph (1) does not apply where –

10 ……

(c) the motor car is unused, and is supplied to….the taxable person for the purpose of being sold.

So the appellants would have been entitled to recover VAT on the purchase of the cars if (a) the motor car was unused and (b) if it was supplied to them for the purpose
15 of being sold.

Were the cars unused?

148. There was no definition of 'unused' in the Order nor anywhere else in the VAT legislation. I was referred to three sources where the meaning had been considered:

(a) The meaning given in the trade;

20 (b) De Voils 'Indirect Tax';

(c) A VAT Tribunal case (*Brown v Frewer).*

Brown & Frewer Ltd (1997) VTD 15209

149. In that case, the taxpayer was assessed to a s 60 VATA dishonesty penalty for selling cars, of which it was registered owner, under the second-hand margin scheme
25 although the cars had little or no mileage on them. To be eligible for sale under the margin scheme, amongst other requirements, the cars had to be 'used'. There was therefore a question whether the appellant had genuinely believed that the cars were used.

150. The Tribunal said:

30 [62] Behind all the Commissioners' intentions (sic) lay the fundamental assertion that no one could reasonably believe that vehicles never driven on the road could be treated as used vehicles or second hand. The answer to this lies in the practice of the trade described by all the witnesses from the Appellant company and from
35 the experience of Mr Ratcliffe [an accountant]. We were told and we accept that it is common practice to pre-register to meet bonus targets and once pre-registered those vehicles are not regarded by the trade, and indeed would not be so regarded by a prospective purchaser, as

> new. Being second hand or used does not depend on mileage covered but by the single act of registration. This is not a case of [the appellant] choosing to treat new vehicles as used because in the context of the trade, once pre-registered they are used and should therefore be treated as such, in [the appellant's] eyes, for all accounting and tax purposes.

151. This was a ruling that, as a matter of fact, the trade regarded the act of registration of a car as making it second-hand; but it stopped short of being a ruling that the act of registration of a car meant a car was 'used' within the meaning of the VAT legislation. In any event, the Tribunal was not required to decide the meaning of 'used' in the VAT legislation, as it was clear that the cars were not eligible for the second-hand scheme in any event because the appellant had recovered input tax on them. Moreover, as a VAT tribunal decision, its ruling is not binding.

152. As the Tribunal made no ruling on the meaning of 'used' in the Cars Order, I am therefore unable to gain any assistance from the case on the meaning of 'unused' in the Input Tax Order. I note in passing that the evidence, and findings, in that case are entirely consistent with the evidence in this case that persons in the car trade regard a car as used once it is registered.

De Voils' Indirect Tax

153. Mr Puzey pointed to De Voils *Indirect Tax* at 6.312 which, in the context of the second-hand margin scheme for cars stated that to be 'used' cars had to have been driven on the roads or used in dealer's business as demonstrators and that mere registration was insufficient to make them 'used' even with delivery miles on the clock.

154. This appears to be no more than the opinion of the author as to the legal meaning of used: authorities are not cited. I cannot rely on it as an accurate statement of the law but must determine the matter myself.

The meaning in the trade

155. I have already commented that the evidence in this case was consistently that the trade regards a car as used from the moment it is registered. This evidence was given by Mr John Lewis, Mr de Rousset-Hall and Mr Francis. Even Mr Robert Lewis appeared to accept that the trade would regard a car as used when registered, even though he did not accept that the VAT meaning was the same as the trade meaning.

156. It was explained to me that the warranty runs from first registration; the MOT due date will be calculated from first registration. It was also explained that a purchaser paying a 'new' price for a car would expect to be its first registered keeper and the trade would regard as used a car with no mileage but which had been registered to a dealer before being sold to the person who actually drove the car. A car pre-registered in the name of a dealer would expected to be sold by the dealer with a discount on the new price, even if it had nil mileage, because it would be seen as a 'used' car.

157. I accept all that evidence. But it does not answer the question of the meaning of 'unused' in the Input Tax Order.

When does a car become used?

158. HMRC's case is that a car is 'used' as a matter of law when it has been driven; they did not agree with the appellants' position that a car became used as soon as it was registered and irrespective of whether it had ever been driven.

159. In support of their case, HMRC suggested that the appellants' view could potentially lead to avoidance. I did not really follow this: no car was eligible for the second-hand margin scheme if it had been acquired in a transaction on which VAT should have been charged on the full price. So a dealer is unable ever to use the second hand margin scheme on cars purchased from the manufacturer, whether sold as new or used.

160. HMRC also pointed out that a car might be legally driven without being registered as long as it was not driven on public roads, to suggest that the opposite must be true: that a car must be unused if it was not driven and irrespective of whether it was registered. While I accept that there may be cars which are driven without being registered, I don't think that that necessarily implies cars which are registered but not driven are unused.

161. The question to me seems to be whether 'unused' in the Input Tax Order was meant in the sense intended by the car industry or by the normal everyday meaning of the word of actual use. If the normal everyday meaning was intended, then I do not consider that registration would be the determining factor of whether a car was 'unused'. Registration denotes no more than the fact a car has a registered keeper. Having a registered keeper does not seem to me to mean a car is 'used' in the normal understanding of the word, as a registered keeper is not obliged to use, in the sense of drive, the car.

162. Looking at the Input Tax Order as a whole, it adopts the word 'used' with the normal everyday meaning. The Input Tax Order itself (and all its predecessors back to 1972) contain a definition of 'motor car' which refers to 'any motor vehicle of a kind normally used on public roads'. As this definition is clearly taking 'used' to mean 'driven', it seems likely that that is the mirror meaning should be ascribed to the word 'unused' in paragraph 7 of the same order (and paragraph 8 of the Cars Order).

163. The appellant suggested that, if I did not accept that registration by itself made a car 'used', then I ought accept that leasing the car would make it 'used'. But I don't agree and for the reasons already given. Changing who is legally entitled to be in possession of a vehicle does not use the vehicle in the sense intended by the Input Tax Order which, as I have said, has the sense that the vehicle is 'used' as intended by being driven on roads.

164. A vehicle might change ownership, it might be leased and change possession, it might change registered keeper, all without ever being driven on a road, and in my view, were that to happen, i would remain 'unused' in the meaning of the Input Tax Order.

Were the cars used when sold to the appellants?

165. Both parties were, as I understood it, agreed that the cars would have been unused at the point to sale by the manufacturers to the dealers. At this point, the cars would be unregistered and would never have been driven.

166. But the question posed by paragraph 7 of the Input Tax Order is whether the cars were 'unused' when supplied to the fleet leasing company, as only VAT incurred on the supply of an unused motor vehicle was entitled to be (if the purpose condition is also met) recovered.

167. It seems to me to be an odd suggestion that cars sold by car dealerships as new cars would nevertheless be 'used' simply because they were registered by the dealer at or just before the sale. The dealer is not even selling a pre-registered car as the first registration will be in the name of the purchaser (ie the fleet leasing company). Even if registration were enough to make the car 'used', I would find the car is unused at the point that the cars were delivered to the fleet leasing companies (or their customer).

168. That does not answer the legal question because I have to consider the precise time at which whether the car is unused should be measured: in effect the suggestions were:

(a) Delivery to fleet leasing company (in other words, delivery to the fleet leasing company's customer's employee);

(b) Time of supply to fleet leasing company;

Shifted time of supply?

169. The cars were delivered to the fleet leasing company's customer's employee: this was clear on the documents and evidence and made commercial sense. Delivery to the end user counts as delivery to the fleet leasing company as it must have been on their instructions.

170. But the point of delivery to the fleet leasing companies was not necessarily the time of supply for VAT purposes. The evidence before the tribunal, which I accept, included invoices from car dealerships which were dated after the date of registration of the car which was the subject of the invoice: this was entirely consistent with the witness evidence which was that dealerships would normally give fleet leasing company credit of 7-10 days.

171. The effect of invoices post-dating the delivery of the vehicle is to shift the date of supply for VAT purposes. Although the normal date of supply ('tax point') would

be delivery of the car or payment if earlier, s 6(5) VATA deems the tax point to be the date of the invoice (as long as it was dated within 14 days of delivery of the car and no payment was made before the date of the invoice.)

172. The evidence (which I also accept) was that the dealer would deliver the cars direct to the fleet leasing company's customer's employee. This makes obvious sense: the appellants' customers hired fleets of cars to be driven by their employees under the terms of their contract of employment. So the cars would be delivered direct from the dealer to the employee and the dealer would register the car immediately before delivery, again for obvious reasons: it would be expected the car would be driven by the employee very soon after it was delivered.

173. But the credit terms offered by the dealer mean that the tax point for the sale to the fleet leasing company was after the date of delivery, and therefore likely to be after the first occasion on which the car would have been driven on roads. Yet the Input Tax Order referred to the supply of 'unused' cars. Where the invoices post-dated delivery, at the time of supply, the cars would not have been unused on even HMRC's test.

174. My conclusion is that the Input Tax Order correctly interpreted would treat the cars sold by the dealers to the appellants as 'unused'. Firstly, as a matter of evidence the appellant has not proved that all purchases of cars would have had invoices which post-dated delivery: as I understood the evidence, it was that this was likely to be common but not the invariable practice. As it is not possible in the absence of direct evidence to work out the percentage of deals where it would be more likely than not that the invoice would post date the delivery, the appellants cannot prove that any of them did so. In any event, as a matter of law, I think that the question of 'used' or unused' should be measured at delivery and not the deferred time of supply, because that is what must have been intended by Parliament, else the legislation would be somewhat nonsensical.

Were the cars unused when sold by the appellants?

175. I was also asked to consider whether the cars where unused when sold by the appellants to the finance houses. I am not clear why I was asked this question. The Tribunal is concerned with Paragraph 7 of the Input Tax Order only in respect of the sale by the dealer to the appellants, as it is that sale on which HMRC say the appellants were entitled to recover their input tax. Paragraph 7 excludes input tax from credit unless incurred, amongst other conditions, on the supply of an unused motor car.

176. In any event, the appellants considered that the cars were registered with the DVLA at time of purchase from dealership and were therefore 'used' by time of sale by appellants to finance house. I don't accept that as I do not consider registration determines when a car is used.

177. The evidence was that the cars would be driven at some point after they were delivered to the end user. I do not have the evidence to determine whether they would

invariably be driven before the sale to the finance house. While this does seem likely in cases where there was a delay of a few days between delivery and financing, I have no evidence of how often there was a delay of between delivery and financing, let alone how soon after delivery a car would be driven.

5 178. I am unable to be satisfied that all the cars would have been used at the date of sale to the finance house. But I do not see that it matters.

What was the appellants' 'purpose'?

179. The second element of the test for input tax recovery on the purchase of cars was whether the car was 'supplied to….the taxable person for the purpose of being 10 sold'.

180. Clearly, in so far as the appellants did not finance any cars they purchased, there was no right to input tax recovery. The cars would not have been purchased 'for the purpose of being sold' but for the purpose of being leased.

181. But the accounts show that the appellanst did finance their purchase of cars. As 15 I have said, HMRC's case is that, because the appellants must have intended to finance the purchase of their cars (as that is what their accounts show they habitually did), then they had the purpose of selling them to the finance house.

182. This led to a factual and legal dispute between the parties, as I said at §37. What did 'purpose' mean as a matter of law and, as a matter of fact, what was the 20 order of transactions?

When is purpose measured?

183. The parties were agreed that that the question of entitlement to input tax recovery must be addressed at the moment of purchase of the car from the dealer. At that point, what was the appellants' purpose in respect of the car?

25 184. Later in the hearing there was reference to the law that I have already mentioned that shifts the time of supply from the earlier of delivery or payment to the date of the invoice if it was issued within 14 days of what otherwise would have been the tax point. And there was evidence that it was normal for invoices to be issued after delivery of the car, albeit before any financing took place (see §111).

30 185. As I have already said in respect of 'unused', in my view 'purpose' should be measured as at the normal time of supply (delivery when it precedes payment) and not any deferred tax point because that is what must have been intended by Parliament. Any other view would be nonsensical: the question is what the buyer intended to do with the car and that must be measured from when it was legally in possession of the 35 car (delivery).

186. 'Purpose' should be measured at the time of delivery. I consider that delivery occurred when the car was delivered to the end user: the fleet leasing company did

not obtain physical possession of the car at that time but it obtained legal possession at that time because (it must be inferred) it was delivered to the end user at the direction of the fleet leasing company. This must be so because the fleet leasing company was buying the car and therefore the delivery to the end user must have been on the instructions of the fleet leasing company.

Meaning of purpose?

187. The appellants' case is that the words

> 'is supplied to….the taxable person for the purpose of being sold'

must be interpreted by looking at the true economic and commercial reason for the purchase of the motor vehicle, and not merely looking at first transaction that the purchaser intends for the newly purchased vehicle. It points to cases where the CJEU have made clear that 'economic and commercial realities' are fundamental to the VAT system (*Loyalty Management* C-53/09 at [39] and *Newey* C-653/11 at [42] and in *Airtours*:

> 'It must be recalled that consideration of economic realities is a fundamental criterion for the application of the common system of VAT'
>
> *Loyalty Management* [39]
>
> 'When assessing the VAT consequences of a particular contractual arrangement, the court should normally characterise the relationships by reference to the contracts and then consider whether the characterisation is vitiated by any relevant facts.
>
> §47 of *Airtours* [2016] UKSC 21

188. HMRC agree that economic and commercial realities are fundamental but say economic/commercial reality is that cars were bought with intention of immediate sale to finance house. The rationale of the appellants' business was that they had to obtain the finance in order to lease large fleets they could not fund from their own resources: the financing was as fundamental to their business as the leasing. It was irrelevant, said HMRC that the motive of the sale to the finance house was to obtain finance to be able to carry out their business purpose of leasing the cars.

189. My view was that the various cases cited to me about economic realities were cases dealing with how to identify the nature of what was agreed to be supplied and between whom. I do not see them as giving guidance, other than of the most general kind, on how 'purpose' should be interpreted in the context of an input tax block. I do not need to elucidate who supplied what to whom: that is clear.

190. It seems to me that what is more relevant are the law and cases concerned with attribution of input tax, which is a matter of purpose, EU case law looks to supplies which the taxpayer intends to make with what it has purchased rather than any underlying business purpose (see, for example, *BLP(1995 C-4/94*).

191. My view is that 'purpose' is used in VAT legislation and should be interpreted in that context. 'Purpose' therefore refers to first supply which the taxpayer intends to make with the car it has purchased. 'Purpose' would not see a later intended supply by way of lease as more significant than an earlier intended supply by way of sale, merely because leasing the cars was the appellants' business raison d'être and the sale was simply part of a financing transaction. 'Purpose' would look at the order of transactions: it would see a first supply of the car (by way of sale to the finance) as the 'purpose' of the original purchase rather than the subsequent lease which could only take place once title had been reacquired (through HP or finance lease from the finance house).

192. This seems very clear if one posited that all the transactions were subject to VAT: if the steps of the transactions were (a) purchase from dealer (b) sale to finance house (c) re-purchase from finance house (d) lease to customer and all these stages were subject to VAT, it is obvious that the VAT on the purchase from the dealer (step (a)) is attributable to the sale to the finance house; it is not attributable to the lease (step (d)). It would be the VAT on the re-acquisition from the finance house that would be attributable to the lease.

193. By seeing an identity between the rules on attribution and the meaning of 'purpose' there is sense and consistency in the VAT rules. Input tax ought not to have been blocked where the intended first supply was one of sale (of an unused car); on the contrary it would have been recoverable as attributable to a taxable transaction.

194. My conclusion is that HMRC are right on the meaning of 'purpose'.

Order of transactions

195. However, that is of little assistance to them, as my finding of fact (§122-125) is that, putting aside any cars financed through undisclosed agency agreements which I discuss below, the first supply which would have occurred after the purchase of the new car would have been the lease to the appellants' customers.

196. Mr Puzey put the case that even if the order of transactions was set out as above, the evidence also showed that the master finance agreement would have been entered into before the car was purchased (see §118).

197. Mr Hitchmough complained he was not forewarned of this argument but I do not really have to consider that as I agree with Mr Hitchmough that it does not assist HMRC's case. Arranging a line of credit is not a supply for VAT purposes.

198. The credit line was no more than an agreement of terms on which the parties would make and receive a supply of credit at an undetermined future point of time in respect of unspecified goods for unspecified price (albeit subject to certain constraints as to specification and price). It was only when the fleet leasing company actually took up the offer of terms in respect of an identified car at an identified price that a supply between finance house and fleet leasing company took place. And that only happened after the lease to the customer was already in place (see §§122-125).

199. This must be right as a matter of principle. There is no supply where the subject matter of the supply is undetermined: *BUPA* C-419/02 (2006). In any event, Mr Puzey's suggestion would lead to bizarre results. The evidence was that a fleet leasing company would have a number of credit lines agreed with a number of finance houses (see §118). If Mr Puzey was right and merely having a credit line was enough for a supply to the finance house to take place, the fleet leasing company would be simultaneously supplying the same car to a number of different finance houses.

Conclusion on appellants' purpose

200. The 'purpose' of the purchase of the new cars was to lease them; this is not because leasing cars was the appellants' business but because it was the first supply they made with the car. The sale to the finance house was therefore not the purpose of the car's purchase.

201. That conclusion is enough to conclude the appeal in favour of the appellants in so far as they can demonstrate quantum of cars obtained through hire purchase and similar structures. It leaves unclear Bramall's claim for 1994-5 where Albany's accounts refer to cars obtained through agency contacts as well as hire purchase and finance leases.

Conclusion on 'purpose' for undisclosed agency contracts

202. Albany's 1994-5 accounts did not make it clear whether the agency contracts were disclosed or undisclosed. It referred to 'agency hire contracts'. Neither party appeared to have considered the implications of this before the hearing.

203. Mr Hitchmough's position in the hearing was that disclosed agency contracts would not be a bar to the first appellant's claim: if it acted as a disclosed agent for the finance house, the input tax would not have been incurred by the first appellant and the question of whether it was blocked is immaterial. Albany would not have had an entitlement to the input tax and therefore its claim to repayment of VAT on the bonuses would be valid.

204. Mr Puzey's response was that if Albany did not buy the car as principle, it could not prove its entitlement to the bonus in the first place. This, however, seemed to me to be a point taken far too late as the appellant had had no opportunity to bring any evidence on it and I do not consider it further. As I said at §26, HMRC had accepted that the appellants would have received the bonuses. Therefore, to the extent that the appellants could prove (which they cannot) that the contracts were disclosed agency, the claim on behalf of Albany in 1994-5 would have been good.

205. So far as undisclosed agency contracts were concerned, originally submissions in the hearing were on the basis that an undisclosed agent would be treated as buyer and seller: if it purchased the car from the dealer as undisclosed agent, under s 47 VATA it would be deemed to buy the car and immediately sell the car to its principle (the finance house). HMRC's view was that, therefore, this deemed sale to the

finance house took place immediately before the lease to the customer and therefore the 'purpose' of the purchase would have been sale.

206. It was then pointed out that, prior to 1 May 1995 when s 47 was amended, a supply via an undisclosed agent was only treated as a supply to and by the undisclosed agent where there was an HMRC direction to that effect: it was not automatic.

207. The appellant's position was that I should assume that there was no such direction unless HMRC could prove that there had been. But I do not accept that: the burden of proof is on the appellant so it is for the appellant to prove that there was no such direction rather than for HMRC to prove that there was. As there was no evidence either way, I proceed on the basis that there would have been such a direction. So I am back in the position described in §205.

208. That means I accept that undisclosed agency contracts on their face involved an immediate sale to the finance house when the car was purchased by the fleet leasing company. Nevertheless, I recognise that the evidence (which I accept) was that, whatever the nature of the finance, in all cases cars were leased before they were sold to the finance house. The conclusion seems to be that these types of contract did not reflect economic reality: whatever the terms, the finance house would not supply finance until a lease was in place.

209. Where a fleet leasing company financed its fleet with undisclosed agency agreements, what was its purpose when it purchased the car? The finance master agreement would show that the intention was make an immediate sale to the principle, albeit that would not be the economic reality of what actually happened. But the intended first supply was sale. Therefore, I cannot be satisfied that Albany in 1994-5 did not have an entitlement to input tax recovery on the cars it purchased. And that, it is accepted, is enough to prevent its claim to repayment of output tax in the relevant years.

Conclusion

210. For the reasons given above, I accept the second and third appellants' case that they would not have been entitled to recover input tax on the purchase of cars from the dealer for their fleet leasing businesses. They did not purchase the unused cars for the purpose of selling them, but for the purpose of leasing them.

211. For the second and third appellants their appeals are allowed in principle subject to the parties agreeing quantum: if they are unable to do so they should revert to the Tribunal.

212. For the first appellant, I accept that up to and including 1993 that it would not have been entitled to recover input tax on the purchase of cars from the dealer for its fleet leasing business. It did not purchase the unused cars for the purpose of selling them, but for the purpose of leasing them. I have not been satisfied of that in respect of 1994-5. The first appellant has therefore won in part on the preliminary issue; its

appeal for 1994-5 is dismissed but its appeal for 1988-1993 is now stayed behind the final determination of *MG Rover*.

213. 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.

Barbara Mosedale

TRIBUNAL JUDGE
RELEASE DATE: